[redacted]

NATIONAL UNIVERSITY
LIBRARY SAN DIEGO

NON CIRCULATING

21

Digitized by the Internet Archive
in 2023 with funding from
Kahle/Austin Foundation

https://archive.org/details/californiareport0000unse_k1l5

01

CALIFORNIA REPORTER

Covering Cases Reported in

PACIFIC REPORTER

213 P.–216 P.

Cite by Volume and Page

of the

PACIFIC REPORTER

Thus:

213 P. 33

ST. PAUL, MINN.
WEST PUBLISHING CO.
1956

213

COPYRIGHT, 1923, BY WEST PUBLISHING CO.
Pacific Reporter, Vol. 213, Nos. 1–5; Vol. 214, Nos. 1–6; Vol. 215, Nos. 1–6; Vol. 216, Nos. 1–4.

COPYRIGHT, 1956, BY WEST PUBLISHING CO.

Cal.Rep. 213–216 P.
2–1967

CASES REPORTED

Vols. 213–216 P.

	P.	
	Vol.	Page
Adams, Ex parte, App.	214	467
Ætna Casualty & Surety Co.; Diamond Match Co. v., App.	213	56
A. G. Sommerville, Inc.; American Nat. Bank v., Sup.	216	376
Ahern; Kansaburo Ohsaki v., App.	215	714
Albertson v. Westlake, App.	216	1117
Alexander; People v., App.	216	968
Al G. Barnes Shows Co. v. Tait, App.	214	1015
Algeo; Pleasant Grove Union School Dist. v., App.	215	726
Allen; Bloom v., App.	214	481
Allen's Collection Agency v. Means, App.	213	65
All Persons, etc.; Garden Grove Drainage Dist. v., Sup.	213	959
American Nat. Bank v. A. G. Sommerville, Inc., Sup.	216	376
American River Gravel Co.; Berkovitz v., Sup.	215	675
Anderson v. Martin, Sup.	213	33
Anderson; People v., App.	214	244
Anderson; People v., App.	216	401
Anderson v. San Francisco-Oakland Terminal Rys., App.	214	289
Anderson v. Standard Lumber Co., App.	213	65
Andrews; Williams v., App.	216	998
Andrews; Williams v., Sup.	216	1002
Anglo-California Trust Co. v. Oakland Rys., Sup.	216	578
Apartment Bldg. Co. v. Daugherty, Sup.	213	983
Argus Enterprises v. Calmy, App.	214	242
Arocena v. Sawyer, App.	213	523
Aros; Smith v., Sup.	214	962
Aros; Wilmon v., Sup.	214	962
Arthur R. Briggs Estate v. Barr, App.	214	449
Azevedo; Gulart v., App.	216	405
Babdaty; Berendsen v., App.	216	385
Bank of Italy; New York Life Ins. Co. v., App.	214	61
Bank of Los Banos; Nicoletti v., Sup.	214	51
Barber v. City of Los Angeles, Sup.	215	897
Barnes Shows Co. v. Kait, App.	214	1015
Barney, In re, Sup.	214	853
Barr; Arthur R. Briggs Estate v., App.	214	449
Barrager v. Walls, App.	216	995
Barrios; Christou v., App.	214	482
Basso; Warfield v., App.	216	48
Bayley v. Garrison, Sup.	214	871
Bean; Bossen v., App.	216	404
Beardsley; Keese v., Sup.	213	500
Bebe Co.; W. H. Blodgett Co. v., Sup.	214	38
Beck; People v., App.	213	61
Becker v. Turpin, App.	214	255
Beinhorn; Shaffer v., Sup.	213	960
Berdine; Siebold v., App.	214	655

	P.	
	Vol.	Page
Berendsen v. Babdaty, App.	216	385
Bergen, Ex parte, App.	214	521
Berger v. Lane, Sup.	213	45
Berkovitz v. American River Gravel Co., Sup.	215	675
Berry; People v., Sup.	215	74
Best v. Toprahanian, App.	216	977
Biaggi v. Mainero, App.	213	541
Birch v. Board of Sup'rs of Orange County, Sup.	215	903
Biurrun v. Elizalde, App.	215	690
Blackburn; Shank v., App.	215	559
Blakeslee v. Wilson, Sup.	213	495
Blevins; Rice Lands & Products Co. v., App.	215	402
Blodgett Co. v. Bebe Co., Sup.	214	38
Bloom v. Allen, App.	214	481
Bloom v. Coates, Sup.	213	260
Board of Sup'rs of Butte County; Drescher v., Sup.	215	902
Board of Sup'rs of Lake County; Sleeper v., App.	214	292
Board of Sup'rs of Orange County; Birch v., Sup.	215	903
Board of Trustees of City of El Paso De Robles; Pickwick Stages, Northern Division, v., App.	215	558
Bogden, Ex parte, App.	216	967
Boland v. Taggart, Sup.	213	504
Bonds of Garden Grove Drainage Dist., In re, Sup.	213	959
Bonham; Carleton v., App.	214	503
Bossen v. Bean, App.	216	404
Bou v. Willits, App.	214	519
Boyle; City and County of San Francisco v., Sup.	215	549
Brennan; Guy v., App.	213	265
Bridge; Johnson v., App.	213	512
Briggs v. Kosich, App.	216	965
Briggs Estate v. Barr, App.	214	449
Brkljaca v. Ross, App.	213	290
Brockman; Foothills Orchards Co. v., Sup.	216	365
Brown; Dennis v., App.	216	977
Brown v. Kennedy, App.	216	969
Brown v. Monroe, App.	214	523
Brown; People v., App.	215	1031
Brown; People v., App.	216	58
Brown; People v., App.	216	411
Browning v. Dow, App.	213	707
Browning; Richardson v., App.	214	281
Bryden v. Industrial Accident Commission, App.	215	1035
Bryson v. Bryson, App.	216	391
Buelke v. Levenstadt, Sup.	214	42
Buell v. Buell, Sup.	214	844
Bufford; Wood v., App.	214	516
Bullard; Waechter v., App.	215	696
Bullock's; Burgesser v., Sup.	214	649
Burd v. Downing, App.	213	287
Burger; Courviosier v., App.	215	93
Burgesser v. Bullock's, Sup.	214	649
Burlingame; Colburn v., Sup.	214	226
Bursell; Henley v., App.	215	114
Caiazza; People v., App.	215	80
California Casualty Indemnity Exch. v. Industrial Accident Commission, Sup.	213	257

	P. Vol.	Page
California Farms Co.; Western Well Works v., App.	214	491
California Highway Commission of Department of Public Works v. Industrial Accident Commission, App.	214	658
California Highway Commission of Department of Public Works v. Industrial Accident Commission, App.	214	661
California Pear Growers' Ass'n v. Herspring, App.	213	518
Calmy; Argus Enterprises v., App.	214	242
Carleton v. Bonham, App.	214	503
Carroll v. Latham, App.	215	715
Catania; Cincotta v., App.	214	451
Catania v. Gucccione, App.	214	495
Catterlin v. Peterson, App.	213	515
Central California Traction Co.; Marovich v., Sup.	216	595
Chamberlain; Lincoln v., App.	214	1013
Chambers Land Co.; Elliott & Horne Co. v., App.	215	99
Chatom; Dunlap v., App.	213	282
Chatom; Woodsend v., Sup.	214	965
Chavez v. Scully, App.	216	46
Chew Hing; People v., App.	215	412
Chiappari; Flynn v., Sup.	215	682
Christou v. Barrios, App.	214	482
Chucovich v. San Francisco Securities Corporation, App.	214	263
Cincotta v. Catania, App.	214	451
Citizens' Nat. Bank; Glassell Development Co. v., Sup.	216	1012
City and County of San Francisco v. Boyle, Sup.	215	549
City of Los Angeles; Barber v., Sup.	215	897
City of Los Angeles; Title Insurance & Trust Co. v., App.	214	667
City of Los Angeles; Weiss v., Sup.	213	979
City of Oakland; Rockridge Place Co. v., App.	216	64
City of Oakland; Wright v., App.	216	66
City of San Bernardino v. Railroad Commission of California, Sup.	213	980
City Street Imp. Co. v. Quigley, Sup.	215	390
Civil Service Commission of City and County of San Francisco; Gilbert v., App.	215	97
Clark; People v., App.	214	248
Claussen v. Newton, App.	216	975
Clément v. Duncan, Sup.	215	1025
Clemente, Ex parte, App.	215	698
Clifford v. Utt, App.	216	972
Clover; Jackson v., App.	213	507
Coalinga Mohawk Oil Co. v. Standard Oil Co., App.	214	265
Coast Truck Line v. Railroad Commission of California, Sup.	215	898
Coates; Bloom v., Sup.	213	260
Cockrill; People v., App.	216	78
Codiga; General Motors Acceptance Corporation v., App.	216	383
Colburn v. Burlingame, Sup.	214	226
Collins v. Eksoozian, App.	214	670
Commercial Centre Realty Co.; Julius Levin Co. v., App.	214	248
Corbin v. Howard, App.	215	920
Courviosier v. Burger, App.	215	93
Crabtree v. Houghton, Sup.	214	846
Crandall v. Shay, App.	214	450
Crawford v. Duncan, App.	215	573
Crawford; People v., App.	214	654
Credit Clearance Bureau v. Guaranty Loan Co., App.	215	104
Crockett v. Industrial Accident Commission of California, Sup.	213	969

	Vol.	Page
Crutcher, In re, App.	215	101
Cunningham; Redemeyer v., App.	215	83
Curtin v. State, App.	214	1030
Daniels; Dufton v., Sup.	213	949
Daugherty; Apartment Bldg. Co. v., Sup.	213	983
Daugherty; Eiseman v., App.	215	1032
Davids; Murphy v., App.	215	1040
Daytona Institute v. Dow, Sup.	213	53
De Bakcsy v. Strain, App.	215	105
De Cou v. Howell, Sup.	214	444
De Fremery Wharf & Land Co.; E. B. & A. L. Stone Co. v., App.	215	687
Dennis v. Brown, App.	216	977
De Vaul; People v., App.	213	58
Diamond Match Co. v. Ætna Casualty & Surety Co., App.	213	56
Diener v. Shaul, App.	213	706
Doane's Estate, In re, Sup.	213	53
Dobbins; Willard v., Sup.	216	1008
Dominguez; People v., App.	214	448
Donley; Poe v., App.	215	399
Doon v. Walcott, App.	216	1117
Dormody; Wrenn v., App.	215	909
Dow; Browning v., App.	213	707
Dow; Daytona Institute v., Sup.	213	53
Downing; Burd v., App.	213	287
Drescher v. Board of Sup'rs of Butte County, Sup.	215	902
Drollinger; Faure v., App.	213	724
Drown v. Haddock, App.	215	689
Duarte; Watson v., App.	215	1039
Dufton v. Daniels, Sup.	213	949
Duncan; Clement v., Sup.	215	1025
Duncan; Crawford v., App.	215	573
Dunlap v. Chaton, App.	213	282
Early; Gaver v., Sup.	215	394
Eaton; People v., App.	213	275
E. B. & A. L. Stone Co. v. De Fremery Wharf & Land Co., App.	215	687
Eiseman v. Daugherty, App.	215	1032
Eksoozian; Collins v., App.	214	670
Elizalde; Biurrun v., App.	215	690
Elliott & Horne Co. v. Chambers Land Co., App.	215	99
Estrada; People v., App.	213	67
Fate v. Gross, App.	214	465
Faure v. Drollinger, App.	213	724
Fewkes; Haines v., Sup.	213	490
Fidelity & Casualty Co. of New York v. Industrial Accident Commission of California, Sup.	216	578
Fink; Flynn v., App.	213	716
Finkle; Siemon v., Sup.	213	954
First Nat. Bank; Lemon v., Sup.	216	620
Fisher v. George, App.	216	974
Flagler v. Kroonen, App.	214	1006
Flaherty; People v., App.	215	699
Flinn & Treacy; Williams v., App.	214	1024
Flynn v. Chiappari, Sup.	215	682
Flynn v. Fink, App.	213	716
Foothills Orchards Co. v. Brockman, Sup.	216	365
Force; Wyckoff v., App.	214	489

P.

	Vol.	Page
Ford; Garfield v., Sup.	214	963
Fouts; People v., App.	214	657
Frankovitch, Ex parte, Sup.	213	39
Frawley Motor Co.; McIllmoil v., Sup.	213	971
Freeman; McBride v., Sup.	215	678
French; People v., App.	214	1003
Fuller; Goatman v., Sup.	216	35
Gak; Radich v., App.	214	1000
Galbraith v. Panini, App.	214	496
Gallo's Estate, In re, App.	214	496
Garden Grove Drainage Dist. v. All Persons, etc., Sup.	213	959
Garey; Imperial County v., App.	215	89
Garfield v. Ford, Sup.	214	963
Garrison; Bayley v., Sup.	214	871
Garrison; Wines v., Sup.	214	56
Gaver v. Early, Sup.	215	394
General Motors Acceptance Corporation v. Codiga, App.	216	383
General Motors Acceptance Corporation v. Parker, App.	216	384
George; Fisher v., App.	216	974
Gilbert v. Civil Service Commission of City and County of San Francisco, App.	215	97
Gismegian; Thomas v., Sup.	216	601
Glassell Development Co. v. Citizens' Nat. Bank, Sup.	216	1012
Glenn v. Inouye, App.	216	418
Globe Grain & Milling Co. v. Los Angeles County, App.	216	631
Goatman v. Fuller, Sup.	216	35
Gonzalez; Searles v., Sup.	216	1003
Gordon; People v., App.	214	276
Goulding; People v., App.	213	277
Grafft; People v., App.	214	273
Grange v. Judah Boas Co., App.	213	712
Graves, In re, App.	216	386
Gray v. Yarbrough, App.	215	914
Gregory; Nielsen v., App.	213	510
Grimes v. Lamar, App.	213	270
Gross; Fate v., App.	214	465
Grossman v. Yip Wing, App.	216	634
Guaranty Loan Co.; Credit Clearance Bureau v., App.	215	104
Gucccione; Catania v., App.	214	495
Gulart v. Azevedo, App.	216	405
Gurnsey v. Wiltsey, App.	214	487
Gurnsey's Estate, In re, App.	214	487
Guy v. Brennan, App.	213	265
Haddock; Drown v., App.	215	689
Hadeler, Ex parte, App.	215	562
Haines v. Fewkes, Sup.	213	490
Hale Co. v. Lea, Sup.	215	900
Hammond Lumber Co.; Title Guarantee & Trust Co. v., App.	216	953
Hansen; People v., App.	216	399
Harder v. Lang Realty Co., App.	214	1017
Hay v. Superior Court in and for Los Angeles County, App.	215	717
Hayward, Ex parte, App.	216	414
Hellman Commercial Trust & Savings Bank v. Southern Pac. Co., Sup.	214	46
Hellner v. Superior Court of California in and for Los Angeles County, App.	215	709
Henley v. Bursell, App.	215	114

	Vol.	Page
Henley; Schneider v., App.	215	1036
Herrera; People v., App.	214	254
Herspring; California Pear Growers' Ass'n v., App.	213	518
Hildebrand v. Martin, App.	215	559
Hillhouse; Riddle v., Sup.	214	230
Hixson, Ex parte, App.	214	677
Holt's Estate, In re, App.	215	124
Honey v. Honey, App.	214	250
Hornblower v. Masonic Cemetery Ass'n of City and County of San Francisco, Sup.	214	978
Horne v. Standard Auto Sales Co., App.	216	970
Houghton; Crabtree v., Sup.	214	846
Hovden Co.; Sturtevant v., App.	214	244
Howard; Corbin v., App.	215	920
Howatt v. Humboldt Milling Co., App.	214	1009
Howell; De Cou v., Sup.	214	444
Howell v. Lillie, Sup.	214	444
Huber; Mackechnie Bread Co. v., App.	213	285
Humboldt Milling Co.; Howatt v., App.	214	1009
Hunt v. Inner Harbor Land Co., App.	214	998
Hussey v. Loeb, App.	213	271
Hyman v. Karl Stern Co., App.	215	913
Hyman v. Stern, App.	215	911
Ijams v. Southern Pac. Co., Sup.	214	46
Imperial County v. Garey, App.	215	89
Industrial Accident Commission; Bryden v., App.	215	1035
Industrial Accident Commission; California Casualty Indemnity Exch. v., Sup.	213	257
Industrial Accident Commission; California Highway Commission of Department of Public Works v., App.	214	658
Industrial Accident Commission; California Highway Commission of Department of Public Works v., App.	214	661
Industrial Accident Commission; Llewellyn Iron Works v., Sup.	214	846
Industrial Accident Commission; London Guarantee & Accident Co. v., Sup.	213	977
Industrial Accident Commission; Pacific Rolling Mill Co. v., Sup.	216	602
Industrial Accident Commission; Stephens v., Sup.	215	1025
Industrial Accident Commission; Storm v., Sup.	214	874
Industrial Accident Commission of California; Crockett v., Sup.	213	969
Industrial Accident Commission of California; Fidelity & Casualty Co. of New York v., Sup.	216	578
Industrial Accident Commission of California; Rissman v., Sup.	213	991
Industrial Accident Commission of California; Western Indemnity Co. v., Sup.	216	611
Inner Harbor Land Co.; Hunt v., App.	214	998
Inner Harbor Land Co.; Jones v., App.	214	998
Inner Harbor Land Co.; Mann v., App.	214	998
Inouye; Glenn v., App.	216	418
Jackson v. Clover, App.	213	507
Jackson v. Snow, App.	216	60
Johnson v. Bridge, App.	213	512
Johnson v. Quinby, App.	216	397
Jones v. Inner Harbor Land Co., App.	214	998
Jones; McDevitt v., App.	214	661
Jones; Turner, Kuhn & Fraser v., App.	215	1033
Judah Boas Co.; Grange v., App.	213	712

	P. Vol.	Page
Judson Mfg. Co. v. Wyckoff, App.	213	269
Julius Levin Co. v. Commercial Centre Realty Co., App.	214	248
Jung Sam; People v., Sup.	213	966
Kady; People v., App.	214	293
Kansaburo Ohsaki v. Ahern, App.	215	714
Karl Stern Co.; Hyman v., App.	215	913
Katz; Trube v., App.	213	264
Keese v. Beardsley, Sup.	213	500
Kelley-Clarke Co. v. Leslie, App.	215	699
Kells; Rempel v., App.	215	1042
Kennedy; Brown v., App.	216	969
Kennerly, Ex parte, Sup.	214	857
Kershaw v. Madsen, App.	216	55
Kessler v. Young, App.	214	665
K. Hovden Co.; Sturtevant v., App.	214	244
Kimball; Prichard v., Sup.	214	863
Kimball; Prichard v., Sup.	214	867
Kingsbury; McNeil v., Sup.	213	50
Klarquist v. Security Trust & Savings Bank, App.	215	398
Klopfer; People v., App.	214	878
Klusman v. Pacific Electric Ry. Co., Sup.	213	38
Knight; People v., App.	216	89
Knight; People v., App.	216	96
Kosich; Briggs v., App.	216	965
Kraner; Snow Mountain Water & Power Co. v., Sup.	216	589
Kroonen; Flagler v., App.	214	1006
Labor Journal, In re, Sup.	213	498
Laiblin v. San Joaquin Agr. Corporation, App.	213	529
Lakenan; People v., App.	214	1021
Lamar; Grimes v., App.	213	270
Lamb, Ex parte, App.	215	109
Lambert v. Valentine, App.	215	692
Lamborn v. Lamborn, Sup.	214	862
Lane; Berger v., Sup.	213	45
Lang Realty Co.; Harder v., App.	214	1017
Lapique v. Walsh, Sup.	214	876
Larson; Levy v., App.	215	918
La Rue; People v., App.	216	627
Lasley, In re, App.	214	284
Latham; Carroll v., App.	215	715
Laughton v. McDonald, App.	215	707
Lea; Hale Co. v., Sup.	215	900
Lee; Ogden v., App.	215	122
Lee v. Superior Court of California in and for City and County of San Francisco, Sup.	214	972
Lemon v. First Nat. Bank, Sup.	216	620
Lennert; People v., App.	216	1117
Leonardi; Resetar v., App.	216	71
Leslie; Kelley-Clarke Co. v., App.	215	699
Leuschen v. Small Claims Court of Highland Tp., San Bernardino County, Sup.	215	391
Levenstadt; Buelke v., Sup.	214	42
Levin, Ex parte, Sup.	215	908
Levin Co. v. Commercial Centre Realty Co., App.	214	248
Levy v. Larson, App.	215	918
Lewis; People v., App.	214	1005

	Vol.	Page
Lillie; Howell v., Sup.	214	444
Lincoln v. Chamberlain, App.	214	1013
Llano Inv. Co. v. Minton, Sup.	214	855
Llewellyn Iron Works v. Industrial Accident Commission, Sup.	214	846
Loeb; Hussey v., App.	213	271
Logan v. Shields, Sup.	214	45
London Guarantee & Accident Co. v. Industrial Accident Commission, Sup.	213	977
Los Angeles County; Globe Grain & Milling Co. v., App.	216	631
Los Angeles County; Pasadena University v., Sup.	214	868
Los Angeles Gas & Electric Corporation; Treat v., App.	213	263
Los Angeles Morris Plan Co.; Swain v., App.	213	703
Los Angeles Stone Co.; Poindexter v., App.	214	241
Luce; Maier v., App.	215	399
Lusher, Ex parte, Sup.	214	985
Lutz v. Western Iron & Metal Co., Sup.	213	962
McBride v. Freeman, Sup.	215	678
McCarthy; Newbert v., Sup.	214	442
McClure; Tarpey v., Sup.	213	983
McCurdy; People v., App.	213	59
McDevitt v. Jones, App.	214	661
McDonald; Laughton v., App.	215	707
McDonald v. McDonald, Sup.	215	545
McDonald; People v., App.	214	1005
McDonald's Estate, In re, Sup.	215	545
McHugh; People v., App.	216	76
McIllmoil v. Frawley Motor Co., Sup.	213	971
Mackechnie Bread Co. v. Huber, App.	213	285
McKenna v. State Industrial Accident Commission, Sup.	215	900
McNeese v. McNeese, Sup.	213	36
McNeil v. Kingsbury, Sup.	213	50
Maderos; Vargas v., Sup.	214	849
Madsen; Kershaw v., App.	216	55
Magee; People v., App.	213	513
Mahach; People v., App.	213	539
Mah See v. North American Accident Ins. Co. of Chicago, Ill., Sup.	213	42
Maier v. Luce, App.	215	399
Mainero; Biaggi v., App.	213	541
Mann v. Inner Harbor Land Co., App.	214	998
Mansfield v. Pickwick Stages, Northern Division, Sup.	215	389
Marblehead Land Co. v. Superior Court in and for Los Angeles County, App.	213	718
Marblehead Land Co. v. Superior Court of California in and for Los Angeles County, App.	215	922
Marovich v. Central California Traction Co., Sup.	216	595
Martin; Anderson v., Sup.	213	33
Martin; Hildebrand v., App.	215	559
Martin; Schimmel v., Sup.	213	33
Mason v. Mason, Sup.	213	39
Masonic Cemetery Ass'n of City and County of San Francisco; Hornblower v., Sup.	214	978
Mathews, Ex parte, Sup.	214	981
Mayors; Page v., Sup.	216	31
Means; Allen's Collection Agency v., App.	213	65
Miller v. Pacific Electric Ry. Co., App.	214	478
Mingo, Ex parte, Sup.	214	850
Minton; Llano Inv. Co. v., Sup.	214	855

P.

	Vol.	Page
Mitchell v. North Pac. S. S. Co., App.	213	293
Mitchell; People v., App.	215	117
Monahan v. Watson, App.	214	1001
Monnette; Twogood v., Sup.	215	542
Monroe; Brown v., App.	214	523
Moore v. Moore, App.	216	981
Moore; Morris v., App.	214	995
Moore; Southwick v., App.	215	704
Moore's Estate, In re, App.	216	981
Morgan v. Morgan, Sup.	213	993
Morganstern, In re, App.	215	721
Moriarity; People v., App.	214	485
Morotti; People v., App.	215	719
Morris v. Moore, App.	214	995
Morrison v. Veach, Sup.	213	945
Morrow v. Morrow, App.	214	239
Mozzetti; Scott, Magner & Miller v., App.	216	979
Murphy v. Davids, App.	215	1040
Murray; Price v., App.	215	710
Myles v. Russell, Sup.	213	491
Naftzger; Setrakian v., App.	215	564
Nelson's Estate, In re, Sup.	216	368
Newbert v. McCarthy, Sup.	214	442
Newbert Protection Dist.; Pacific Seaside Home for Children v., Sup.	213	967
Newhall's Estate, In re, Sup.	214	231
Newton; Claussen v., App.	216	975
Newton v. Stoddart, App.	216	985
Newton; Thomas v., App.	216	975
New York Life Ins. Co. v. Bank of Italy, App.	214	61
New York Lubricating Oil Co. v. United Railroads of San Francisco, Sup.	215	72
Nicoletti v. Bank of Los Banos, Sup.	214	51
Nielson v. Gregory, App.	213	510
Norman; People v., App.	216	402
North American Accident Ins. Co. of Chicago, Ill.; Mah See v., Sup.	213	42
North End Water Co.; Sargent v., Sup.	213	33
North Pac. S. S. Co.; Mitchell v., App.	213	293
Norton v. Rosenkranz, App.	216	380
Oakland Rys.; Anglo-California Trust Co. v., Sup.	216	578
Odd Fellows' Cemetery Ass'n; Tonningsen v., App.	213	710
Ogden v. Lee, App.	215	122
Okahara, Ex parte, Sup.	216	614
Oliver; People v., App.	214	272
Olivieri v. Police Court of City of Bakersfield, App.	216	44
Olsen; Reinders v., App.	214	268
O'Meara v. Swortfiguer, Sup.	214	975
O'Toole; Robson v., App.	214	278
Pacific Electric Ry. Co.; Klusman v., Sup.	213	38
Pacific Electric Ry. Co.; Miller v., App.	214	478
Pacific Rolling Mill Co. v. Industrial Accident Commission, Sup.	216	602
Pacific Seaside Home for Children v. Newbert Protection Dist., Sup.	213	967
Page v. Mayors, Sup.	216	31
Palmer; Reed v., App.	216	387
Panini; Galbraith v., App.	214	496
Parisi; People v., Sup.	213	968
Parker; General Motors Acceptance Corporation v., App.	216	384
Parkinson's Estate, In re, Sup.	213	259

P.

	Vol.	Page
Parsell's Estate, In re, Sup.	213	40
Pasadena University v. Los Angeles County, Sup.	214	868
People v. Alexander, App.	216	968
People v. Anderson, App.	214	244
People v. Anderson, App.	216	401
People v. Beck, App.	213	61
People v. Berry, Sup.	215	74
People v. Brown, App.	215	1031
People v. Brown, App.	216	58
People v. Brown, App.	216	411
People v. Caiazza, App.	215	80
People v. Chew Hing, App.	215	412
People v. Clark, App.	214	248
People v. Cockrill, App.	216	78
People v. Crawford, App.	214	654
People v. De Vaul, App.	213	58
People v. Dominguez, App.	214	448
People v. Eaton, App.	213	275
People v. Estrada, App.	213	67
People v. Flaherty, App.	215	699
People v. Fouts, App.	214	657
People v. French, App.	214	1003
People v. Gordon, App.	214	276
People v. Goulding, App.	213	277
People v. Grafft, App.	214	273
People v. Hansen, App.	216	399
People v. Herrera, App.	214	254
People v. Jung Sam, Sup.	213	966
People v. Kady, App.	214	293
People v. Klopfer, App.	214	878
People v. Knight, App.	216	89
People v. Knight, App.	216	96
People v. Lakenan, App.	214	1021
People v. La Rue, App.	216	627
People v. Lennert, App.	216	1117
People v. Lewis, App.	214	1005
People v. McCurdy, App.	213	59
People v. McDonald, App.	214	1005
People v. McHugh, App.	216	76
People v. Magee, App.	213	513
People v. Mahach, App.	213	539
People v. Mitchell, App.	215	117
People v. Moriarity, App.	214	485
People v. Morotti, App.	215	719
People v. Norman, App.	216	402
People v. Oliver, App.	214	272
People v. Parisi, Sup.	213	968
People v. Peterson, App.	214	247
People v. Pickens, App.	214	1027
People v. Pimentel, App.	214	1005
People v. Pribnow, App.	214	475
People v. Pryor, App.	214	484
People v. Redlands High School Dist., App.	216	965
People v. Reynolds, App.	213	54
People v. Rodriguez, App.	214	452
People v. Rodriguez, App.	214	465

P.

	Vol.	Page
People v. Ross, App.	214	267
People v. San Bernardino High School Dist., App.	216	959
People v. Sanders, App.	214	246
People v. Sapienzo, App.	213	274
People v. Saunders, App.	215	120
People v. Schmah, App.	216	624
People v. Shelest, App.	216	389
People v. Silbelo, App.	214	462
People v. Smith, App.	214	468
People v. Superior Court of City and County of San Francisco, Sup.	213	945
People v. Thal, App.	214	296
People v. Thurman, App.	216	394
People v. Tropea, App.	213	1118
People v. Vacarella, App.	214	237
People v. Vitella, App.	215	693
People v. Wilson, App.	215	565
People v. Woods, Sup.	213	951
People v. Yosemite Lumber Co., Sup.	216	39
People v. Y. Wong, App.	215	409
People v. Zmak, App.	213	1118
People v. Zuvela, Sup.	215	907
Perky v. Perky, Sup.	213	492
Peterson; Catterlin v., App.	213	515
Peterson; People v., App.	214	247
Pezzalia v. San Joaquin Light & Power Corporation, App.	214	285
Phelps; Rustigian v., Sup.	213	957
Phillips v. Superior Court of City and County of San Francisco, Sup.	216	32
Phillips; Wright v., App.	213	288
Pickens; People v., App.	214	1027
Pickwick Stages, Northern Division, v. Board of Trustees of City of El Paso De Robles, App.	215	558
Pickwick Stages, Northern Division; Mansfield v., Sup.	215	389
Pickwick Stages, Northern Division; Sheffield v., Sup.	214	852
Pieters-Wheeler Seed Co.; Sofuye v., App.	216	990
Pimentel; People v., App.	214	1005
Pleasant Grove Union School Dist. v. Algeo, App.	215	726
Poe v. Donley, App.	215	399
Poindexter v. Los Angeles Stone Co., App.	214	241
Police Court of City of Bakersfield; Olivieri v., App.	216	44
Pomper v. Superior Court in and for Los Angeles County, Sup.	216	577
Posz v. Taylor, App.	215	107
Powers v. Sutherland Auto Stage Co., Sup.	213	494
Pribnow; People v., App.	214	475
Price, In re, App.	215	710
Price v. Murray, App.	215	710
Prichard v. Kimball, Sup.	214	863
Prichard v. Kimball, Sup.	214	867
Priver v. Young, App.	216	966
Proctor; Rohan v., App.	214	986
Pryor; People v., App.	214	484
Quigley; City Street Imp. Co. v., Sup.	215	390
Quinby; Johnson v., App.	216	397
Radich v. Gak; App.	214	1000
Railroad Commission; Saunby v., Sup.	215	904
Railroad Commission of California; City of San Bernardino v., Sup.	213	980
Railroad Commission of California; Coast Truck Line v., Sup.	215	898

P.

	Vol.	Page
Ramsay v. Rodgers, App.	214	261
Redemeyer v. Cunningham, App.	215	83
Redlands High School Dist.; People v., App.	216	965
Reed v. Palmer, App.	216	387
Rees v. Rees, Sup.	216	1006
Reese v. Turpin, App.	214	257
Reinders v. Olsen, App.	214	268
Rempel v. Kells, App.	215	1042
Resetar v. Leonardi, App.	216	71
Reynolds; People v., App.	213	54
Reynolds v. Reynolds, Sup.	216	619
Rice Lands & Products Co. v. Blevins, App.	215	402
Richardson v. Browning, App.	214	281
Riddle v. Hillhouse, Sup.	214	230
Riedele; Smith v., App.	213	281
Ring v. United States Gypsum Co., App.	216	409
Rissman v. Industrial Accident Commission of California, Sup.	213	991
Ritzman v. Ritzman, Sup.	213	493
Robson v. O'Toole, App.	214	278
Rocca v. Steinmetz, App.	214	257
Rockridge Place Co. v. City of Oakland, App.	216	64
Rodgers; Ramsay v., App.	214	261
Rodriguez; People v., App.	214	452
Rodriguez; People v., App.	214	465
Rodriguez v. Severini, App.	215	557
Rohan v. Proctor, App.	214	986
Romer v. Wehner, App.	214	993
Rosenkranz; Norton v., App.	216	380
Ross; Brkljaca v., App.	213	290
Ross; People v., App.	214	267
Russell; Myles v., Sup.	213	491
Russell v. Superior Court in and for Sacramento County, Sup.	215	544
Rustigian v. Phelps, Sup.	213	957
Ryan v. Ryan, Sup.	216	366
Ryan's Estate, In re, Sup.	216	366
Sachs; Yellow Cab Co. of San Diego v., Sup.	216	33
San Bernardino High School Dist.; People v., App.	216	959
Sanders; People v., App.	214	246
Sanderson; Wardlow v., Sup.	213	35
San Francisco-Oakland Terminal Rys.; Anderson v., App.	214	289
San Francisco-Oakland Terminal Rys.; Unger v., App.	214	510
San Francisco Securities Corporation; Chucovich v., App.	214	263
San Joaquin Agr. Corporation; Laiblin v., App.	213	529
San Joaquin Light & Power Corporation; Pezzalia v., App.	214	285
Sapienzo; People v., App.	213	274
Sargent v. North End Water Co., Sup.	213	33
Saunby v. Railroad Commission, Sup.	215	904
Saunders; People v., App.	215	120
Sawyer; Arocena v., App.	213	523
Scarborough v. Urgo, Sup.	216	584
Schimmel v. Martin, Sup.	213	33
Schlitz v. Thomas, App.	216	51
Schmah; People v., App.	216	624
Schneider v. Henley, App.	215	1036
Scholes; Silvius v., App.	214	1020
Scott v. Stuart, Sup.	213	947

	Vol.	Page
Scott v. Symons, Sup.	216	604
Scott, Magner & Miller v. Mozzetti, App.	216	979
Scully, Chavez v., App.	216	46
Searles v. Gonzalez, Sup.	216	1003
Security Trust & Savings Bank; Klarquist v., App.	215	398
Ser-Vis v. Victor Valley Irr. Dist., Sup.	214	223
Setrakian v. Naftzger, App.	215	564
Severini; Rodriguez v., App.	215	557
Shaffer v. Beinhorn, Sup.	213	960
Shaingold v. Shaingold, Sup.	216	603
Shank v. Blackburn, App.	215	559
Shaul; Diener v., App.	213	706
Shay; Crandall v., App.	214	450
Sheffield v. Pickwick Stages, Northern Division, Sup.	214	852
Shelest; People v., App.	216	389
Sheriff; Winterburn v., App.	215	406
Shields; Logan v., Sup.	214	45
Siebold v. Berdine, App.	214	655
Siemon v. Finkle, Sup.	213	954
Silbelo; People v., App.	214	462
Silvius v. Scholes, App.	214	1020
Sleeper v. Board of Sup'rs of Lake County, App.	214	292
Small Claims Court of Highland Tp., San Bernardino County; Leuschen v., Sup.	215	391
Smith v. Aros, Sup.	214	962
Smith; People v., App.	214	468
Smith v. Riedele, App.	213	281
Snow; Jackson v., App.	216	60
Snow; Stevens v., Sup.	214	968
Snow Mountain Water & Power Co. v. Kraner, Sup.	216	589
Sociedad Espanola De Beneficencia Mutua; Taboada v., Sup.	215	673
Sofuye v. Pieters-Wheeler Seed Co., App.	216	990
Sommerville, Inc.; American Nat. Bank v., Sup.	216	376
Southern Pac. Co.; Hellman Commercial Trust & Savings Bank v., Sup.	214	46
Southern Pac. Co.; Ijams v., Sup.	214	46
Southern Pac. Co.; Storey v., Sup.	214	46
Southern Pac. Land Co.; Wilson v., App.	215	396
Southwick v. Moore, App.	215	704
Standard Auto Sales Co.; Horne v., App.	216	970
Standard Lumber Co.; Anderson v., App.	213	65
Standard Oil Co.; Coalinga Mohawk Oil Co. v., App.	214	265
State; Curtin v., App.	214	1030
State Industrial Accident Commission; McKenna v., Sup.	215	900
Steinmetz; Rocca v., App.	214	257
Stephens v. Industrial Accident Commission, Sup.	215	1025
Stern; Hyman v., App.	215	911
Stern Co.; Hyman v., App.	215	913
Sternes v. Sutter Butte Canal Co., App.	216	66
Stevens v. Snow, Sup.	214	968
Stevens v. Storke, Sup.	216	371
Stoddart; Newton v., App.	216	985
Stoddart's Estate, In re, App.	216	985
Stone Co. v. De Fremery Wharf & Land Co., App.	215	687
Storey v. Southern Pac. Co., Sup.	214	46
Storke; Stevens v., Sup.	216	371
Storm v. Industrial Accident Commission, Sup.	214	874

	P.	
	Vol.	Page
Strain; De Bakcsy v., App.	215	105
Stuart; Scott v., Sup.	213	947
Sturtevant v. K. Hovden Co., App.	214	244
Superior Court in and for Alameda County; Svoboda v., Sup.	214	440
Superior Court in and for Los Angeles County; Hay v., App.	215	717
Superior Court in and for Los Angeles County; Marblehead Land Co. v., App.	213	718
Superior Court in and for Los Angeles County; Pomper v., Sup.	216	577
Superior Court in and for Sacramento County; Russell v., Sup.	215	544
Superior Court of California in and for City and County of San Francisco; Lee v., Sup.	214	972
Superior Court of California in and for Los Angeles County; Hellner v., App.	215	709
Superior Court of California in and for Los Angeles County; Marblehead Land Co. v., App.	215	922
Superior Court of California in and for Los Angeles County; Tripp v., App.	214	252
Superior Court of City and County of San Francisco; People v., Sup.	213	945
Superior Court of City and County of San Francisco; Phillips v., Sup.	216	32
Superior Court of Orange County; Tannahill v., Sup.	216	601
Sutherland Auto Stage Co.; Powers v., Sup.	213	494
Sutter-Butte By-Pass Assessment No. 6 of Sacramento & San Joaquin Drainage Dist., In re, Sup.	213	974
Sutter Butte Canal Co.; Sternes v., App.	216	66
Svoboda v. Superior Court in and for Alameda County, Sup.	214	440
Swain v. Los Angeles Morris Plan Co., App.	213	703
Swortfiguer; O'Meara v., Sup.	214	975
Symons; Scott v., Sup.	216	604
Taboada v. Sociedad Espanola De Beneficencia Mutua, Sup.	215	673
Taggart; Boland v., Sup.	213	504
Taggart's Estate, In re, Sup.	213	504
Tait; Al G. Barnes Shows Co. v., App.	214	1015
Tannahill v. Superior Court of Orange County, Sup.	216	601
Tarpey v. McClure, Sup.	213	983
Taylor; Posz v., App.	215	107
Thal; People v., App.	214	296
Thomas v. Gismegian, Sup.	216	601
Thomas v. Newton, App.	216	975
Thomas; Schlitz v., App.	216	51
Thompson; Williams v., App.	213	705
Thurman; People v., App.	216	394
Title Guarantee & Trust Co. v. Hammond Lumber Co., App.	216	953
Title Insurance & Trust Co. v. City of Los Angeles, two cases, App.	214	667
Tonningsen v. Odd Fellows' Cemetery Ass'n, App.	213	710
Toprahanian; Best v., App.	216	977
Treat v. Los Angeles Gas & Electric Corporation, App.	213	263
Tripp v. Superior Court of California in and for Los Angeles County, App.	214	252
Tropea; People v., App.	213	1118
Trube v. Katz, App.	213	264
Turner, Kuhn & Fraser v. Jones, App.	215	1033
Turpin; Becker v., App.	214	255
Turpin; Reese v., App.	214	257
Twogood v. Monnette, Sup.	215	542
Unger v. San Francisco-Oakland Terminal Rys., App.	214	510
United Railroads of San Francisco; New York Lubricating Oil Co. v., Sup.	215	72

	P.	
	Vol.	Page
United States Gypsum Co.; Ring v., App.	216	409
Urgo; Scarborough v., Sup.	216	584
Utt; Clifford v., App.	216	972
Vacarella; People v., App.	214	237
Valentine; Lambert v., App.	215	692
Vargas v. Maderos, Sup.	214	849
Veach; Morrison v., Sup.	213	945
Vermilyea v. Vermilyea, App.	215	686
Victor Valley Irr. Dist.; Ser-Vis v., Sup.	214	223
Vitelle; People v., App.	215	693
Waechter v. Bullard, App.	215	696
Walcott; Doon v., App.	216	1117
Walker v. Walker, Sup.	213	967
Walls; Barrager v., App.	216	995
Walsh; Lapique v., Sup.	214	876
Wardlow v. Sanderson, Sup.	213	35
Warfield v. Basso, App.	216	48
Watson v. Duarte, App.	215	1039
Watson; Monahan v., App.	214	1001
Wehner; Romer v., App.	214	993
Weisgerber; Youmashef v., Sup.	214	961
Weiss v. City of Los Angeles, Sup.	213	979
Western Indemnity Co. v. Industrial Accident Commission of California, Sup.	216	611
Western Iron & Metal Co.; Lutz v., Sup.	213	962
Western States Life Ins. Co.; Wright v., App.	214	990
Western Well Works v. California Farms Co., App.	214	491
Westlake; Albertson v., App.	216	1117
W. H. Blodgett Co. v. Bebe Co., Sup.	214	38
Whiting v. Whiting, App.	216	91
Whiting v. Whiting, App.	216	92
Whittington; Work v., App.	214	474
Willard v. Dobbins, Sup.	216	1008
Williams v. Andrews, App.	216	998
Williams v. Andrews, Sup.	216	1002
Williams v. Flinn & Treacy, App.	214	1024
Williams v. Thompson, App.	213	705
Williams v. Williams, App.	213	508
Willits; Bou v., App.	214	519
Wilmon v. Aros, Sup.	214	962
Wilson; Blakeslee v., Sup.	213	495
Wilson; People v., App.	215	565
Wilson v. Southern Pac. Land Co., App.	215	396
Wiltsey; Gurnsey v., App.	214	487
Wines v. Garrison, Sup.	214	56
Winterburn v. Sheriff, App.	215	406
Witt; Worth v., App.	216	90
Wood v. Bufford, App.	214	516
Woods; People v., Sup.	213	951
Woodsend v. Chatom, Sup.	214	965
Work v. Whittington, App.	214	474
Worth v. Witt, App.	216	90
Wrenn v. Dormody, App.	215	909
Wrenn's Estate, In re, App.	215	909
Wright v. City of Oakland, App.	216	66
Wright v. Phillips, App.	213	288

	P.	
	Vol.	Page
Wright v. Western States Life Ins. Co., App.	214	990
Wyckoff v. Force, App.	214	489
Wyckoff; Judson Mfg. Co. v., App.	213	269
Yarbrough; Gray v., App.	215	914
Yellow Cab Co. of San Diego v. Sachs, Sup.	216	33
Yip Wing; Grossman v., App.	216	634
Yosemite Lumber Co.; People v., Sup.	216	39
Youmashef v. Weisgerber, Sup.	214	961
Young; Kessler v., App.	214	665
Young; Priver v., App.	216	966
Y. Wong; People v., App.	215	409
Zmak; People v., App.	213	1118
Zuvela; People v., Sup.	215	907

CALIFORNIA REPORTER

213 PACIFIC REPORTER

190 Cal. 512

SARGENT v. NORTH END WATER CO.

(L. A. 6865.)

(Supreme Court of California. Feb. 19, 1923.)

Damages 🔑62(1)—Measure of, is amount which, if expended by plaintiff, would have prevented the injury.

The refusal to charge, that if the jury found plaintiff could have prevented the damage complained of by the expenditure of a comparatively small amount of money, his measure of damages would be the expenditure which would reasonably have prevented the injury, *held* reversible error.

In Bank.

Appeal from Superior Court, Los Angeles County; Franklin J. Cole, Judge.

Action by Ray L. Sargent against the North End Water Company. From judgment for plaintiff, defendant appeals. Reversed.

Nathan Newby, of Los Angeles, for appellant.

Conkling & Brown, of El Centra, for respondent.

PER CURIAM. The following opinion was rendered by the court from the bench on February 19, 1923:

The judgment is reversed because of the error of the trial court in modifying instruction No. 3 by striking out the portion thereof in italics. The instruction is as follows:

"You are further instructed that if you find from the evidence that the plaintiff, Ray L. Sargent, could by the exercise of reasonable diligence have prevented the injury complained of, but failed to do so, then your verdict must be for the defendant, *and if you find that the plaintiff could have prevented the injury complained of by the expenditure of a comparatively small sum of money, and find otherwise according to these instructions that the plaintiff is entitled to recover anything at all from the defendant, then the measure of damage would be the amount of money which could have reasonably prevented the injury complained of had the plaintiff expended said money.*"

The judgment is reversed.

WILBUR, C. J., and LAWLOR, LENNON, WASTE, SEAWELL, KERRIGAN, and MYERS, JJ., concur.

---

190 Cal. 429

SCHIMMEL v. MARTIN.

ANDERSON v. SAME.

(L. A. 7276, 7277.)

(Supreme Court of California. Feb. 17, 1923.)

1. Contracts 🔑10(4)—Sales contract containing no agreement to buy lacking in mutuality.

A contract of M. to let U. have continuously at a certain price water to capacity of M.'s pump, but with no agreement of U. to buy, treated as a contract for sale of personalty, is lacking in mutuality.

2. Property 🔑4—Right to water for irrigation real property.

The right to water to be used for irrigation is a right in real property.

3. Waters and water courses 🔑158(1)—Contract for water for irrigation uncertain as to price.

Contract of M. to let U. have, for irrigation continuously at 1½ cents per inch, the 150 inches of water, the capacity of M.'s pumping plant, is void for uncertainty as to price; the period to be covered by the price named not being stated, and it being unreasonable to construe it as providing for only one payment.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Two actions, one by James Schimmel, the other by H. O. Anderson, both against A. J. Martin. From adverse judgments, defendant appeals. Reversed.

R. B. Bidwell, of Glendora, for appellant.

Walters & Mauk, of Los Angeles, for respondents.

LENNON, J. The above-entitled actions were separately instituted in the court below to recover from defendant damages for an alleged breach of a contract to furnish water to the respective lands of the plaintiffs. The cases come here on appeal upon separate records, but the appeals have been submitted upon a single set of briefs and will therefore be considered and decided as one.

The undisputed facts are these: On the 14th day of February, 1918, a written contract was entered into between one O. K. Uzzell and A. J. Martin, defendant herein, which contract was in the words and figures as follows:

"This agreement, entered into between A. J. Martin, of Baldwin Park, Los Angeles county, California, the party of the first part, and O. K. Uzzell, of Meriden avenue, South Pasadena, California, the party of the second part, witnesseth:

"That A. J. Martin is the owner of 150 inches of water, the capacity of his pumping plant, in Baldwin Park, California, and he agrees to let O. K. Uzzell have this water continuously at 1½ cents per inch, to be applied on the 20 acres of land owned by O. K. Uzzell, and which adjoins the ranch of A. J. Martin; and O. K. Uzzell is to pay monthly for the water he uses. In case O. K. Uzzell fails to pay for the use of water, the party of the first part has the privilege of cutting off the supply, but in case party of the second part fails to pay but does pay later, he shall then have the water supplied to him as in the beginning on the same terms, by paying up all bills for the use of water; and further, to secure party of the first part, the party of the second part agrees that

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

A. J. Martin shall have a lien on the crops grown on the said 20 acres until he pays said bills as security for water furnished. The contract agreement shall be continuous under said terms. Said water is to be furnished to O. K. Uzzell whenever notice is given to A. J. Martin by party in charge of O. K. Uzzell's ranch.

"Party of the second part to give 5 days' notice when water is wanted.

"[Signed] A. J. Martin.
"O. K. Uzzell."

On January 14, 1920, Uzzell transferred his interest in said contract to James Schimmel and Eva Anderson jointly, and on June 3, 1920, Eva Anderson assigned her interest in said contract to H. O. Anderson. In the meantime the title to the lands mentioned in said contract became vested in said James Schimmel and H. O. Anderson, plaintiffs herein, each becoming owner of 10 acres thereof. Prior to April 30, 1921, plaintiffs and their predecessors in interest received water from defendant's pumping plant for irrigating said property, and paid defendant in full therefor.

On January 6, 1921, the defendant gave notice to plaintiffs that he would furnish no water after April 30, 1921, and after that date did refuse to furnish water to either plaintiff. Upon the trial of the separate actions for the recovery of damages alleged to have been caused by the failure and refusal of defendant to furnish water, judgment in the sum of $368 was rendered in favor of plaintiff Anderson, and judgment in the sum of $300 in favor of plaintiff Schimmel. From these judgments, defendant appeals.

[1] The contract is lacking in mutuality. Considered as a contract for the sale of personal property, as the parties to the action treated and considered it, and as the trial court in effect found it to be, there is clearly no mutuality in the absence of an agreement by the plaintiffs to buy the water offered for sale by the contract.

The cases cited in the brief by counsel for respondents in support of the contention that the contract is mutual were all cases wherein the purchaser agreed in effect to purchase so much of the commodity as he should need in his business during the time specified in the contract. As a matter of course, under the circumstances narrated in those cases, the purchaser was legally bound to accept and pay for so much of the commodity as he should need. But in the instant case we are unable to find in the contract any obligation or promise on the part of the plaintiffs or their predecessors in interest to take or purchase any water at all.

[2, 3] The lack of mutuality in the contract is the principal point made in support of the appeal. Incidentally, however, it is contended that the contract was void for uncertainty. This point, even though it be indifferently made, is well taken. The right to water to be used for irrigation is a right in real property. Fawkes v. Reynolds (Cal. Sup.) 211 Pac. 449; Stanislaus Water Co. v. Bachman, 152 Cal. 716, 723, 725, 726, 93 Pac. 858, 15 L. R. A. (N. S.) 359; Copeland v. Fairview Land, etc., Co., 165 Cal. 148, 153, 131 Pac. 119. Considered as a contract for the sale of a right to the use of water for the purpose stated in the complaint, all of the elements essential to the creation of such a contract may be said to be clearly expressed, save and except the price to be paid for the water. The contract contemplates payments from time to time at the specified rate of 1½ cents per inch; but whether that is the rate to be paid per hour, per day, per month, per year, or for any other period is uncertain and incapable of ascertainment from the terms of the contract.

That the pumping of water is expensive is a matter of common knowledge and with that knowledge in mind the parties to the contract must have intended that the price should bear some relation to the period of time during which the water was being delivered and used. Such period of time, however, is not expressed in the contract. It would be utterly unreasonable to construe the contract to be a sale of a permanent water right, granting and assuring the continuous flow of a sufficient amount of water to irrigate 20 acres of land, to be paid for at the rate of 1½ cents per inch.

No point is made as to the right of plaintiffs to succeed to and take by assignment any interest in the contract. It, of course, goes without further saying that the quesion of the right of plaintiffs to so take, although it may be involved in the case, is not decided here.

Judgment reversed.

We concur: WILBUR, C. J.; MYERS, J.; KERRIGAN, J.; SEAWELL, J.; LAWLOR, J.; WASTE, J.

190 Cal. 417

WARDLOW v. SANDERSON et al.

(Sac. 3391.)

(Supreme Court of California. Feb. 16, 1923.)

1. Sales 🔑396—Complaint for purchase money.

A complaint alleging purchase and delivery of a defective tractor, a subsequent agreement to purchase another tractor in consideration of the exchange of the defective tractor and a stipulated sum of money, and failure of seller to perform, states no cause of action, where a subsequent written rescission of the second contract is alleged.

2. Sales 🔑391(7)—No recovery for purchase price of goods as for money had and received, where no rescission and no implied warranty by vendor.

In an action by the buyer for the purchase price of a defective tractor, as for money had and received by defendants for the use of plaintiff, where there was no rescission of the sale and no implied warranty on the part of the vendor, under Civ. Code, § 1764, *held* that plaintiff was not entitled to recover.

3. Sales 🔑397—Evidence of condition of tractor in action for purchase price as money had and received held inadmissible.

In an action to recover back the purchase price of a tractor as money had and received by the seller for the use of the buyer, evidence as to the condition of the tractor was irrelevant and inadmissible.

In Bank.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Anna Wardlow against F. H. Sanderson, Sr., and another, doing business under the firm name and style of F. H. Sanderson & Son. From a judgment for plaintiff, defendants appeal. Reversed.

Max B. Jamison, of Parterville, for appellants.

Waldo E. Burford and Guy Knupp, both of Parterville, for respondent.

LENNON, J. This case is here on rehearing after judgment of the District Court of Appeal of the Second District, Division 1, reversing a judgment made and entered by the trial court in favor of the plaintiff. The Court of Appeal concluded, and accordingly adjudged, that the judgment against the defendants could not be sustained, upon the theory that there had been a rescission of the first contract entered into between the plaintiff and the defendants, and which was the basis of the plaintiff's cause of action. The conclusion of the Court of Appeal in this behalf was made and based upon the theory that the evidence adduced upon the entire case in the court below did not warrant nor support a finding that there had been a rescission of the contract referred to. At first blush it did not appear to us why said contract, even under the facts narrated in the opinion of the Court of Appeal, was not rescinded. A rehearing was granted primarily for the purpose of ascertaining the state of the evidence upon the subject of the rescission of the first contract, and now, after a careful consideration of the record, we are constrained to the conclusion that the Court of Appeal was correct in its statement of the facts and its application of the law, and, accordingly, the opinion of Mr. Presiding Justice Conrey is hereby adopted and made the opinion of this court, as follows:

"On or about April 1, 1919, appellants, in consideration of the sum of $1,545 paid by respondent to appellants, sold and delivered to respondent one certain model S–25 Samson tractor. This tractor was equipped with a defective motor, and by reason thereof would not perform the work for which it was sold; that is to say, respondent purchased the tractor for use in her orange grove, and the fact that it was purchased for this purpose was known to appellants at the time of the sale. Respondent kept the tractor and endeavored to use it until the following November. From time to time appellants attempted to remedy the defects, but without success. Appellants were not the manufacturers of the tractor, but were engaged in the business of selling such tractors. Respondent did not attempt to rescind the sale, and did not bring any action for damages for any alleged breach of the contract of sale. On the 7th day of November, 1919, respondent and appellants entered into a contract, the material part of which is as follows: 'We agree to sell Mr. Wardlow one 30-X Samson tractor to be delivered as soon as possible for his S–25 and $400.' The Mr. Wardlow mentioned in this contract is the son of respondent, and it is admitted that he represented her in the transaction. At the same time, and in part performance of this agreement, the S–25 was delivered by respondent to appellants. About 30 days later, with the consent of appellants, respondent, by her said agent, rescinded the contract of November 7th by writing thereon the following: 'Having changed our mind we have decided not to take the 30–X and agree to let Sanderson sell the S–25 for $1,470. Sanderson agrees to sell this tractor within 60 days. Mrs. Jas. Wardlow. Per Ralph Wardlow.' The S–25 was not sold. At the time of the trial of this action it remained on the premises of appellants without any further agreement concerning same.

"The amended complaint in this action is in two counts. The first count alleges the making of the original sale; the defects and failure of the S–25; the agreement of November 7th; the delivery of the S–25 to appellants; 'that thereafter and after a reasonable time had elapsed the said plaintiff demanded of and from the said defendants that said defendants perform their agreement and deliver to the said plaintiff the aforesaid model 30–X Samson tractor but to perform the agreement on the part and behalf of the said defendants to do and perform and to deliver said model 30-X Samson tractor to the said plaintiff, the defendants have and do now neglect, fail and refuse'; alleges that the plaintiff at all times has been ready, able, and willing to perform her part of said contract, and that she has failed to pay said sum of $400 solely for the reason that appellants have refused to deliver the 30–X tractor; that after such refusal, the plaintiff demanded the return of said sum of $1,545, but that defendants have failed, neglected, and refused to repay the same. The second count of the complaint is in the ordinary form of a complaint in an action for money had and received by the defendants, to and for the use of plaintiff.

"The answer of the defendants denied the principal allegations of the complaint other than those alleging the original sale and the making of the contract of November 7th. The answer also alleged the fact of rescission by mutual consent of the contract of November 7th. The court made findings and entered judgment in favor of the plaintiff. Without reviewing the evidence, we shall assume that it is sufficient in fact to support all of the findings except the finding that it is not true that the contract of November 7th was rescinded. The evidence, without any conflict therein, shows that the rescission was made as hereinabove stated.

"The evidence concerning the defective condition of the S–25 tractor was received over the objection of appellants that the same was incompetent, irrelevant, and immaterial. The defects shown by the evidence thus received are indefinite concerning the particular faults of the tractor, other than that when put to use in respondent's orchard, it would run for a short time and would then cease to operate satisfactorily and would not produce the power necessary for the work required. For some reason not explained, the motor failed to develop power sufficient for satisfactory use of the machine in the plaintiff's orchard. It remained in the possession of the plaintiff for more than six months, except during such time as it was in the place of business of appellants, or elsewhere, for purposes of repair. It appears to have been in the possession of respondent immediately prior to the time when she delivered it to appellants under the contract of November 7th.

[1] "The first count of the complaint attempts to state a cause of action for breach of the contract of November 7th. It is clear that respondent's right to recover on that count must be defeated by reason of her voluntary rescission of the agreement on which that cause of action is based.

[2, 3] "It only remains to determine whether the plaintiff is entitled to recover under the second count, which seeks recovery of the original purchase price of the S–25 as for money had and received by defendants for the use of plaintiff. This cause of action cannot be sustained unless the plaintiff was entitled to and did rescind the original sale of the S–25 tractor. The transaction of November 7th was not a rescission, and the delivery of the tractor by respondent to appellants at that time was not pursuant to any rescission or notice of rescission. No agreement was made that the transaction of November 7th was or should be considered to be in the nature of a rescission, and it is clear that, without the consent of appellants, respondent did not at that time have any right to rescind. There had been no breach of any warranty of sale on the part of the vendor. In the article of the Civil Code relating to warranties of sales, it is declared that 'Except as prescribed by this article, a mere contract of sale or agreement to sell does not imply a warranty.' Civ. Code, § 1764. That article does not provide for any warranty applicable to the facts of this case. Remsberg v. Hackney Mfg. Co., 174 Cal. 799, 803, 164 Pac. 792; Brackett v. Martens, 4 Cal. App. 249, 255, 256, 87 Pac. 410. There is no evidence of any express warranty. In stating one of his questions to the witness Ralph Wardlow, the attorney for the plaintiff referred to the original contract for the S–25 as being a document then in his hands; but it is not in the record, and nothing has been said concerning its contents. The court should have sustained the objections of appellants to the questions concerning the condition of the S–25 tractor, or should have granted their motion to strike out that evidence, because it was not relevant to the issues of the case."

For the reasons given in the foregoing opinion, the judgment is reversed.

We concur: WILBUR, C. J.,; MYERS, J.; KERRIGAN, J.; WASTE, J.; LAWLOR, J.; SEAWELL, J.

190 Cal. 402

McNEESE v. McNEESE. (L. A. 7270.)

(Supreme Court of California. Feb. 13, 1923.)

1. Insane persons 🔑66—Suit unnecessary to set contract aside.

The interposition of a court of equity is not necessary to the rescission of a contract entered into by an insane person, as it may be rescinded by the act of the party entitled and desiring to rescind, in view of Civ. Code, §§ 1688, 1689, 1691.

2. Insane persons 🔑66—Offer to restore unnecessary where nothing received.

Where nothing is received by an insane person to be restored, an offer to restore is impossible and unnecessary as a condition of rescission, under Civ. Code, § 1691.

3. Insane persons 🔑66—Formal notice of rescission of conveyance unnecessary.

It is not necessary that a notice of an insane person to rescind a conveyance of an automobile shall be formal and explicit, it being sufficient that the notice shall be given to the other party which clearly shows the intention to consider the contract at an end, and a demand for the automobile made by the guardian of the insane person preliminarily to the institution of an action is sufficient notice of desire and determination to rescind.

In Bank.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Samuel J. McNeese, by H. Parker Wood, guardian of his estate, against Samuel S. McNeese. Judgment for defendant, and plaintiff appeals. Reversed.

Waldo M. York, of Los Angeles, for appellant.

Nathan Newby, William J. Palmer, and Raymond W. Stewart, all of Los Angeles, for respondent.

LENNON, J. Plaintiff in this action was on the 26th day of January, 1920, duly adjudged an incompetent person, and H. Parker Wood was appointed guardian of his estate. Thereafter, on the 25th day of May, 1920, an action in claim and delivery was instituted by said guardian in behalf of said incompetent for the recovery from the possession of the defendant of a certain Buick automobile formerly owned by said incompetent. Plaintiff and defendant are respectively father and son.

The allegations of the complaint were the usual allegations in actions of claim and delivery. In addition thereto it was alleged:

> "That while the said Samuel J. McNeese was the owner of said automobile as aforesaid, and while he was in possession thereof and entitled to the possession thereof, and while he was so as aforesaid incapable of taking care of himself and managing his property and incapable of consenting thereto, the said defendant, without right, took said automobile from the possession of said Samuel J. McNeese."

The defendant in his answer denied that plaintiff was the owner of and entitled to the possession of said automobile, and alleged affirmatively that on the 21st day of October, 1919, he, the defendant, became the owner of the automobile and entitled to the possession thereof. At the trial a bill of sale from plaintiff to defendant was offered and received in evidence, and defendant testified that said bill of sale had been given to him by his father. On behalf of the plaintiff evidence was introduced to show that said plaintiff had no recollection of having made the bill of sale. There was also the testimony of two doctors to the effect that the plaintiff at the time of the execution of the bill of sale was incompetent to transact business. This testimony was based upon a hypothetical question and was admitted out of order and without a foundation having been laid. But later in the trial of the case the plaintiff offered to prove as a foundation for said testimony all of the facts narrated therein. The court refused to hear evidence tending to establish the facts relied upon as a basis for the hypothetical question upon the ground that, even though all of the facts therein narrated were shown to be true, nevertheless the necessary conclusion of the court would have to be that the contract was not void. This was so, the trial court stated, for the reason that such facts would not establish the fact that plaintiff was "entirely without understanding," and, unless plaintiff were entirely without understanding, he would not come within the Code provision which provides that contracts by such a person are invalid and utterly void. Civ. Code, § 38.

Judgment was made and entered in favor of the defendant, and findings were made to the effect that a bill of sale was executed by plaintiff and delivered to defendant, and that at the time of the conveyance of said automobile the plaintiff was not entirely without understanding. It was evidently the theory of the trial court that, if the plaintiff was entirely without understanding, no contract had come into existence, for the reason that plaintiff would have been incapable of making a contract, and an action for claim and delivery would lie; but, upon the other hand, if plaintiff were not "entirely without understanding," then his contract was merely voidable, and his remedy was not an action for claim and delivery, but rather for rescission of the contract.

From this judgment plaintiff appeals, basing his appeal primarily upon the contention that the contract had actually been rescinded by and for the plaintiff prior to the commencement of the action in claim and delivery. Section 39 of the Civil Code, upon which the plaintiff bases his right of rescission, reads as follows:

> "A conveyance or other contract of a person of unsound mind but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, as provided in the chapter on rescission of this Code."

[1] The interposition of a court of equity to set the contract aside was not necessary to rescission. A contract may be rescinded by the act of the party entitled and desiring to rescind. It is well recognized that sections 1688, 1689, and 1691 of the Civil Code provide for rescission effected by the act of the parties. Loaiza v. Superior Court, 85 Cal. 11, 24 Pac. 707, 9 L. R. A. 376, 20 Am. St. Rep. 197; Kelley v. Owens, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797; More v. More, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76; McDonald v. Pacific Debenture Co., 146 Cal. 667, 80 Pac. 1090; McGue v. Rommel, 148 Cal. 539, 83 Pac. 1000; California, etc., Co. v. Schiappa-Pietra et al., 151 Cal. 732, 91 Pac. 593; Spreckels v. Gorrill, 152 Cal. 383, 92 Pac. 1011; Bray v. Lowery, 163 Cal. 256, 124 Pac. 1004; Brown v. Domestic Utilities Mfg., 172 Cal. 733, 159 Pac. 163.

Under section 1691 of the Civil Code two requirements are set forth as necessary to effect a rescission by the act of the party.

> "1. He must rescind promptly, upon discovering the facts which entitle him to rescind, if

he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and,

"2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so."

[2, 3] It is conceded by defendant that, where nothing is received to be restored, an offer to restore is impossible, and in the case at bar, the property having been transferred by gift, there can be no question that an offer to restore is not necessary. McGue v. Rommel, 148 Cal. 539, 83 Pac. 1000; California, etc., Co. v. Schiappa-Pietra et al., 151 Cal. 732, 91 Pac. 593. It is insisted, however, that a notice to rescind was necessary, and that such notice was not given by plaintiff to defendant in the instant case. It is not necessary that the notice to rescind shall be formal and explicit; it is sufficient that notice shall be given to the other party which clearly shows the intention of the person rescinding to consider the contract at an end. It has been held in other states that the mere bringing of an action is a sufficient disaffirmance of a sale. Mahoney v. Gano, 2 Ind. App. 107, 27 N. E. 315. This has been held true not only in executory contracts of sale, but in cases where the action was ejectment, and the courts conceded that the transfer was not void, but merely voidable. Smith v. Ryan, 191 N. Y. 452, 84 N. E. 402, 19 L. R. A. (N. S.) 461, 123 Am. St. Rep. 609, 14 Ann. Cas. 505.

But, aside from the foregoing considerations, we think the demand for the automobile made by the guardian of the plaintiff preliminarily to the institution of this action was sufficient notice to defendant of plaintiff's desire and determination to rescind and adequately inform defendant that plaintiff did not intend to be longer bound by the transfer.

The question of whether or not at the time of the alleged rescission he was entitled, because of incompetency, to rescind, was embraced within the issues, and evidence upon that phase of the case was admissible. The trial court having erroneously refused the offer of plaintiff to prove all the facts set forth in the hypothetical question, which proof would have tended to sustain his contention that he was at the time of the execution of the bill of sale incompetent, the case must be sent back for a new trial.

Judgment reversed

We concur: WILBUR, C. J.; KERRIGAN, J.; MYERS, J.; LAWLOR, J.; SEAWELL, J.; WASTE, J.

---

190 Cal. 441

KLUSMAN et al. v. PACIFIC ELECTRIC RY. CO. et al. (L. A. 7284.)

(Supreme Court of California. Feb. 20, 1923.)

Carriers ⚷333(10)—One stepping in front of car without looking in direction from which it approached held contributorily negligent.

One passing around the end of a north-bound street car, from which she had alighted, *held* contributorily negligent as a matter of law in stepping in front of a north-bound car on a parallel track without looking to the south, whether or not she knew cars were operated in both directions on such track.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Katherine O. Klusman and another against the Pacific Electric Railway Company and others. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

Frank A. McDonald and Gesner Williams, both of Los Angeles, for appellants.

Frank Carr, of Oakland, and R. C. Gortner and W. R. Millar, both of Los Angeles, for respondents.

WILBUR, C. J. The plaintiff Katherine O. Klusman stepped upon the track of the defendant railway company in front of a north-bound interurban train going from Los Angeles towards Glendale. The accident occurred at the intersection of Berkeley, Alvarado, and Glendale boulevard in Los Angeles. This action was brought to recover the damages sustained by the plaintiffs as a result of the collision. Defendants' motion for nonsuit was granted and a judgment in their favor entered and plaintiffs appeal. The defendant railway company owns a three-track system of railway at the scene of the accident. The middle track is used by the outgoing and incoming interurban cars, the easterly track by north-bound and the westerly track by south-bound local cars traveling from Los Angeles to Edendale, terminating at the street intersection where the accident occurred. According to the testimony of the plaintiff she alighted from the north-bound Edendale car after it had stopped at its terminus, walked south along the side of the car, passed around the end of the car in which she had been riding, stepped upon the middle track, and was almost instantly struck by a car proceeding in the same direction as the car in which she had just arrived. She testified that a second car upon the local line had arrived and was standing about 60 feet in the rear of the car from which she alighted, and that the headlight thereon was burning brightly, illuminating the scene of the accident. The plaintiff testified that aft-

---

er arriving at the rear of the car in which she had been riding she turned to the west, and proceeded without looking toward the south at all, and was not aware of the approach of the car from the south until she was struck by it. She testified that it was a drizzly, damp night, and that it seemed very dark; that she had visited the place where the accident occurred a number of times, and admitted that she knew there were three tracks there, but stated she was not very familiar with that fact; that she had gone there in the evening, and had paid very little attention to the tracks.

If the plaintiff knew that cars were operated on the middle track in both directions, she was bound in the exercise of ordinary care to look in both directions before stepping upon the track. If she did not know that cars were operated in both directions upon the middle track, she was negligent in assuming that cars were only operated in one direction, without taking the precaution to look in the other direction as well. From either point of view the conclusion of the trial court that she was guilty of negligence as a matter of law was correct.

Judgment affirmed.

We concur: WASTE, J.; KERRIGAN, J.; MYERS, J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.

190 Cal. 439

MASON v. MASON. (L. A. 7341.)

(Supreme Court of California. Feb. 20, 1923.)

1. Appeal and error 🔑1009(3)—Finding on conflicting evidence conclusive.

In an action to set aside a deed, the finding of the court on conflicting evidence is conclusive on appeal.

2. Costs 🔑260(4)—On frivolous appeal appellee allowed damages.

Where judgment in action to set aside a deed was rendered on conflicting evidence, and it is apparent from the brief that an appeal therefrom was not taken in good faith and was for delay only, appellee should be allowed damages for frivolous appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Louisa C. Mason against Robert E. Mason. From a judgment for defendant, plaintiff appeals. Affirmed.

Willedd Andrews, of Los Angeles, for appellant.

A. C. Routhe, of Los Angeles, for respondent.

WILBUR, C. J. [1, 2] Plaintiff and defendant were husband and wife at the time the plaintiff executed a deed to the defendant on May 22, 1920. They were divorced June 30, 1920. Plaintiff brings this action to set aside the deed on the ground that it was procured by duress. Judgment having been rendered in favor of the defendant, plaintiff appealed, claiming that the evidence is insufficient to justify the judgment. The evidence is conflicting, and for that reason the appeal is without merit. It is apparent from an inspection of the plaintiff's brief that the appeal was not taken in good faith and was taken for delay only. The defendant should be allowed damages for frivolous appeal.

Judgment affirmed with $250 damages to be entered as costs in the trial court.

We concur: WASTE, J.; MYERS, J.; LENNON, J.; SEAWELL, J.; LAWLOR, J.; KERRIGAN, J.

190 Cal. 440

Ex parte FRANKOVITCH. (Cr. 2551.)

(Supreme Court of California. Feb. 20, 1923.)

Fines 🔑11—Judgment to pay fine or be confined in jail held not to impose sentence of imprisonment for nonpayment.

Judgment that defendant, found guilty of selling liquor in violation of the Wright Act, "was to pay a fine of $500, or be confined in the city jail for the period of six months upon his failure to pay said fine," does not provide for imprisonment for nonpayment of the fine, as the judgment, when properly construed, is one imposing a sentence of imprisonment, but gives defendant opportunity to escape punishment by paying the fine.

In Bank.

Original application of John Frankovitch for a writ of habeas corpus, against the Chief of Police of the City of Los Angeles. Writ denied.

J. Morgan Marmaduke, of Los Angeles, for petitioner.

PER CURIAM. Petitioner seeks the release of John Frankovitch on habeas corpus. Frankovitch was convicted of selling liquor in violation of the Wright Act (St. 1921, p. 79) "and judgment was passed upon him to this effect, that he, the said John Frankovitch, was to pay a fine of $500 or be confined in the city jail for the period of six months upon his failure to pay said fine." On February 13, 1923, Frankovitch notified the trial court that he was unable to pay the fine, or any part thereof, whereupon he was committed to the county jail for the period of six months. The Volstead Act (41 Stat. 305) provides that for the first offense the person who sells liquor shall be fined not more than $1,000, or suffer imprisonment not exceeding six months. It is claimed that this provision, adopted by our Wright Act does not justify the alternative judgment imposed upon Frankovitch, because such judgment, in effect, provides for imprisonment for the nonpayment of the fine. On the other hand, we think the judgment, properly construed, is one imposing a sentence of imprisonment for six months, but gives the party convicted the opportunity of escaping such punishment by the payment of a fine. Having failed to pay the fine, he is in no position to complain of the imprisonment.

Writ denied.

WILBUR, C. J., and WASTE, MYERS, LENNON, SEAWELL, KERRIGAN, and LAWLOR, JJ., concur.

---

190 Cal. 454

In re PARSELL'S ESTATE. (L. A. 7315.)

(Supreme Court of California. Feb. 21, 1923.)

1. Executors and administrators 🔑315(1)—Decree distributing portion of estate to deceased person void.

A decree, distributing a portion of an estate to a person afterwards discovered to have been deceased, is absolutely void, and, rather than an inadvertent distribution, a total failure to distribute exists.

2. Judgment 🔑12—For or against dead person void with exceptions.

Judgment for or against a dead person is void with certain exceptions.

3. Executors and administrators 🔑315(3)—Executor's proceeding to have decree of distribution corrected held improper and insufficient to give court jurisdiction.

Where a portion of an estate is distributed to a deceased person, that portion of the decree is absolutely void and an executor cannot get the decree of distribution corrected by proceeding under Code Civ. Proc. § 473, relating to amendments by the court, but should proceed by proper petition and notice to all claimants for a new order of distribution as to the portion of the estate covered by the previous void decree.

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Julius M. Parsell, deceased. Appeal by Hester and Bessie L. Marsh, residuary legatees under the will of Josephine Sleight Marsh, deceased residuary legatee under the will of Julius M. Parsell, deceased, from an order modifying a decree of distribution. Order reversed.

Clock, McWhinney & Clock, of Long Beach, for appellants.

Daly, Daly & Todd, of Long Beach, for Los Angeles Trust & Savings Bank.

WILBUR, C. J. This is an appeal from an order modifying a decree of distribution. The application for the modification of the decree was made by the executor of the estate upon the ground of its mistake and inadvertence. By the decree of distribution a small portion of the state, the sum of $1,389.35, was distributed to Josephine Sleight Marsh. The decree was dated February 23, 1921, and entered March 1, 1921. In April, 1921, it was discovered that Josephine Sleight Marsh had died on the 1st day of June, 1920. An affidavit was made by the attorney for the executor, sworn to August 19, 1921, stating that the executor was ignorant of the fact of death of Josephine Sleight Marsh at the time of the application for distribution, and did not become aware thereof until April, 1921. This affidavit and a motion of the same date to amend the decree were filed with the county clerk August 23, 1921. The motion was brought on for hearing October 4, 1921, and an order was made and filed November 23. 1921, amending the decree of distribution by ordering the distribution of the amount theretofore distributed to Josephine Sleight Marsh to be distributed to the numerous residuary legatees under the will of the decedent, Julius M. Parsell. This order recites that the matter came on regularly for hearing on the 4th day of October, 1921, and that at that time Messrs. Daly & Daly appeared as attorneys for the executor of the estate of Julius M. Parsell, and that Messrs. Clock, McWhinney & Clock appeared on behalf of Hester and Bessie L. Marsh, *residuary legatees under the last will and testament of Josephine Sleight Marsh, deceased.* The notice of appeal from this order was signed by Messrs. Clock, McWhinney & Clock, as attorneys for Hester and Bessie L. Marsh, "*residuary legatees and executrices under the last will and testament of Josephine Sleight Marsh, deceased.*" A transcript of the record prepared under the provisions of section 953a, Code of Civil Procedure, has been filed in this court and a brief of the appellants, but no reply brief has been filed. The substantial question presented by the record and the one passed upon by the trial court is the question of whether or not the residuary legatees of Josephine Sleight Marsh succeeded to her rights, or whether, as the trial court concluded, the property under the terms of the will of the decedent passed to his residuary legatees.

[1] At the threshold of this inquiry we are met by the appellants' contention that the court was without jurisdiction to amend or modify the decree for the reason that the application was not made to the court within six months of the date of the entry of the decree of distribution. But even if we assume that the application was made within six months the record presents a more serious question, which we are reluctant to dis-

cuss in the absence of any one representing the respondents or any argument on behalf of the appellants thereon. The question is this: What was the effect of that portion of the decree distributing $1,389.35 to a deceased person? If that portion of the decree of distribution is absolutely void, then, instead of an inadvertent distribution, we have a total failure to distribute that portion of the estate. It seems clear that the decree distributing a portion of the estate to a deceased person is absolutely void. The decree of distribution is in the nature of a judgment. Benning v. Superior Court, 34 Cal. App. 296, 167 Pac. 291; Nason v. Superior Court, 39 Cal. App. 448, 179 Pac. 454; Crane v. Superior Court, 42 Cal. App. 285, 183 Pac. 606; Code Civ. Proc. § 1666; Wm. Hill Co. v. Lawler, 116 Cal. 359, 362, 48 Pac. 323; Crew v. Pratt, 119 Cal. 139, 51 Pac. 38; Goad v. Montgomery, 119 Cal. 552, 558, 51 Pac. 681, 63 Am. St. Rep. 145; Cunha v. Hughes, 122 Cal. 111, 113, 54 Pac. 535, 68 Am. St. Rep. 27; McKenzie v. Budd, 125 Cal. 600, 58 Pac. 199; Mulcahey v. Dow, 131 Cal. 73, 63 Pac. 158; More v. More, 133 Cal. 489, 495, 65 Pac. 1044, 66 Pac. 76; Estate of Schmierer, 168 Cal. 747, 145 Pac. 99.

[2, 3] A judgment rendered for or against a dead person is void (De Leonis v. Walsh, 140 Cal. 175, 178, 73 Pac. 813, with certain exceptions (section 669, Code Civ. Proc.; Fox v. Hale & Norcross S. M. Co., 108 Cal. 478, 41 Pac. 328; Estate of Page, 50 Cal. 40) not applicable to the facts of this case. If that portion of the decree in favor of the deceased legatee was absolutely void because the legatee was dead at the time of the proceedings for distribution, it could not be corrected after the notice here given, under section 473, Code of Civil Procedure, as is well illustrated in the case at bar. Here the executor, who has no interest in the manner in which the estate is distributed and no right to participate in controversies between the heirs as to distribution (Estate of Parsons, 65 Cal. 240, 3 Pac. 817; Estate of Jessup, 80 Cal. 625, 22 Pac. 260; Estate of Healy, 137 Cal. 474, 477, 70 Pac. 455; McCabe v. Healy, 138 Cal. 81, 89, 70 Pac. 1008; Estate of Hite, 155 Cal. 448, 456, 101 Pac. 448; Estate of Friedman, 176 Cal. 226, 228, 168 Pac. 21; Id., 178 Cal. 27, 172 Pac. 140), applied to the court, not for distribution of this portion of the estate and upon proper petition and notice, but for correction of the order of distribution based upon its own mistake in assuming that the legatee was living when application was made by it for the original decree of distribution. The record does not show upon whom notice of the application to amend the decree was served, nor is a copy of the notice contained in the record, and aside from the recitals in the order amending the decree there is no evidence that any notice whatever was given. The conflicting rights resulting from the death of the distributee, Josephine Sleight Marsh, were those of her heirs, legatees, administrators, or executors, as the case might be, on the one hand, and on the other hand the numerous residuary legatees who would participate in the fund if, under the terms of the will, the property distributed to Josephine Sleight Marsh should be distributed to them in the event of her death, instead of to the latter's representatives or successors. The order made by the court shows that the only persons represented at the hearing were the residuary legatees of Josephine Sleight Marsh, who, in the notice of appeal, were also assumed to be executrices of her last will and testament, and the executor of the estate of the decedent, Julius M. Parsell. As the latter had no interest in the controversy and no right to represent either set of claimants, in that court or in this (Estate of Marrey, 65 Cal. 287, 3 Pac. 896; Estate of Friedman, supra), it is therefore obvious that the real parties in interest were not represented at the hearing of the motion. The law provides the method of acquiring jurisdiction of all claimants of an estate upon distribution, and in the absence of such notice distribution cannot be made. We conclude, then, that the court was without jurisdiction to make the order from which the appeal is taken, not because the application was made more than six months after the decree, but because the court had jurisdiction to make this new distribution only after proper petition for distribution and notice.

In view of this conclusion, we feel that it would be improper to discuss or attempt to determine the rights of the parties under the will, for the reason that these parties are not before us.

Judgment reversed.

We concur: LENNON, J.; WASTE, J.; MYERS, J.; SEAWELL, J.; KERRIGAN, J.; LAWLOR, J.

190 Cal. 421

MAH SEE v. NORTH AMERICAN ACC. INS. CO. OF CHICAGO, ILL. (S. F. 9777.)

(Supreme Court of California. Feb. 16, 1923. Rehearing Denied March 15, 1923.)

1. Insurance 🔑464—Insurer held liable for death inflicted by person shooting at another.

Under proviso in an accident policy that the insurer assumed no liability for death arising from injury "intentionally inflicted on the insured by any person," three elements were requisite to render the proviso operative, namely, an intention to injure, directed at the insured, and the infliction of injury upon him; under such policy the insurer was not exempt from liability if the person who shot and killed insured intended thereby to shoot some other person, in view of Civ. Code, § 1641.

2. Insurance 🔑146(3)—Policy susceptible of two constructions must be construed in favor of insured and against insurer.

Where an accident insurance policy is susceptible of two constructions, one of which is unfavorable to insured, the ambiguity will be construed liberally, and in favor of insured, and strictly against the insurer, under Civ. Code, § 1654.

3. Insurance 🔑646(6)—Burden of proving death arose within exceptions in policy on insurer.

Where an accident insurance policy provided that the insurance company would not be liable for death arising from "injury intentionally inflicted on the insured by any person," the burden rested upon insurer to prove by a preponderance of the evidence the facts necessary to bring the case within the purview of the exceptions of the policy.

4. Insurance 🔑646(6)—Burden of proving insured's death not result of own acts on beneficiary.

Though the burden of proof in an action on an accident insurance policy was upon the beneficiary to prove by a preponderance of the evidence that death resulted "through accidental means," as provided in the policy, such burden was fully met when it was shown without contradiction that the shooting of insured did not follow as a natural or probable result from anything done by him.

5. Appeal and error 🔑996—Where two inferences deducible from facts, verdict of jury or finding of court will not be set aside.

Where it appears that either one of two inferences may fairly be deduced from facts, the question of fact is to be determined by the jury or the court without a jury, and their verdict or finding will not be set aside on the ground that it is not sustained by the evidence.

6. Appeal and error 🔑931(1)—Evidence subject to opposing inferences to be regarded in light most favorable to support judgment.

In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in a light most favorable to the support of the judgment.

7. Insurance 🔑665(5)—Coroner's jury finding insured was murdered does not compel conclusion murderer intended to injure insured.

In an action on an accident insurance policy exempting the insurer from liability for death arising from injury intentionally inflicted on insured, *held*, even though plaintiff beneficiary was bound by the finding of the coroner's jury that insured was murdered, such finding does not compel the conclusion that the person who murdered insured intended to injure him.

8. Evidence 🔑366(2)—Certificate of death held properly excluded in action on insurance policy because not properly authenticated.

It was not error, in an action on an accident insurance policy, to exclude a certified copy of a certificate stating the cause of death of insured, where it was not shown that such certificate was made and signed by the physician last in attendance, as required by St. 1917, pp. 717–728, and St. 1905, pp. 115–122, as amended by St. 1907, pp. 296–300, or that the certificate was made by a public officer or by any other person in the performance of a duty specially enjoined by law, as required by Code Civ. Proc. § 1920.

9. Evidence 🔑471(11)—Objection to question held proper where answer would have necessitated conclusions of witness.

In an action on an accident insurance policy for the death of insured resulting from homicide, objection to defendant's question, "Did you know that insured prior to his being injured or killed had been threatened on the part of certain tong leaders in Chinatown?" *held* properly sustained, since the answer would have involved at least three separate conclusions in the mind of the witness as to what constituted "threat," as to who were the "tong leaders," and as to whether or not a threat had been made "on the part of" such leaders.

10. Appeal and error 🔑1058(2)—Where objection to exclusion of testimony is cured by subsequent answer, objection not considered.

The appellate court will not consider an objection to a ruling excluding testimony where the questions were subsequently answered and the error thus cured.

11. Evidence 🔑314(1)—Question as to receipt of letter properly excluded where letter itself, if produced, would be hearsay.

In an action on an accident insurance policy, to which defendant insurer interposed the defense that insured was shot and killed by one who intended to kill him, *held* not error to exclude defendant's question to plaintiff, "Did you receive another anonymous letter on the day following the shooting of insured?" where, if such letter had been actually produced and identified as being signed by the man who admitted the shooting, it would have been hearsay.

12. Insurance 🔑659(1)—Evidence of threats received by insured and his request for police protection held not competent against beneficiary.

Evidence by defendant insurer "that six months prior to shooting of insured the latter with others complained to the chief of police concerning threats, and asked for police protection," *held* incompetent against beneficiary in an action on an accident policy in which insurer sought to evade liability by showing that person who shot and killed insured intended to kill him.

Lennon, J., and Wilbur, C. J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Mah See (Mar Shee) against the North American Accident Insurance Company of Chicago, Ill. Judgment for plaintiff, and defendant appeals. Affirmed.

Rehearing denied; LENNON, J., dissenting.

John Ralph Wilson, C. B. Morris, and Fred L. Berry, all of San Francisco, for appellant.

Harding & Monroe and Robert H. Borland, all of San Francisco, for respondent.

MYERS, J. [1] The plaintiff, who was the wife of one Fong Wing, and the beneficiary named in an accident insurance policy issued to him by the defendant, sues herein to recover for his death by shooting. This is a companion case to Mar Shee v. Maryland Assurance Corporation (Cal. Sup.) 210 Pac. 269, ad the facts in the two cases are the same, except that the language of the proviso or exception attached to the policy and relied upon by the defendant herein is materially different. The policy herein contained the following proviso:

> "This policy is issued upon condition that the company assumes no liability hereunder should the accident, injury, disability, death, loss of limb or sight, result wholly or in part directly or indirectly, from injury *intentionally inflicted on the insured* by any person." (Italics ours.)

The principal contention of the defendant is that the evidence does not support the finding of the court that, "It is not true that the death of said Fong Wing was caused wholly or directly by personal injury intentionally inflicted upon him." It is apparent from the evidence that the person who did the shooting was at the time aiming at Fong Wing, and that the shots killed him. He was killed by some one who either intended to kill the said Fong Wing, or who intended to kill some other person and shot at Fong Wing, believing at the time that he was such other person. In the former event the company clearly would not be liable, and its counsel contend that the same result would follow the latter event. They argue that the person killed was the one at whom the shots were aimed, and that, when it transpires that he was in fact the insured, it follows that the injury was "intentionally inflicted on the insured." We cannot adopt this view. To do so is to strike out from the proviso the words "on the insured," and make it read so as to exempt the company from liability for "injury intentionally inflicted by any person." But the rule of interpretation is that—

> "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Civ. Code, sec. 1641.

The words "on the insured" cannot be deemed to have been inserted in the proviso for the purpose of qualifying the verb "inflicted," because they are unnecessary for that purpose, and, so regarded, they are wholly superfluous. The entire contract of insurance concerns itself only with injuries to the insured. Injuries to any other person would be wholly irrelevant thereto. If, then, we are to give any effect to those words, which we must do, "if reasonably practical," they must be regarded as qualifying the adverb "intentionally," and as defining the intention of the person inflicting the injury. We conclude, therefore, that the concurrence of three elements is requisite to render the proviso operative: (1) An intention to injure, (2) directed at the insured, Fong Wing, and (3) the infliction of injury upon him. From this it follows that the company is not exempted from liability if the person who shot Fong Wing intended thereby to shoot some other person. This conclusion finds support in the cases of Utter v. Travelers' Ins. Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913, and Butero v. Travelers' Acc. Ins. Co., 96 Wis. 536, 71 N. W. 811, 65 Am. St. Rep. 61.

[2] But, if it be conceded that the language of the proviso is susceptible to the construction contended for by defendant, it must also be conceded that it is likewise susceptible to the construction here adopted, and we are thus confronted by an uncertainty or ambiguity which it is our duty to construe liberally in favor of the insured and strictly as against the insurer. This for two reasons: (1) Because it is found in a policy of insurance (Civ. Code, § 1654; Maryland Casualty Co. v. Ind. Acc. Com., 178 Cal. 491, 494, 173 Pac. 993; Wells Fargo & Co. v. Pac. Ins. Co., 44 Cal. 397); and (2) because the language in question is found in an exception attached to the policy which purports to limit the risk assumed by the insurer in the general provisions thereof. (Berliner v. Travelers' Ins. Co., 121 Cal. 458, 53 Pac. 918, 41 L. R. A. 467, 66 Am. St. Rep. 49).

[3, 4] It remains, then, to consider the sufficiency of the evidence to support the finding of the court construed as a finding that the person who shot the insured did not intend thereby to injure Fong Wing. In considering the claimed insufficiency of the evidence to sustain this finding, it is to be remembered that the burden rested upon the defendant to prove by a preponderance of the evidence the

facts necessary to bring the case within the purview of the exception to the policy. Of course, the burden was upon the plaintiff to prove by a preponderance of the evidence that the death resulted "through accidental means," as provided in the body of the policy. But this burden was fully met when it was shown, without contradiction, that the shooting did not follow as a natural or probable result from anything done by the insured. Richards v. Travelers' Ins. Co., 89 Cal. 170, 175, 26 Pac. 762, 23 Am. St. Rep. 455; Jenkin v. Pacific, etc., Ins. Co., 131 Cal. 121, 63 Pac. 180; Price v. Occidental Life Ins. Co., 169 Cal. 800, 802, 147 Pac. 1175. But, on the issue raised by the claim of the defendant that the insured died as the result of "injuries intentionally inflicted" on him, the burden of proof rested upon the defendant. Postler v. Travelers' Ins. Co., 173 Cal. 1, 3, 158 Pac. 1022.

[5, 6] It is apparent from the evidence that the person who did the shooting was at the time aiming at Fong Wing. From this either one of two conclusions could be drawn: Either that the shooter knew and recognized Fong Wing and intended to shoot him, or that the shooter intended to shoot some one else and mistook Fong Wing for that other person. The evidence discloses nothing to indicate whether the shooting was done from close at hand or from a great distance. It does show without contradiction that it occurred after dark; that the street lamps were burning, but that "it was not very light" at the point where Fong Wing fell. Cases of mistaken identity are of the commonest occurrence in everyday human experience, even under the most favorable circumstances of light, proximity, and unobstructed vision. Even though it may appear to our minds more probable that the one who did the shooting intended to shoot Fong Wing, and that therefore the trial court should have found in favor of the defendant upon this issue, it was not compelled to so find under the evidence. This court has frequently held that, even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts there still remains in the case a question of fact to be determined by the jury (or by the trial judge where the case is tried without a jury), and that the verdict of the jury or the finding of the trial judge thereon cannot be set aside by this court on the ground that it is not sustained by the evidence. Anderson v. L. A. Transfer Co., 170 Cal. 66, 148 Pac. 212. In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment. Woodard v. Glenwood Lumber Co., 171 Cal. 513, 519, 520, 153 Pac. 951; Hassell v. Bunge, 167 Cal. 365, 367, 139 Pac. 800.

> "In reviewing a question of this kind, all the inferences reasonably possible from the evidence favorable to the plaintiff [the prevailing party] must be indulged by this court." Bandle v. Commercial Bk. of Los Angeles, 178 Cal. 546, 547, 174 Pac. 44, 45.

[7] In this connection it may be pointed out that, even if it should be assumed that the plaintiff is bound by the verdict of the coroner's jury finding that the insured was murdered, that in no way compels the conclusion that the person who murdered him intended to injure the insured.

[8] The claimed errors of law all relate to rulings of the trial court in the admission and rejection of evidence. Defendant offered and the court received in evidence a certified copy of the certificate of death, which stated the cause of death of the insured as "homicide." Thereafter, when it appeared in evidence that there had been a physician in attendance upon the insured up to the time of his death, and that the certificate was not signed by this physician, but by another who was not shown to have ever been in attendance upon the insured, the certificate was stricken out on plaintiff's motion, and of this the defendant complains. Defendant relied in its brief on appeal upon the act of 1905 (pages 115–122), as amended by the act of 1907 (pages 296–300), and in its petition for hearing by this court, on the act of 1917 (pages 717–728). Each of said acts contains a provision that a certified copy of a certificate of death made in accordance therewith "shall be prima facie evidence in all courts and places of the facts therein stated." The certificate was, nevertheless, properly stricken out for the reason that each of the acts relied on provides that "the medical certificate [which states the cause of death] shall be made and signed by the physician, if any, last in attendance on the deceased," and the certificate herein was not so made or signed. Nor is the defendant aided herein by the provisions of section 1920, Code of Civil Procedure, because the certificate was not made by a public officer or by any other "person in the performance of a duty specially enjoined by law." It is further apparent that, if the certificate had remained in evidence, it could not have affected the result.

[9] Complaint is made that the trial court sustained plaintiff's objection to the following question:

> "As a matter of fact do you know that Fong Wing, prior to his being injured or killed, had been threatened on the part of certain tong leaders in Chinatown?"

The objection was sustained on the ground that it was not cross-examination, but it was also objected to on the ground that it was incompetent. The answer to the question would involve at least three separate conclusions in the mind of the witness; as to what constitutes a "threat," as to who were "tong leaders," and as to whether or not a purported threat had been made "on the part of" such leaders. The ruling was correct, regardless of the considerations which prompted it.

[10] Appellant complains of rulings excluding testimony as to the amount of money which had been demanded of the steamship company on one occasion, and the amount paid it on another occasion. Both questions were afterward answered, so that if there was any error it was cured.

[11] Appellant earnestly complains of a ruling sustaining plaintiff's objection to the following question: "Did you receive another anonymous letter on the day following the shooting of Fong Wing?" As suggested by plaintiff's counsel, if such a letter had been actually produced and identified, stating, "I am the man who murdered Fong Wing," and if it had been proven to be signed by a man then living in San Francisco, it still would have been pure hearsay.

[12] Enough has been shown to illustrate the character of the claimed errors. Suffice it to say that we have considered all of the rulings claimed as erroneous which are not here specifically discussed, and, in our opinion, they were correct. The trial court was extremely liberal in affording the defendant every opportunity to prove its claimed blackmailing conspiracy. It even went to the extent of permitting the defendant to introduce evidence to the effect that, six months prior to the shooting, the insured, with others, had complained to the chief of police concerning certain threats, and had asked for police protection. As against the beneficiary who is here suing, this evidence was wholly incompetent, and might properly have been excluded. Jenkin v. Pacific, etc., Ins. Co., 131 Cal. 121, 123, 63 Pac. 180.

The judgment is affirmed.

We concur: WASTE, J.; KERRIGAN, J.; SEAWELL, J.

LAWLOR, J. I concur in the judgment and in the opinion of Mr. Justice MYERS except that, for the reasons given in my dissent in the companion case (Mar Shee v. Maryland Assurance Corporation [Cal Sup.] 210 Pac. 269), I am of the view there is ample support in the evidence for the finding herein that "Fong Wing received a bodily injury through external, violent and accidental means." In the face of this finding I do not think it can be said as a matter of law "that the person who did the shooting was at the time aiming at Fong Wing."

LENNON, J. I dissent. The evidence is not, in my opinion, sufficient to support the finding of the trial court that "It is not true that the death of said Fong Wing was caused wholly or directly by personal injury intentionally inflicted upon him." There is no doubt, from the evidence adduced, that the shot which killed Fong Wing was deliberately aimed at him. Whether the person who did the shooting intended to kill Fong Wing, or intended to kill some other person, and, under the mistaken belief that Fong Wing was such other person, shot and killed Fong Wing, it cannot be denied that he did intend to kill the body at whom he aimed. If it be true that the assailant was mistaken, and the deceased was not the man he intended to kill, that he was not the man for whom he intended the bullet, this fact does not alter the result. His intent at the time was to shoot the man at whom he aimed, namely, Fong Wing. Any mistaken conception that Fong Wing was another person was formed before he fired at him. The intent of the assailant when he took aim and fired was to hit the man before him. Obviously, therefore, it was an injury intentionally inflicted upon the deceased, identified though he may have been in the mind of his assailant as the man whom his assailant believed him to be, and comes, therefore, in my judgment, within the exception in the policy. If this be so, then it follows that the finding is not supported by the evidence, and the defendant is not liable.

I concur: WILBUR, C. J.

190 Cal. 443

BERGER et al. v. LANE. (L. A. 7442.)

(Supreme Court of California. Feb. 21, 1923.)

1. Accord and satisfaction 🔑11(3)—Check tendered in full satisfaction of claim and so accepted by debtor constitutes accord and satisfaction, if accepted by creditor.

Where the amount due is in dispute, and a check less than that claimed is sent to the creditor with a statement that it is sent in full satisfaction of the claim, and the tender is accompanied by such acts or declarations as amount to a condition that, if the check is accepted at all, it is accepted in full settlement of the disputed claim, and the creditor so understands, its acceptance by the creditor constitutes an accord and satisfaction, even though the creditor states at the time that the amount tendered is not accepted in full satisfaction. Civ. Code, §§ 1521, 1523.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accord and Satisfaction.]

2. Accord and satisfaction 🔑25(4)—One relying upon accord and satisfaction must plead and prove both.

He who relies upon an accord and satisfaction must plead and prove both.

3. Accord and satisfaction 🔑8(1)—Dispute as to amount due must be founded in good faith.

While it is not necessary that the dispute or controversy should be well founded, for the payment to constitute an accord and satisfaction it is necessary that it be founded in good faith.

4. Accord and satisfaction 🔑8(1)—Agreement to tender lesser amount for liquidated claim void, in absence of honest dispute.

Without an honest dispute, an agreement to tender a lesser amount in payment of a liquidated claim is without consideration and void.

5. Accord and satisfaction 🔑8(1)—Arbitrary refusal to pay on pretense of exacting inequitable terms not such honest dispute as to afford consideration for tender of lesser amount to pay debt.

An arbitrary refusal to pay a debt, based on a mere pretense of the debtor, whether for the obvious purpose of exacting terms which are inequitable and oppressive, is not such an honest dispute as will satisfy the rule that, where there is not an honest dispute, an agreement to take a lesser amount in payment for the liquidated claim is without consideration and void.

6. Accord and satisfaction 🔑27—Whether dispute in amount due and whether tender made on condition that acceptance be in full satisfaction of debt, held for court.

Whether there was a dispute concerning the amount due, and whether a tender was made on condition that acceptance would be in full satisfaction of a debt, are primarily questions of fact for the trial court.

7. Appeal and error 🔑927(3)—On review of nonsuit, favorable inferences and presumptions considered as facts proved by plaintiff.

On review of judgment of nonsuit, every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of plaintiff.

8. Appeal and error 🔑927(3)—On review of nonsuit view most favorable to plaintiff taken, where evidence fairly susceptible of two constructions.

Where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the appellate court on review of nonsuit must take the view most favorable to the plaintiff, and, if contradictory evidence has been given, it must be disregarded.

9. Appeal and error 🔑927(3)—On review of nonsuit, evidence must be weighed in light most favorable to plaintiff.

On review of nonsuit, the plaintiff must be given the benefit of every piece of evidence which tends to sustain his averments, and such evidence must be weighed in the light most favorable to plaintiff's claim.

10. Appeal and error 🔑927(3)—On review of nonsuit, relevant evidence must be given full probative strength.

On review of nonsuit, evidence, whether erroneously admitted or not, if relevant to the issues joined, must be given the credit and benefit of its full probative strength, and any question arising from the fact of variation between the evidence of the witnesses cannot be raised or considered.

11. Trial 🔑139(1)—Motion for nonsuit denied, where plaintiff establishes prima facie case.

If plaintiff has introduced proof sufficient to make out a prima facie case under the allegations of the complaint, a motion for nonsuit, if made at the close of the case, should be denied.

In Bank.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by C. C. Berger and others against R. B. Lane. From a judgment for defendant, plaintiffs appeal. Reversed.

R. L. Horton and C. S. Anderson, both of Los Angeles, for appellants.

Fred N. Arnoldy, of Los Angeles, for respondent.

SEAWELL, J. This case came here on rehearing after decision by the District Court of Appeal, Second Appellate District, Division Two. Our consideration of the case has satisfied us of the correctness of the conclusion reached in the second opinion of that court, written by Mr. Justice Craig, and for practically the same reasons, but more elaborately stated, we have concluded that the judgment must be reversed.

The appeal is from a judgment of nonsuit. At the close of plaintiffs' case the court was of the opinion that the case made by them established an accord and satisfaction of a pre-existing claim, and accordingly gave judgment against them. The vital questions about which the controversy centers and which must be found to be satisfactorily sustained by the evidence produced, if the judgment of nonsuit is to stand, are whether a bona fide dispute, or, indeed, any real dispute is shown to have existed between the parties as to the amount due under an original contract, and, if so, was the acceptance of a check for a lesser amount, under the circumstances of the transaction between the parties, such an act as amounted to a condition that it was tendered and accepted in full satisfaction of a disputed pre-existing claim, and did the plaintiffs so understand it? These questions can only be answered by an examination of the evidence in the case.

Respective counsel seem to have fallen into the error of treating as evidence in the case testimony given by defendant, Lane, which had been stricken from the record by the trial court of its own motion.

The facts need only to be briefly stated. The defendant, as owner of a tract of land containing 40 acres, situated in the county of Los Angeles, and plaintiffs, real estate agents, entered into a written contract whereby the latter was authorized, by the terms of said contract, to sell said 40 acres "at and for the sum of $700 per acre, payable as follows—said Sexsmith, Jenal, and Berger to receive their commissions of 5 per cent." Said contract of agency, or listing order, as it is sometimes referred to, bore date October 6, 1919. A printed form was used, the open spaces being supplied by data wholly furnished by defendant, Lane, and the insertions in writing were made by him. The parties had no previous acquaintance, and defendant's visit at the office of the plaintiffs was unsolicited.

Eight days thereafter, to wit, October 14, J. F. Jenal, a member of said realty firm, procured a purchaser, Ralph H. Petz, and an agreement to purchase was on that day formally executed. The other persons present and witnessing said transaction were Jenal and a brother of Petz. Subsequently, a deed passed from Lane to Petz, pursuant to their agreements, thereby completing the transaction. The purchase price agreed upon and inserted in each of said instruments was placed at $28,000. At the close of the transaction of October 14, defendant, Lane, addressing himself to Petz, remarked: "Who is going to take care of Mr. Jenal?" The latter, as the record indicates, was surprised at the inquiry and replied that he did not know there was any doubt as to who was to take care of him. Mr. Lane then said: "Oh, yes, this has got to net me $28,000." Jenal continued: "'Well,' I said, 'I did not think there was any question as to who was to take care of me.' 'Well,' Mr. Lane says, 'I want this to net me $28,000,' and I said, 'Well, this is not what my partner Sexsmith told me.' 'Well,' he said, 'I can't help it; I want this to net me $28,000.'" And "there was talk pro and con," and Mr. Lane suggested, "I am willing to 'donate' Mr. Jenal $500 and I think the Petz boys ought to make up the rest, or some." The effort of the defendant to persuade or induce the Petz brothers to pay a commission of $250 seems not to have been unacceptable to Jenal, but, as the Petz brothers were in no way obligated to pay any part of a commission, they declined to commit themselves further.

Jenal, prior to this time, had not seen the contract of agency or listing order, and, as a matter of fact, did not know positively that an agreement had been reduced to writing. On the day following he sought out his partner Berger, and told him of his experience of the previous day. He was somewhat disturbed by the attitude of Lane. Then, for the first time, he examined the contract. On the following day, to wit, October 16, Berger called on Lane and addressed him in this manner: "Mr. Jenal informed me that you would only pay $500 commission. * * * I have a contract in the office where you agreed to pay us 5 per cent." Lane responded by asking him if he had the contract with him, and was told that he did not have it with him, but that it was at his office, and Lane could inspect it by calling there. Berger had no further conversation with Lane, but was told by his partner Sexsmith that the latter called at the office and after examining the contract said: "Well, I will not pay it unless you sue me." No other word or communication is shown to have passed between any of the parties until November 3, 1919, on which date defendant, Lane, sent to Jenal a letter inclosing a check for the sum of $500. Omitting formal parts, the check was in the following words: "Pay to the order of J. F. Jenal five hundred ($500) dollars." The letter was as follows: "Hollywood, Nov. 3, 1919. Mr. Jenal. Dear Sir: I inclose my check for $500 as your commission for sale of lot 755 BL 1000 to Petz Bros. as agreed upon at time of sale & as part of terms of said sale. Very truly. R. B. Lane." Jenal retained the check. The bank's indorsement shows it to have been cashed November 5, 1919. On the day following, November 6, Jenal addressed the following letter to Lane: "Your check for $500 to apply on commission to Messrs. Jenal, Berger, and Sexsmith received. The balance of the commission as per your written agreement is the sum of $900. This is now due so please send check for same at once." Lane made no reply to this letter.

On December 6, 1919, plaintiffs brought their action to recover the balance of said commission, to wit, $900, having given credit on account for the $500 paid by check of November 5. Defendant answered by setting up accord and full satisfaction of plaintiffs' demand as a defense to the action.

[1] The general rule, which is but an amplification of our Code sections (Civ. Code, §§ 1521, 1523) defining satisfaction and accord, is—

> "That where the amount due is in dispute, and a check less than that claimed is sent to the creditor with a statement that it is sent in full satisfaction of the claim, and the tender is accompanied by such acts or declarations as amount to a condition that if the check is accepted at all it is accepted in full satisfaction of the disputed claim, and the creditor so understands, its acceptance by the creditor constitutes an accord and satisfaction even though the creditor states at the time that the amount tendered is not accepted in full satisfaction." Lapp-Gifford Co. v. Muscoy Water Co., 166 Cal. 25, 134 Pac. 989; B. & W. Engineering Co. v. Beam, 23 Cal. App. 164, 137 Pac. 624.

[2-5] The general rule is that he who relies upon an accord and satisfaction must plead and prove both. Simmons v. Oullahan, 75 Cal. 508, 17 Pac. 543. While it is not necessary that the dispute or controversy should be well

founded, it is necessary that it should be founded in good faith. Without an honest dispute, an agreement to take a lesser amount in payment for the liquidated claim is without consideration and void. An arbitrary refusal to pay, based on the mere pretense of the debtor, whether for the obvious purpose of exacting terms which are inequitable and oppressive, is not such a dispute as will satisfy the requirements of the rule. Corpus Juris, vol. 1, § 75, pp. 554, 555 and notes.

It is clear that the agreement of the defendant to pay a commission of 5 per cent. on $28,000 is an agreement to pay a fixed and definite sum. It will be kept in mind that the contract has not been assailed on any ground of invalidity or unfairness. No suggestion of repudiation on any equitable or legal grounds is to be found in the record. So far as evidentiary disclosures are concerned, its validity is not open to dispute even on trivial grounds. It was a contract wholly prepared by defendant, and, standing alone, it is unassailable. The only means by which it could have been destroyed was to show that a subsequent dispute arose as to the amount due thereunder, and that a lesser sum was consented to and accepted in full satisfaction of the greater sum agreed upon by the contracting parties.

The conversation on which defendant must rely as furnishing a basis for accord as a defense occurred immediately after Petz had signed an agreement binding himself to purchase the property October 14. Lane, who should have entertained no doubt as to who was to pay Agent Jenal, in the face of his contract to do so himself, asked who "was to take care of Jenal?" Why he should have asked such a question or felt at all uneasy or interested in the matter, unless he was conscious of a legal liability, is a circumstance not to be left out of the case. In this conversation his obligation to pay the commission was brought specifically and pointedly to his attention, and he did not at any time dispute or deny it. The most he said, with circumstances calling upon him to speak in unequivocal and emphatic terms, was: "This (sale) has got to net me $28,000." Upon being reminded by Jenal that such was not the contract according to the information furnished him by Sexsmith, and by the further observation made by Jenal "that there was no doubt existing as to who was to pay him," defendant spoke evasively and stated that he was willing to "donate" Jenal $500 and that "the Petz boys ought to come through, too; the Petz boys ought to make up the rest, or some." And so, too, when Jenal said: "I did not think there was any question as to who was to take care of me," Lane replied, "I want this to net me $28,000." Lane made no claim that the understanding of the parties was different from what was contended for by Jenal, and contented himself with unsatisfactory replies.

One more incident may be added to the above. Berger testified that a short time after October 14 he was told by Sexsmith that Lane had called upon him and, after inspecting the contract of agency, said, "Well, I will not pay it unless you sue me." If anything further was said it does not appear in the record, and no unfavorable inference may be indulged against plaintiffs as to what may have been said.

The foregoing excerpts present, in substance, all the oral evidence found in the case which in any way throws light upon the question of a dispute or to an acceptance of the $500 in full satisfaction of plaintiffs' claim. The execution or validity of the contract was not disputed. The amount fixed as commissions or compensation agreed upon was not denied. That plaintiffs were the procuring cause of sale was admitted. No other or different agreement, written or parol, or understanding, express or implied, modifying the contract of agency was set up or asserted or claimed. No complaint was made as to the time, place, or condition of performance. Nothing was said upon which a dispute might be predicated. Clearly, the attitude of defendant appears to be that of a person endeavoring to release himself from the full consequences of a binding contract. This view is strengthened by the offer to "donate" $500. Rather a quick and firm denial of any liability whatsoever would have been the expected retort of a person who felt that an effort was being made to extort money from him. The attempt to induce the Petz brothers, who in nowise were bound to pay any part of the commission, to bear a portion thereof is another circumstance pointing in the same direction. The remark that he (Lane) could not help what Jenal's partners had informed him in respect to the terms of the contract (which was a true statement of fact) was an expression of apparent indifference, rather than a positive denial of indebtedness. The further remark that "I will not pay it unless you sue me" belongs to a class of loose expressions made use of under varying circumstances, and should be considered in the light of the situation in which they are spoken. Sometimes they are used coercively and are intended to have a deterrent effect, and again they may be spoken to express a determination to stand on one's rights. In any event, the purpose of such an expression under the circumstances of this case could do no more than present an issue of fact to be determined by the court or a jury as any other fact in the case.

We are next brought to a discussion of the defendant's letter inclosing a check for $500, written some two or three weeks after the last conversation above reviewed, as bearing upon the issue of a dispute. The letter reads as follows: "I inclose my check for $500 as your commission for sale of lot 755 * * * to Petz Bros. *as agreed upon at time of sale and as part of terms of sale.*" (Italics ours). The contract referred to is absolutely silent on the subject of commissions. The subject is not mentioned. That there was no parol agreement made at the time has already been fully shown, so this statement is at best erroneous and has no foundation in fact to support it.

The rule that a mere refusal to pay cannot be made the basis of a consideration for a compromise, in the absence of a bona fide dispute, is treated in Demars v. Musser-Sauntry, etc., Co., 37 Minn. 418, 35 N. W. 1. The principle there announced, and which we think applicable to the case at bar, is as follows:

> "The defendant is entirely right in his law that the compromise of a disputed or doubtful claim is in itself a good consideration, and that no investigation into the character or value of the claim submitted will be gone into for the purpose of setting aside a compromise honestly made. It is sufficient if the parties entering into it thought at the time that there was a question between them. It is not even necessary that the question in dispute should be really doubtful, if the parties bona fide considered it so. The real consideration which each party receives under a compromise is not the sacrifice of the right, but the settlement of the dispute. But, on the other hand, it is equally true that, to constitute a good consideration for a settlement by way of compromise, there must have been an actual bona fide difference or dispute between the parties as to their [legal] rights. There is an entire absence of evidence in this case tending to show any such dispute. There was certainly none as to the amount of plaintiff's claim. Neither was there any as to when it was due according to the terms of the contract. Swenson, who made the alleged settlement with plaintiff, did not claim that the contract was different from what plaintiff asserted it to have been, or that by law the wages were not payable until the logs arrived at the boom. He simply asserted, according to plaintiff's statement, that he would not pay all the money because it was not 'the law of the company,' or, according to his own statement, because they 'didn't settle that way,' without giving any reason. A person cannot create a dispute sufficient as a consideration for a compromise by a mere refusal to pay an undisputed claim. That would be extortion, and not compromise. There must in fact be a dispute or doubt as to the rights of the parties honestly entertained. The evidence of this is utterly wanting in this case."

Lastly we come to a consideration of the check and statement sent with it. The rule is that, where the amount due is in dispute, as claimed here, and a check for a less amount is sent to the creditor with a statement that it is sent in full satisfaction of the claim, or language equivalent thereto is employed, and the tender is accompanied with such acts or declarations that it amounts to a condition that if the check is accepted at all it is accepted in full satisfaction of the disputed claim, and the creditor so understands it, its acceptance, even though the creditor states at the time that the amount tendered is not accepted in full satisfaction, constitutes an accord and satisfaction. An examination of the check and the accompanying statement will show that the language used does not measure up to the requirements of the leading authorities to be found on the subject. In all the cases that have been called to our attention in which a satisfaction has been held to have been conclusively expressed in writing, the writing in some form shows without question that the acceptance of the inclosure was clearly intended to be a satisfaction in full of the claim. This sometimes is shown by the express words used in the body of the check or by an accompanying receipt, stating that the amount sent is in full of all demands. Of course, the statements, declarations, and acts of the parties are to be considered and weighed in arriving at the understanding of the parties, but they must be of such a character as to express in a clear manner the intention of the parties to be affected. Neither the language of the receipt nor the check here involved can be said to be conclusive on the case at bar. The plaintiffs with reasonable diligence notified defendant that the payment made was not to be considered in full satisfaction of the claim, and that there remained a balance due. Neither Jenal nor any of his partners consented at any time to accept $500 in full satisfaction of the demand.

[6] Whether there was a dispute concerning the amount due, and whether the tender was made on condition that acceptance would be in full satisfaction, are primarily questions of fact for the trial court. Lapp-Gifford Co. v. Muscoy Water Co., supra; B. & W. Engineering Co. v. Beam, supra; Nassoiy v. Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695.

[7-11] We have reviewed the facts in this case in their relation to a judgment of nonsuit. In so doing we have been compelled to adopt the rules of law which apply to cases of nonsuit and which may be briefly summarized as follows: Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of the plaintiffs. Where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiffs. If contradictory evidence has been given, it must be disregarded. Estate of Arnold, 147 Cal. 583, 82 Pac. 252. The plaintiff must also be given the benefit of every piece of evidence which tends to sustain his averments and such evidence must be weighed in the light most fa-

vorable to plaintiffs' claim. Anderson v. Wickliffe, 178 Cal. 120, 172 Pac. 381. Evidence, whether erroneously admitted or not, if relevant to the issues joined, must be given the credit and benefit of its full probative strength and any question arising from the fact of variation between the evidence of the witnesses cannot be raised or considered. The evidence must be taken most strongly against the defendant, and, if the plaintiff has introduced proof sufficient to make out a prima facie case under the allegations of his complaint, the motion, if made upon the close of the case, should be denied. Bush v. Wood, 8 Cal. App. 647, 97 Pac. 709; In re Estate of Daly, 15 Cal. App. 329, 114 Pac. 787; Wassermann v. Sloss, 117 Cal. 425, 49 Pac. 566, 38 L. R. A. 176, 59 Am. St. Rep. 209; Lassen v. S. P. Co., 173 Cal. 71, 159 Pac. 143; Kleist v. Priem (Cal. App.) 196 Pac. 72.

If an inference can be said to flow from the language used by the defendant to the effect that "the sale has got to net me $28,000," or "I want this to net me $28,000," it is weakened by other testimony in the case. We find that the sale did not, as a matter of fact, net the defendant $28,000, as there were liens outstanding against the property which reduced the amount to some extent. Then, again, we find in the record the uncontradicted testimony of Berger to the effect that Lane was very anxious to sell the property and rid himself of it and told him not to turn down an offer of $650 an acre, and when asked,by Berger if he would pay a commission on a sale at $650 he replied, "I will pay a commission on the price that I accept."

We are of the opinion that Petz brothers, whose testimony was offered by the plaintiff, should have been heard, although offered as witnesses after plaintiffs formally closed their case, inasmuch as they were the only disinterested persons who were present and heard the full conversation about which the controversy arose. Upon a review of the situation we are of the opinion that the motion for a nonsuit was erroneously granted.

The judgment is reversed.

We concur: WILBUR, C. J.; WASTE, J.; KERRIGAN, J.; LAWLOR, J.; MYERS, J.; LENNON, J.

---

190 Cal. 406

McNEIL v. KINGSBURY, Surveyor General.
(S. F. 10440.)

(Supreme Court of California. Feb. 14, 1923.)

1. Public lands ⚿29—Statutes ⚿162—Public lands devoted to public use not included in general statutes for disposal of public lands, such general statute not repealing special act.

The principle, that the law does not favor a repeal by implication, and where two statutes treat the same subject, one being special and the other general, unless irreconcilably inconsistent, the general, though later in date, will not be held to have repealed the special, but the special act will prevail in its application to the subject-matter, so far as coming within its particular provisions, when applied to public lands results in the rule that, where lands are devoted to some special public use by legislative authority, they are not included in general statutes concerning disposal of public lands.

2. Mines and minerals ⚿9—Oil Leasing Act held not to authorize issuance of permit for oil exploitations on state hospital grounds.

St. 1913, p. 884, provides for the establishment of a state hospital for the insane and purchase of a site therefor with title in the state, and, under Pol. Code, §§ 2145, 2146, 2150, Norwalk Hospital is a corporation, with power to condemn land, and is under control of board of managers, which board under Pol. Code, §§ 366c, 366d, as added by St. 1921, pp. 1048, 1049, is advisory to the state department of institutions. *Held*, that the grounds of Norwalk State Hospital, being land devoted to public use of the state, do not come within St. 1921, p. 404, providing that oil and other mineral deposits in lands belonging to the state are reserved to the state, but authorizing prospecting thereon under named conditions.

In Bank.

Application for mandamus by William A. McNeil against W. S. Kingsbury, as Surveyor General of the State of California. Denied.

Raymond Benjamin, of San Francisco, and Pierson M. Hall, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., for respondent.

WILBUR, C. J. Petitioner seeks a writ of mandate to compel the surveyor general of the state to issue to him a prospecting permit authorizing him to prospect for oil upon the grounds of the Norwalk State Hospital for the Insane at Norwalk, Cal. Petitioner's application is based upon a statute enacted by the Legislature May 25, 1921, going into effect July 29, 1921. Stats. 1921, p. 404, c. 303. Section 1 of this act provides that all oil and gas and—

> "other mineral deposits in lands belonging to the state, or which may become the property of the state, are hereby reserved to the state; provided, however, that nothing in this act shall apply to lands acquired by the state on a sale of delinquent taxes, except such land, the deed for which is required to be filed in the surveyor general's office. Such deposits are reserved from sale except upon a rental and royalty basis, as herein provided for; and a purchaser of any lands belonging to the state, or which may become the property of the state, shall acquire no right, title or interest in, or to, such deposits except as hereinafter expressly provided; and the right of such purchaser shall be subject to the reservation of all coal, oil, oil shale, gas, phosphate, sodium, and other min-

eral deposits, and to the conditions and limitations prescribed by law providing for the state and persons authorized by it to prospect for, mine, and remove such deposits, and to occupy and use so much of the surface of said land as may be required for all purposes reasonably extending to the mining and removal of such deposits therefrom."

Section 2 provides that all applications to purchase state lands filed subsequent to the passage of the act and all sales shall be subject to this reservation.

The land which the petitioner seeks to prospect for oil was acquired by the state of California under the terms of an act of the Legislature of the state of California, approved June 7, 1913, which went into effect August 10, 1913. Stats. 1913, p. 884, c. 455. This statute provided for the establishment of a state hospital for the care of the insane, for the selection of a suitable site therefor, and the erection of the necessary buildings thereon for a hospital for insane persons. It was further provided:

> "Not more than ninety thousand dollars of the money herein appropriated shall be used for the purchase of said site and water rights. Said site shall contain not less than three hundred acres of tillable land." Section 6.

It is provided that title to the land "shall be taken in the name of the state of California." Section 5. Section 4 of the statute provided:

> "* * * The control and management of said institution as a hospital for the insane shall be continued as and in the manner provided by law for the control, management and operation of state hospitals for the care of the insane."

By section 2145 of the Political Code, the Norwalk State Hospital is declared to be a corporation. Section 2146 of the Political Code provides:

> "Each of the corporations mentioned in the preceding section may acquire and hold in its corporate name by gift, grant, devise or bequest property to be applied to the maintenance of the inmates of the hospital and for the general use of the corporation. All lands necessary for the use of state hospitals must be acquired by condemnation as lands for other public uses are acquired, except those acquired by gift, devise or purchase, and the terms of every purchase must be approved by the commission. No public street or road for railway or other purposes, except for hospital use, must be opened through the lands of any state hospital, unless the Legislature by special enactment consents thereto."

By section 2150 of the Political Code, the board of managers of the state hospital has general control and direction of the property and concerns of the institution for which it is appointed, where not otherwise provided by law.

By an act subsequent to the Oil Leasing Act under which the petitioner seeks his permit, a department of institutions was created (Stats. 1921, p. 1047, c. 610), and this department succeeded to all the duties, powers, purposes, responsibility, and jurisdiction of the board of managers of the Norwalk State Hospital and other state institutions (section 366c, p. 1048, Stats. 1921), but the board of directors and managers and trustees of the institutions were continued in force in an advisory capacity to the department of institutions (Stats. 1921, p. 1049, § 366d).

The respondent contends that the statute providing for the acquisition, control, management, and use of the Norwalk State Hospital grounds, being a special statute applicable to use of those grounds, will control over the broad general language of the later act under which petitioner seeks his permit, and that the later act, general in terms, will not be held to have repealed the previous act devoting such land to an altogether different purpose. He also relies upon the general proposition that lands devoted to a public use are not subject to entry or sale under general laws affecting the public domain. Petitioner concedes the correctness of these general propositions, but asserts that the Oil Leasing Act under which he seeks his permit is a special act, in that it relates to subterranean rights only, and does not interfere with the surface, and that certain provisions in the act themselves indicate that the purpose of the Legislature was to deal with such properties as the Norwalk State Hospital grounds in its provisions concerning the granting of oil leases, and prospecting permits.

[1] The whole question involved is one of the intent of the Legislature in the passage of the Oil Leasing Act. No question is raised by either side as to the right of the state to sell or lease the land used by the Norwalk State Hospital, but the question is whether or not such provision has been made by the Legislature in the act in question. In short, the question is whether the Legislature, in the general terms used in the statute concerning state lands, intended such provisions to apply to land used and controlled by public corporations utilizing lands belonging to the state for the purpose of maintaining thereon hospitals for the care and treatment of the insane. That the terms of the statute are broad enough to cover such lands if literally construed is admitted, and hence the necessity of recourse to the well-established rules of construction stated by the Attorney General as follows:

> "The law does not favor a repeal by implication, and where two statutes treat the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, though later in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject-matter, so far as coming within its particular provisions"—citing Bateman v. Colgan, 111 Cal.

580, 44 Pac. 238; People v. Pacific Imp. Co., 130 Cal. 442, 62 Pac. 739; Trinity County v. Mendocino Co., 151 Cal. 279, 90 Pac. 685; Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 128 Pac. 9, 18; Estate of Brewer, 156 Cal. 89, 103 Pac. 486.

[2] This principle applied to public lands results in the rule that where lands are devoted to some special public use by legislative authority they are not included within general statutes concerning the disposal of public lands. See Scott v. Carew, 196 U. S. 100, 25 Sup. Ct. 193, 49 L. Ed. 403; Wilcox v. Jackson, 13 Pet. 498, 10 L. Ed. 264; Leavenworth L. & G. R. Co. v. U. S., 92 U. S. 733, 23 L. Ed. 634; Newhall v. Sanger, 92 U. S. 761, 23 L. Ed. 769; United States v. Midwest Oil Co., 236 U. S. 459, 35 Sup. Ct. 309, 59 L. Ed. 673; Buhne v. Chism, 48 Cal. 467. The petitioner seeks to break the force of these well-established rules by pointing out that the act in question deals only with the mineral rights in the land, and hence is a special statute on that subject, not inconsistent with the surface rights already in use by the public agencies of the state, and thus seeks to apply the terms of the Oil Leasing Act to all state lands whether or not already devoted to a public use. Petitioner points out some provisions of the Oil Leasing Act which he contends lead to the conclusion that the law was intended to apply to all lands belonging to the state. He insists that the reservation of oil in the lands of the state, made in section 1 of the act, is necessarily as applicable to lands occupied by state hospitals as to any other state land. The obvious answer to this contention is that it was unnecessary for the state to reserve rights in land which it owns in fee and which is not subject to sale except by special authority of the Legislature. These rights already belong to the state, and will remain in the state until the lands are sold pursuant to such legislative authority. The necessity for the reservation of mineral rights in state land only exists with reference to these lands already authorized to be sold, and the purpose of such reservation is to indicate the character of title that can be conveyed by the state officer authorized to execute such grant. Even without the aid of the above rule of construction, which would exclude from the general provisions of this statute land procured for special purposes and dedicated to those purposes, it is manifest on the face of the act itself that this reservation was intended to apply only to the public domain which was subject to sale under statutes in existence at the time the Oil Leasing Act was passed. The petitioner also insists that the provision of section 3 of the Oil Leasing Act, by which the surveyor general is not only authorized to classify the land of the state for its different possible values and uses, but is also authorized to require the state mineralogist, the director of agriculture or other organization, agency, or institution of the state government to make such classification, is an indication that the statute was intended to be applicable to all lands owned by the state. The very general provisions of this section do not point with any clearness to the construction that lands of the state, purchased for the purpose of the state and devoted to such purposes, are intended to be subject to sale or exploitation under the terms of the act. The legislators who passed this statute would undoubtedly be astonished to find an oil derrick erected upon the state capitol grounds under the authority vested in the surveyor general of the state by this statute, and no doubt would be equally surprised to see noisy oil well drilling outfits invade the grounds of hospitals for the insane where peace and quiet are so essential to proper treatment and recovery of the patients.

The statute expressly mentions river beds, lake beds, overflowed, tide, and submerged lands as subject to the issuance of prospecting permits (section 4, Stats. 1921, p. 405), and also reserves one sixteenth only of the mineral rights in state lands sold by the state (section 10). We cannot see that these provisions concerning lands held by the state by virtue of its sovereignty, and its public lands offered for sale under its public land laws, shed any light upon the question as to whether or not the statute was intended to apply to lands already devoted to a public use.

It is clear from the foregoing considerations that there is no reasonable basis for deciding that the act in question authorizes the surveyor general to issue permits for oil explorations upon the state hospital grounds at Norwalk. In view of this conclusion it is unnecessary to pass upon the other points advanced by the petitioner.

Writ denied.

We concur: MYERS, J.; WASTE, J.; LENNON, J.; LAWLOR, J.; KERRIGAN, J.; SEAWELL, J.

(190 Cal. 412)

In re DOANE'S ESTATE.

DAYTONA INSTITUTE et al. v. DOW et al.

(L. A. 7383.)

(Supreme Court of California. Feb. 14, 1923. Rehearing Denied March 15, 1923.)

1. Wills 🔑487(3)—Letter not mentioned in will held not part thereof, and inadmissible to show testator's intent.

A letter, explaining that a bank, the residuary legatee under a will, was to take in trust for certain others, *held* inadmissible to show the testator's intent, where the will was clear and unambiguous, notwithstanding the bank would otherwise be disqualified to take, by Civ. Code, § 1275.

2. Wills 🔑97—Extrinsic writing must be clearly identified to become part of will.

To make an extrinsic writing a part of a will, it must be described in such clear, explicit, and unambiguous language as to leave its identity without doubt.

3. Wills 🔑487(5)—Parol evidence inadmissible to show testator intended bank to take as trustee, in absence of language creating trust.

Though a bank may have two legal capacities, one as an individual and one as a trustee, parol evidence is inadmissible to prove that a testator, who, by unambiguous language, left his residuary estate to a bank, intended it to take in the capacity of a trustee, for, in order to create a trust, some expression of intent is requisite.

4. Wills 🔑671—No particular form necessary to create.

No particular form of expression is necessary to create a trust, though some expression of intent to that end is requisite.

5. Wills 🔑446—Where language is clear, courts cannot construe will unnaturally to save it from condemnation.

Where the language of a will is clear and unambiguous, the courts may not wrest from it an unnatural meaning to save it from condemnation, however beneficial the testator's unexpressed intent may have been.

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rivers, Judge.

In the matter of the estate of George S. Doane, deceased. Appeal by the Daytona Institute and others against Arthur P. Dow and others, from an order directing partial distribution. Affirmed.

Parker & Parker, of Pasadena, for appellants.

James G. Owen and Henry M. Willis, both of Los Angeles, for respondents.

Hahn & Hahn, of Pasadena, for intervener Doane Orphanage.

G. A. Gibbs, of Pasadena, for National Bank & Trust Co. of Pasadena.

LENNON, J. By an order for partial distribution in the above-entitled cause it was decreed that George S. Doane died intestate as to the residuary portion of his estate, and that the residue of the estate be distributed to the heirs at law. The correctness of this adjudication is the sole question raised upon the present appeal.

Clause tenth of the last will and testament of the decedent, dated April 28, 1920, provides:

> "All the rest and residue of my property of whatever nature and wheresoever located, I give, devise and bequeath to the National Bank & Trust Company of Pasadena, a national banking association, of Pasadena, California."

The trial court's conclusion that this clause of the will is invalid is based upon section 1275 of the Civil Code, which provides that corporations other than counties, municipal corporations, and corporations formed for scientific, literary, or solely educational or hospital purposes cannot take under a will, unless expressly authorized by statute. Appellants concede that the National Bank & Trust Company of Pasadena is incompetent to take property under a will for its own use and benefit but contend that the residue of the estate must be distributed to the bank in its capacity of trustee; that being the only capacity in which the bank could lawfully receive the property. In support of the contention that it was the intention of the testator to devise and bequeath to the bank as trustee only, appellants introduced in evidence a letter signed by the decedent, and reading as follows:

> "National Bank & Trust Company of Pasadena, Pasadena, California—Gentlemen: I hereby request that you as residuary legatee under my last will and testament dated January 26, 1920, distribute any property or funds which may come to you as such residuary legatee, as follows:
>
> "1. To the Doane Orphanage ten thousand dollars ($10,000).
>
> "2. To the Rescue Mission, Springfield, Massachusetts, one thousand dollars ($1,000).
>
> "3. To the Daytona Institute of Daytona, Florida, three thousand dollars ($3,000).
>
> "4. To the Baptist Academy near St. Augustine, Florida, one thousand dollars ($1,000). * * * [Signed] George S. Doane.
>
> "Pasadena, Cal. January 26, 1920.
>
> "Witness: George S. Pooley, Pasadena, Calif.
> "L. R. Jenkins, Pasadena, Calif."

[1, 2] The trial court struck out the letter upon motion of respondents. The exclusion of this evidence was proper, for the rule is well established in this state that a separate written instrument, which is not mentioned or referred to in the will, cannot be considered as part of the will. Thus, in Estate of Young, 123 Cal. 337, 55 Pac. 1011, it is said:

> "An existing writing may by reference be incorporated into and made a part of a will. But before such an extrinsic document may be so incorporated the description of it in the will itself must be so clear, explicit and unambiguous as to leave its identity free from doubt."

Quoting from In re Shillaber, 74 Cal. 144, 15 Pac. 453, 5 Am. St. Rep. 433:

> "If the will be duly executed and attested, the paper referred to, whether attested or not, will become a part of the will, if it be already in existence, and is clearly described and identified. The identification must be by a description given of the paper in the will."

There is no identification or even mention of the letter in the will under consideration. Moreover, it will be noted that the letter itself refers to a will "dated, January 26, 1920," whereas the date of the will before the court is April 28, 1920. There is an attempt to overcome the discrepancy by evidence to the effect that the testator originally intended the letter to accompany a will executed on January 26, 1920, but that, having subsequently revoked that will, he declared on the occasion of the execution of the will of April 28, 1920, that he desired the letter to be in full force and applicable to the later will. The danger of accepting such evidence in the construction of wills is obvious, and therefore the necessity of the rule that a document cannot be incorporated as part of a will unless referred to therein is illustrated by the very facts of the case now presented.

[3-5] It is further contended by appellants that the National Bank & Trust Company of Pasadena has two legal capacities, one as an individual and one as a trustee, and in view of the presumption in favor of testacy, it is urged, parol proofs were admissible for the purpose of showing in which capacity the testator intended that the residuary legatee should take. This contention cannot be sustained, for the reason that there is no ambiguity or uncertainty in the language employed by the testator in disposing of the residue of his estate. While no particular form of expression is necessary for the creation of a trust, nevertheless some expression of intent to that end is requisite. Estate of Marti, 132 Cal. 666, 669, 61 Pac. 964, 64 Pac. 1071. In the present case there is nothing in the will in question which even hints at a restriction or limitation upon the residuary legatee. On the contrary, it affirmatively appears upon the face of the will that the residue is given, devised, and bequeathed, outright, to the National Bank & Trust Company of Pasadena, a national banking association of Pasadena, Cal. The bequest is absolute in terms.

> "Where the language of the provisions of a will is plain and unambiguous the courts are not permitted to wrest it from its natural import in order to save it from condemnation." Estate of Walkerly, 108 Cal. 627, 660, 41 Pac. 772, 780 (49 Am. St. Rep. 97).

The decedent having made an invalid provision in clear, unequivocal language, the courts are without power to alter that language to express what may have been in the testator's mind but was not attempted to be expressed by him, however beneficent such unexpressed intent may have been.

> "It may be said of all wills, that the testator's intent is to make a valid disposition of his property. * * * But a court is not therefore authorized to modify or vary the plain language of the testator, and thus create a new and valid will for him, even if it were certain that the testator would have adopted the interpretation of the court, had he known his own attempt was invalid." Estate of Walkerly, supra, 108 Cal. 627, 659, 41 Pac. 772, 780 (49 Am. St. Rep. 97).

The order appealed from is affirmed.

We concur: WILBUR, C. J.; MYERS, J.; KERRIGAN, J.; WASTE, J.; SEAWELL, J.; LAWLOR, J.

60 Cal. App. 449

PEOPLE v. REYNOLDS. (Cr. 901.)

(District Court of Appeal, Second District, Division 1, California. Jan. 16, 1923.)

1. Criminal law 🔑1169(12)—Admission of evidence that accused gave prosecutrix liquor held nonprejudicial.

Evidence that accused had given the prosecutrix intoxicating liquor *held* nonprejudicial.

2. Criminal law 🔑1036(1)—Objection to testimony, not available at trial, held not proper to be considered on appeal.

Where the prosecutrix in a prosecution for rape testified to one act at a particular place, and it was shown on cross-examination that she had on preliminary examination fixed the act as occurring at a different place, *held* that the objection on appeal that accused was shown to have been held to answer for an offense other than that for which he had been placed on trial was not available to defendant on trial, and hence not proper to be considered on appeal.

3. Indictment and information 🔑137(6)—Motion to set aside remedy, where complaint and commitment at variance with information.

If the complaint and commitment based thereon charge an offense as having been committed on a different day from that set forth in the information, defendant's only remedy is under Penal Code, § 995, by a motion to set aside the information.

4. Witnesses 🔑379(9)—Discrepancies in prosecutrix's testimony at preliminary hearing and at trial properly considered as affecting credibility.

If the testimony of the prosecutrix at trial differs from her testimony given at the preliminary examination, that fact may properly be considered by the jury as affecting her credibility, but such discrepancies do not constitute ground for objection by accused.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

George W. Reynolds was convicted of rape, and he appeals. Affirmed.

Emmons & Aldrich, of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of rape, and appeals from the judgment of imprisonment.

[1] It was charged in the information that defendant, on or about the 28th day of March, 1921, in the county of Kern, committed the crime referred to. The other person concerned was a girl, who, it was charged in the information, was at the time of the age of 14 years. It was shown by the testimony of the girl in question that she had on several occasions voluntarily consented to acts of sexual intercourse with defendant. Defendant denied the charge, admitted that he was acquainted with the girl, and offered evidence to establish an alibi as to the date charged in the information. The court allowed evidence to be introduced showing that upon divers occasions defendant had given the girl intoxicating liquor to drink, and that he had given such liquor to others who happened at some of the times to be a part of the company present. The girl did not testify that she became intoxicated at all, and we cannot infer that such was the fact, or that her failing to show it was due to any reticence, for she testified, as the record indicates, boldly and unhesitatingly as to the facts showing her illicit relations with defendant, and she exhibited very complete knowledge of the meaning of the terms necessary to describe the acts referred to. Appellant complains that it was highly prejudicial to his right to a fair trial to allow the district attorney to make proof of his habit of drinking liquor and of having given it to the girl and other companions to drink. It is not necessary to make a close analysis of the argument addressed to this proposition, for the record discloses that the girl was allowed to testify without objection to the fact that defendant, upon at least two occasions, gave her liquor to drink. Assuming that evidence of the giving of liquor to others was wholly irrelevant, we cannot see how defendant was injured thereby.

[2-4] The prosecution was allowed to prove the commission of acts of sexual intercourse separate from that which was shown to have been committed on the particular day charged in the information; this under the rule which is too familar to require any statement as to the reason supporting it. The prosecution elected to rely upon an act which the girl testified occurred on the 28th day of March in a tent a short way from her father's house. The girl fixed the happening of a like occurrence at another time and at a place near the Kern river bridge. By the cross-examination of this witness it was shown that at the preliminary examination she had testified to but one such occurrence, and had at that time fixed the act as having been committed near the bridge. Appellant's counsel insists that because of the variance his client was shown to have been held to answer for an offense other than that for which he was placed on trial. This objection was not available to the defendant at the trial; hence is not proper to be considered on his appeal. It seems to be admitted, for the contrary is not shown, that by the commitment of the magistrate the defendant was held to answer for the crime of rape which was charged to have been committed at the same time and place as the rape charged in the information filed by the district attorney. But if such had not been the case, and if the complaint in the justice's court and the commitment based thereon had charged the offense as having been committed on a day different from that set forth in the information, defendant's only remedy would have been to move to set aside the information on the ground that he had never been legally committed for the offense as therein charged. Pen. Code, § 995. The discrepancies, if such there were, between the testimony of the girl given at the trial and that given at the preliminary examination were matters which the jury had a right to take into consideration for the purpose of determining her credibility, but such discrepancies would not furnish ground for the objection which appellant has argued. The information was clear in the statement of the charge as to the date, place, and other essential facts; the district attorney gave notice of his election to stand upon his proof directed to the particular date charged, and there was evidence to make out the case as claimed by the prosecution. The court was careful to advise the jury that the prosecution was required to make proof beyond a reasonable doubt of the commission of the act described on the particular day charged, and further advised the jury as to the limited effect which should be given the evidence as to the other and independent acts. The instructions, taken as a whole, clearly and fully advised the jury of the law as it appllied to the case before it. No error appears from which it could be inferred that defendant has been prejudiced in his right to a fair trial.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

60 Cal. App. 425

DIAMOND MATCH CO. v. ÆTNA CASUALTY & SURETY CO. (Civ. 2482.)

(District Court of Appeal, Third District, California. Jan. 11, 1923.)

1. Pleading 🔑403(3)—Answer admitting partial liability of surety precludes attack on sufficiency of complaint.

Even though a complaint against the surety on an undertaking for the payment of materials to be used in constructing a school building was insufficient to state a cause of action, because it failed to allege that the undertaking which was attached to the complaint was executed by the defendant, the defendant cannot raise that objection on appeal, after it had filed an answer below admitting its liability for a portion of the amount claimed, which was equivalent to an agreed statement of all the facts except the amount of liability, even though Code Civ. Proc. § 447, providing that, when the written instrument on which the action is brought is annexed to the complaint, the due execution of the instrument is deemed to be admitted, unless the answer denying it be verified, furnishes a rule of evidence only and not of pleading.

2. Trial 🔑397(1)—Finding on undisputed issue is unnecessary.

It is not necessary to make a finding upon a fact that is not disputed.

3. Principal and surety 🔑162(4)—Findings held to show execution of instrument sued on.

In an action on a bond to secure payment for building material, a finding that "the bond executed and delivered by defendant as surety for the contractor, and upon which the action was brought, did not provide," etc., is a sufficient finding of the execution of the bond by defendant, under the rule requiring construction of the findings, if possible, so as to uphold the judgment.

4. Interest 🔑39(1)—Allowed in quantum meruit on amount admitted to be due from date of answer making admission.

Though, ordinarily, the rule with reference to the allowance of interest is not the same in an action on quantum meruit as in one based on an express contract, interest can be allowed in the former case on the amount which defendant admitted to be due from the date of filing of the answer containing the admission, though interest on the balance recovered by plaintiff can be allowed only from the date of the judgment.

5. Appeal and error 🔑1140(5)—New trial unnecessary to correct erroneous allowance of interest which involves mere computation.

A new trial need not be granted for the erroneous allowance of interest, which can be corrected by a mere computation.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by the Diamond Match Company against the Ætna Casualty & Surety Company, on an undertaking to secure payment for building material. Judgment for plaintiff, and defendant appeals. Judgment modified by reducing the amount of interest, and as modified affirmed.

George R. Freeman, of Willows, for appellant.

George F. Jones, of Oroville, and L. W. Hughes, of Corning, for respondent.

BURNETT, J. The action was brought to recover on an undertaking executed by defendant, to secure the payment by W. R. Zumwalt to plaintiff of the amount due for lumber and building material furnished to said Zumwalt for the construction of a public school building in Corning, Tehama county, and plaintiff recovered judgment for the sum of $6,553.54, with interest thereon from March 11, 1921, the date of the filing of the complaint. The appeal is from the judgment, and the contentions of appellant are, first, that the complaint is fatally defective; second, that the findings do not support the judgment; and, third, that interest should not have been allowed until the judgment was rendered.

The particular point as to the complaint is that there is no allegation that the undertaking was executed by defendant, and it is claimed that, although no demurrer was filed, the question goes to the sufficiency of the statement of a cause of action and can be raised at any time. Appellant relies upon San Francisco S. Co. v. Ætna I. Co., 7 Cal. App. 98, 93 Pac. 888, and similar decisions. In the first of these it was said:

> "It is elementary that in order to state a cause of action against a surety upon an undertaking, the complaint must in some way allege or show that the defendant executed or delivered the undertaking."

On the other hand, it is the contention of respondent that this fact sufficiently appears to withstand a general demurrer or, at any rate, a cause of action is stated under the Public Works Bond Act of March 27, 1897 (Stats. of 1897, p. 201), as amended in 1911 (Stats. of 1911, p. 1422); and attention is called to the various allegations of the complaint setting out the corporate capacity of the parties, the fact that a contract in writing was executed on February 11, 1920, by said Zumwalt and said school district for the erection of a public school building; that said contract was duly recorded; that said Zumwalt, "before entering upon the performance of said work, duly filed with the said board of trustees * * * a bond of which the following is a true and correct copy" (the bond being set out in full); that said bond was in the sum of not less than one-half of the total amount payable to the said W. R. Zumwalt by the terms of said contract, and that it was duly approved by said board of trustees before being filed; that plaintiff sold to said Zumwalt lumber and building material of the value of $16,507.33, to be used, and which were used, in said building, the amount paid and the balance still due on said claim were also alleged; that the work was finished on January 15, 1921, and that the notice of completion was filed in the county recorder's office on January 20, 1921; that on December 17, 1920, plaintiff filed with said board of trustees its verified statement of claim against the contractor and "that 90 days have not elapsed since the completion and acceptance of said building or since the filing of said verified claim."

[1] Whether there should have been an additional specific allegation that said undertaking was executed by defendant it is unnecessary to decide, for the reason that it is entirely apparent that, under the peculiar facts of the case, appellant was not prejudiced by the absence of such allegation, and it should not be permitted to raise the objection now. This will appear from the following statement: The default of defendant was entered for its failure to appear, but thereafter, on motion, the default was set aside and an answer was filed, in which the only issue tendered was as to the amount due to plaintiff from said Zumwalt, defendant claiming that it was $6,431.18 instead of $7,158.54, as claimed by plaintiff. Thereafter, on June 15, 1921, an amendment to the answer was filed, stating the amount due to be $6,297.68, and praying "that plaintiff take judgment for no greater sum that the sum of $6,297.68." Another amendment was subsequently filed after trial, in which it was claimed that Zumwalt was entitled to a credit of $234.10 for work done by him which should have been done by plaintiff. Since a copy of the undertaking was set out in the complaint, the case is one for the application of section 447 of the Code of Civil Procedure, providing:

> "When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified."

Herein there was no denial of the same, the only denial being, as we have seen, as to the exact amount which was due. Appellant claims that the section furnishes a rule of evidence but not of pleading. If we concede that it is thus correctly characterized, it cannot be disputed that the situation is the same in effect as if the appellant had admitted or stated in open court that said undertaking was genuine and was duly executed. Indeed, in view of said exhibition of the bond and the only denial of the answer as to the amount due, the court was called upon to try only that one issue and appellant is in the same situation as though it had admitted that such was the only controversy in the case. Under such circumstances, the practical and sensible rule in the interest of the expeditious administration of justice precludes an appellant from successfully maintaining on appeal that one of the material issues was not sufficiently presented by the complaint. Indeed, the case is the same in principle as though there was an agreed statement of all the material facts, except the single one to which we have referred. This phase of the matter is governed by the principle announced in such cases as Cushing v. Pires, 124 Cal. 663, 57 Pac. 572; Throop v. Weaver, 180 Cal. 335, 181 Pac. 55; Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 Pac. 90; Boyle v. Coast Improvement Co., 27 Cal. App. 714, 151 Pac. 25; Ruperd v. Hunter, 40 Cal. App. 96, 180 Pac. 638. In the first of these it is said:

> "It is true that the objection that the complaint does not state a cause of action may be successfully made for the first time on appeal, but the appellate court will not be overzealous to find a defect in a complaint that the appellant himself failed to discover until the case had been decided against him on its merits."

In the second, the court declares:

> "Appellants also make the point that the cross-complaint does not state a cause of action, their criticism really being that the cause of action pleaded is not a proper matter for cross-complaint. Conceding this to be true, they cannot here raise the point as they joined issue upon said cross-complaint and went to trial without demurrer or objection."

In the Goldberg Case the court declared:

> "It seems to us that the reformed procedure would receive a decided shock, if a defendant should be permitted to stand by and without objection allow an issue to be tried as though properly presented by the pleadings and on appeal escape the consequences by claiming that the complaint failed to present such issue."

Therein, it is to be observed, there was omitted from the complaint an essential element in the statement of a cause of action, but it was held to be unjust to permit appellant to maintain the point an appeal.

In Boyle v. Coast Improvement Co., supra, it was said:

> "If counsel were of the opinion that the complaint stated no cause of action, or, if they conceived that the negligence to the proof of which the testimony was directed was not the negligence pleaded and relied upon in the complaint, they should have objected to the evidence upon that specific ground, and their failure to do so supplied the deficiency of the complaint in that respect or any omission to allege therein facts essential to the statement of a cause of action."

The last two decisions were cited with approval in the Ruperd Case, supra, and in all three a hearing was denied by the Supreme Court. Assuredly, there is as much reason herein as in any of those cases for disallowing this belated objection.

[2, 3] A similar objection has been made to the findings, but, since the genuineness and due execution of the instrument are deemed admitted, no finding thereon was required. Our practice does not demand a finding upon a fact that it is not disputed. Besides, the execution of the bond does sufficently appear in finding 4:

> "That the bond executed and delivered by the defendant herein as surety for the said W. R. Zumwalt, and upon which this action is brought, does not provide," etc.

Of course, the rule is to construe the findings, if possible, so as to uphold the judgment, and we think the application of that rule to this case does not give rise to any serious difficulty.

[4] As to the allowance of interest, there seems to be some merit in the contention of appellant. The liability of the surety, admittedly, is coextensive with that of the principal and the latter's obligation was based upon a quantum meruit. Ordinarily, in reference to the allowance for interest, a distinction exists between such case and one based upon an express contract. Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 99 Am. St. Rep. 164; Courteney v. Standard Box Co., 16 Cal. App. 600, 117 Pac. 778; Merchants' C. Agency v. Gopcevic, 23 Cal. App. 216, 137 Pac. 609; Sea v. Lorden, 37 Cal. App. 444, 174 Pac. 85; Erickson v. Stockton, etc., Co., 148 Cal. 206, 82 Pac. 961.

However, in Gray v. Bekins, 186 Cal. 389, 199 Pac. 767, the defendants admitted in the answer that the amount was due as subsequently found by the trial court, and, in discussing the question, the Supreme Court said:

> "The test, then, to be applied in the instant case is whether or not the exact sum found to be due was known and admitted by the defendants to be due to the plaintiffs. We are of the opinion that the allegations of the defendants' answer in the particulars previously pointed out constituted an acknowledgment of plaintiffs' claim, to the extent of the sum therein admitted, and by the trial court found to be due to the plaintiffs. In short, the admission of the defendants' answer in this behalf was tantamount to the ascertainment of the balance found to be due the plaintiffs, and, consequently, interest should have been allowed thereon from the date of the filing of the answer, namely, March 27, 1907. Skinker v. Clute, 9 Nev. 342."

Herein, on April 22, 1921, appellant filed an answer in which it admitted expressly that the sum of $6,431.18 was due, and offered to allow judgment to be entered for that sum in favor of plaintiff and against defendant, provided that an order given by said Zumwalt on February 28, 1921, to the board of trustees for the payment of that sum to plaintiff was not accepted and the money therein paid to the plaintiff. But, as we have seen, on June 15, this was amended, so as to admit that $6,297.68 was due. Under the settled rule, therefore, plaintiff should be allowed interest on that sum from the date of the filing of the amended answer, and on the amount found due from the time of the judgment. It is to be observed that this is in accordance with the provision of section 1917 of the Civil Code, allowing interest on an "account, from the day an which the balance is ascertained." Herein, the admission in the answer is equivalent to an ascertainment on that date that $6,297.68 was due, but the difference between that sum and the said $6,553.54 was not ascertained till the date of the judgment.

[5] As the question involves a mere matter of computation there is no necessity for a new trial.

The judgment is modified by striking therefrom the phrase "together with interest thereon from the date of the commencement of this action, to wit, March 11, 1921," and substituting therefor "together with interest on the sum of $6,297.68 from June 15, 1921, to the date of the judgment, and interest on the sum of $6,553.54 from the date of the judgment," and, as thus modified, the judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

---

60 Cal. App. 497

PEOPLE v. DE VAUL. (Cr. 647.)

(District Court of Appeal, Third District, California. Jan. 20, 1923.)

Homicide ⚷250—Evidence held sufficient to sustain conviction for manslaughter.

Evidence *held* sufficient to sustain conviction for manslaughter.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

E. H. De Vaul was convicted of manslaughter, and he appeals from the judgment and order denying new trial. Affirmed.

F. W. Taft, of Willits, and Will Van Dyke, of Ukiah, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was indicted by the grand jury of Mendocino county for the crime of murder, and, on being tried, was convicted of the crime of manslaughter. A motion for a new trial was made in his behalf and the same denied. He appeals from the judgment and the order disallowing his motion for a new trial.

The cause was placed on the calendar of the January term of this court for hearing and argument, and the attorneys of record

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

of the accused duly notified by the clerk of this court of that fact; but no appearance was made for the defendant before this court when the appeal was regularly called for hearing. No brief in support of the appeal was then on file, nor has any since been filed by or for the accused. We have, nevertheless, read the testimony and thus incidentally noticed the rulings upon proffered but challenged evidence and also have read the charge of the court to the jury. Our conclusion from the examination so given the record is that the verdict is amply supported and the rulings and instructions free from substantial error. Indeed, as to the question (if there be such question here intended to be raised) whether the verdict derives sufficient support from the evidence, we are led to observe that, accepting, as we must, the testimony presented by the people as truly disclosing the circumstances attending the commission of the homicide, the jury appear to have been singularly lenient with the accused.

The homicide took place near the town of Willits, in Mendocino county, on the 25th day of January, 1922. Although the defendant was the father-in-law of the deceased, each, it seems, nursed a violent hatred for the other. They met on the day above named at the home of the defendant's son, and immediately engaged in a bitter altercation, which culminated in a "fist fight," in which, after each had struck the other blows about the face, the two men fell or one or the other was knocked to the ground, with the deceased on the top of the defendant. While they were in this position, the deceased beat the defendant about the face and head. A bystander finally persuaded the deceased to cease fighting and to get up, and both men arose to their feet. As the deceased was leaving the spot where the fight took place, and when about six feet from the defendant, the latter drew a revolver and fired at the deceased; the bullet entering the left hip and passing into and through certain parts of the intestines. The deceased fell to the ground, and the defendant thereupon stepped to where he was lying and began kicking him about the body, particularly on the head and face. The deceased soon lost consciousness; but prior thereto, and while the defendant was still engaged in kicking him, he begged the defendant to cease kicking him and implored him to "let me die in peace." The deceased died the following day from the effects of the bullet wound, aided, perhaps, by the kicking which the defendant had administered to him while he was lying prostrate and helpless upon the ground. The autoptical report of the doctor making such examination showed that, in addition to the bullet wound, the body of the deceased, including the head and the face, was marked with a number of severe bruises, abrasions, and contusions.

The above is a sufficient statement of the facts to confirm the declaration made at the outset that, in finding the defendant guilty of manslaughter, the jury seemed to have shown great, if not unwarranted, mercy to the accused; for, if the evidence, as above outlined, does not bring the defendant's act within the definition of murder of the first degree, the case as made by the evidence, without doubt, borders dangerously close thereto.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; BURNETT, J.

---

60 Cal. App. 499

PEOPLE v. McCURDY. (Cr. 672.)

(District Court of Appeal, Third District, California. Jan. 20, 1923.)

Infants ⚷20—Acts of defendant held to constitute offense of lewd conduct with child.

In a prosecution for violating Pen. Code, § 288, punishing lewd conduct with a child with intent to arouse or gratify lust or passion, evidence *held* to show that the acts committed by defendant with a 13 year old girl were such as are denounced by that section.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Wm. McCurdy, who answers his true name to be W. R. McCourtie, was convicted of violating Pen. Code, § 288, and he appeals. Affirmed.

R. P. Talbot, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was convicted in the superior court of the county of Sacramento under an information charging him with the commission of lewd and lascivious acts upon and with the body of a female child under the age of 14 years. Pen. Code, § 288. He made a motion for a new trial, which was denied, and he prosecutes this appeal from the judgment of conviction and the order denying him a trial de novo.

The sole point upon which the defendant relies for a reversal is that the evidence is insufficient to support the verdict. The specific contention is that, conceding it to be true that the accused did all the acts which the prosecutrix testified that he committed upon her body, such acts were not of a nature to bring the defendant's conduct in committing them within the purview or the condemnation of section 288 of the Penal Code.

The crime charged was committed in the month of May, 1922, at which time the prosecutrix was approximately two months over the age of 13 years, and resided in North Sacramento, in Sacramento county. She testified that, on a Saturday early in the month of May, 1922, she was a passenger on the auto stage running between the city of Sacramento and North Sacramento, and on her way to her home; that there were in that stage at the same time other passengers, of whom several were women; that the defendant, who then was a perfect stranger to her, boarded the stage near a railroad station known as Ben Ali, and took a seat beside her; that at a point a short distance from Ben Ali the women passengers left the stage, leaving as the only occupants thereof herself and the defendant and another man, whose name it was subsequently learned was J. C. Hornbeck; that immediately after the women passengers had left the stage, the defendant placed his hand on her leg and pinched it, or to use her own language: "He pinched it and felt of it." He continued this conduct until the point was reached where she was to leave the stage; that, as she was about to alight from the stage, the defendant preceded her to the ground and took hold of her under the arm, and "lifted" her to the ground; that, after reaching the ground, he held onto her elbow, and, after the stage had gotten a short distance from where they stood, he placed his hands around her and pressed her body to his, at the same time saying to her: "You are just old enough to feel good, aren't you?" To this she replied: "I don't know, and he said he knew." She testified:

> "He told me to come up to his place some time and let him feel of my legs and breast, and love me up, and he said I was almost a woman," all this time still holding her body against his.

She stated that when he asked her to "come to his place some time" he pointed "up the road," and said that he "lived up there." She continued:

> "I pushed away from him, but he just held me deep in his arm, and then when he let me go, why I walked fast until I was out of his sight, and he kept calling up the road to me, 'Little girl, little girl;' and before I left, he told me not to tell my mother, and he said: 'Now, you will come up to my place, now, won't you?' And I told him I didn't think I would, and I started away from him, and then I walked along fast until I got off the side, and he kept calling, 'Little girl, little girl;' and after I got on the side I started to run home."

The witness Hornbeck, above named, testified that he saw the defendant place his hand on the girl's lap and leg while they were riding along. He stated, in response to a question on cross-examination, that the familiarities taken by the defendant with the prosecutrix rather led him to suppose that the girl was a relative of the defendant—a granddaughter, perhaps.

The defendant admitted that he had never met or seen the prosecutrix prior to the day of the commission of the alleged acts, but positively denied that he hugged her or pressed her body against his. He further denied saying to her that she was "just old enough to feel good," or that he invited her to visit his place some time for the purpose stated by the prosecutrix. He would not say positively that, while in the auto bus, he did not place his hand on her leg; nor would he likewise say that he did not request the prosecutrix not to tell her mother of the happenings described by the girl. He further stated that it was possible that he might have asked her not to tell her mother "something"; that he "might have told her anything," but that he had no recollection of making any such request of the prosectrix; that there was no reason why he should have made such a request.

The above comprises a statement in substance of all the testimony given at the trial. It is not questioned here, nor could it be successfully, that, if the conduct of the defendant towards the prosecutrix involved acts which come within the ban of section 288 of the Penal Code, the testimony affords ample support to the verdict. Therefore the single question is, as above stated, whether the acts committed by the defendant are such as are interdicted and penalized by the section named. Said section reads as follows:

> "Any person who shall willfully and lewdly commit any lewd or lascivious act, other than the acts constituting other crimes provided for in part two [one] of this Code, upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, or of such child, shall be guilty of a felony, and shall be imprisoned in the state prison not less than one year."

One of the essential elements of the offense, if, indeed, not the real gist thereof, is in the *intent* with which the act is done or committed, and the intent may, of course, be betrayed by the nature of the act or any other circumstances which may tend to discover a wicked state of mind in the perpetrator with reference to the act or acts. Whether the acts actually, or in point of fact have the effect of arousing the passions or sexual desires of the person upon whom they are committed is immaterial. If the acts are of a lascivious nature, and the intent is to arouse the passions or sexual desires of the party upon whom they are committed, then the crime is consummated. In the present case, the defendant, at the time of the occurrences responsible for his prosecution and conviction was a stranger to the prosecutrix, they never having seen each other before; and, judging from the testimony of the witness Hornbeck, he was so far her senior in years as to justify said witness in forming the opinion, from his conduct towards the prosecutrix, that he was her grandfather. Under these circumstances, the act of the accused in feeling of and pinching the leg of the prosecutrix was of itself sufficient to suggest libidinous notions and perhaps to generate lustful desires in an infant of unmatured judgment and of little or no worldly experience. But, even if that act alone cannot be held to be sufficient to show an evil intention in the defendant or to bring his conduct within the denunciation of the statute, it cannot be doubted that the acts subsequently committed by him upon the prosecutrix were, not only of a lascivious nature, but were such as irresistibly to lead to the conclusion that they were intended by the defendant to arouse in the prosecutrix lustful desires. Indeed, if those acts in themselves were not such as plainly to show that his intention was thus to arouse the passions of the prosecutrix and so excite in her lustful desires, what he said to her at the time he got hold of her and pressed his body against hers clearly disclosed that those acts were committed with such intention. In fact, what other motive or purpose or intent could have been in the mind of this stranger to the little girl in treating her as she described? The question answers itself.

Our conclusion is that the testimony, as a whole, if true (and the jury so regarded it), clearly shows that the conduct of the defendant towards the girl involved the commission of acts which section 288 of the Penal Code denounces as a felony.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; BURNETT, J.

---

60 Cal. App. 417

PEOPLE v. BECK et al. (Cr. 649.)

(District Court of Appeal, Third District. California. Jan. 11, 1923. Hearing Denied by Supreme Court, March 12, 1923.)

1. Criminal law 🔑742(1)—Question for jury whether witness is willfully evasive or his memory deficient.

It is for the jury to determine whether one who is apparently an unwilling witness is deficient in memory or merely willfully evasive.

2. Criminal law 🔑673(4)—Evidence limited as against one defendant cannot be considered against another, though it was admissible against him.

Though statements made by two defendants, charged as conspirators, may have been admissible against either defendant as statements made in furtherance of the alleged conspiracy, still, where such testimony upon introduction has been expressly limited to one defendant it cannot thereafter be considered against both, because if it had been admitted against the second defendant he might have been able to disprove it.

3. Conspiracy 🔑45—Time of soliciting money properly considered in determining intended purpose.

The fact that money to defeat a contemplated local prohibition ordinance, either by influencing the vote of the county supervisors or bringing about a referendum in case of its passage, was solicited before the supervisors had voted, and before it was known whether a referendum would be needed, is a circumstance that may properly be considered in determining the use intended.

4. Conspiracy 🔑47—Evidence held to sustain conviction for conspiracy to bribe county supervisors.

Evidence *held* sufficient to sustain conviction for a conspiracy to bribe county supervisors.

5. Criminal law 🔑1159(2)—Appellate court considers only sufficiency, not weight, of evidence.

The appellate court has to do only with the sufficiency of evidence, not its weight.

6. Conspiracy 🔑44½—Criminal purpose may be inferred.

Criminal purpose of defendants charged with conspiracy may be inferred from their acts and declarations.

7. Conspiracy 🔑47—Evidence held to establish doing of overt act.

Evidence *held* sufficient to establish the doing of overt acts, consisting of soliciting money to influence county supervisors' vote, pursuant to an agreement which would amount to a conspiracy under Pen. Code, § 184, as amended by St. 1919, p. 170.

8. Conspiracy 🔑27—Overt act need not be of itself criminal.

An overt act, pursuant to an agreement sufficient to complete the crime of conspiracy, need not of itself be criminal.

9. Criminal law 🔑427(5)—Abuse of discretion in admitting proof of conspirators' declarations held not shown.

Showing *held* insufficient to establish an abuse of discretion on the part of the court in permitting proof of declarations by alleged coconspirators, without sufficient independent evidence of the alleged conspiracy.

10. Criminal law 🔑696(7)—Motion to strike testimony should be specifically directed to objectionable part.

A motion to strike an answer, only part of which is objectionable, should be directed specifically to the objectionable part.

11. Criminal law 🔑1159(2)—Court cannot interfere with verdict supported by sufficient evidence.

Where there is sufficient evidence to support a verdict, the appellate court cannot interfere.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Walter E. Beck and John C. Calvert were convicted of conspiracy, and they appeal. Affirmed.

E. Fitzgerald, of Placerville, and Eugene S. Wachhorst, Donald E. Wachhorst, and T. A. Farrell, all of Sacramento (George A. Work, of Sacramento, of counsel), for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendants were convicted of conspiracy and prosecute this appeal from the judgment of conviction and the order denying their motion for a new trial. The indictment charges that the defendants conspired to bribe one of the supervisors of El Dorado county to influence his vote upon the question of adopting a prohibition ordinance, and that they—

> "in pursuance of said conspiracy and to effect the object thereof, did each contribute * * * the sum of twenty dollars * * * and did solicit money from one E. J. Barrett and from other persons to the grand jury unknown; and * * * did collect and receive * * * the sum of twenty dollars * * * from one John Zugnoni."

The defendant Beck was the proprietor of a hotel, and the defendant Calvert of the Klub Café in Placerville. Barrett and Zugnoni were in business in Camino, a few miles above Placerville, and Seymour Hill, a witness at the trial, conducted a business at El Dorado, a few miles below. It is to be inferred from the evidence that these five persons sold soft drinks at their respective places of business. In November, 1921, the board of supervisors had under consideration the adoption of an ordinance prohibiting the unlawful manufacture, possession, transportation, and sale of intoxicating liquors. The proposed ordinance was defeated by a majority vote of the supervisors on the 8th of November. Appellants' main contention is that the evidence is insufficient to prove such conspiracy. Some of the evidence was admitted generally as bearing upon the charge against both defendants, some parts thereof were expressly limited by the prosecuting attorney and the court to the charge against Beck, and other parts to that against Calvert. The testimony will be stated accordingly under three heads.

Evidence Not Limited.

The defendant Calvert testified:

> That, in a conversation between himself and Beck, on the 5th of November, the latter "spoke of the Little Volstead Act which was coming up for a vote before the board of supervisors the following week. He told me he had been led to believe it might pass, and, if it did, he suggested we get busy and start a referendum to put it to a vote of the people, which had been done the spring previous when he and Mr. Bert Simmons, who was then the proprietor of the Klub Café, had stood the cost, or most of the cost of the referendum." That on the 7th of November he took Mrs. Calvert, at her request, down to El Dorado to meet the Seymour Hill family, arriving there about 9:30 in the forenoon. That in a conversation there with Hill "I mentioned the fact about this Little Volstead Act coming up. * * * I told him what Mr. Beck had led me to believe that they might pass it, and that it would be a good thing to get busy and take up a little money to start a referendum. * * * Mr. Hill * * * said he wished to Christ they would pass the Little Volstead Act." That he and his wife returned to Placerville, and that the latter then suggested that they drive up to Camino "and perhaps have an Italian dinner." That they proceeded to Camino and arrived at Zugnoni's place about noon, where they had lunch. That after lunch his wife requested him to take her up to see a dance hall which he had told her about, and that they drove up to a point near Barrett's place, where the witness left his wife in the machine and proceeded on foot to Barrett's place of business. That "I passed the time of day with Mr. Barrett; I said to him, * * * 'I met our friend Beck as I was coming up to Camino' which I had met Mr. Beck a couple of miles down from Camino. Mr. Barrett said: 'Yes, what the hell do you think he was up here doing?' I said: 'I don't know.' He says: * * * 'He has been up here trying to gather up some money to start a referendum, he says they are going to pass the Little Volstead Act over you fellows down there.' * * * I said: 'I believe myself they are.' * * * Barrett says: 'I wish to Christ they would.' That he did not 'have a chance' to ask Barrett for money for the referendum. That 'Mr. Barrett was in favor that they pass the Volstead Act.'"

Zugnoni testified:

> That some time prior to November 11th Beck called at his place of business and asked for money; that he did not remember for what purpose Beck desired the money, but thought it was for a bill which Mrs. Zugnoni owed; that Beck did not state the amount he desired; that he (Zugnoni) did not have the money at the time, but paid Beck $20 November 11th.

[1] Zugnoni was apparently an unwilling witness for the prosecution. He testified that his memory was very poor and most of his answers were: "I don't remember." It was for the jury to determine whether the witness was deficient in memory or willfully evasive.

Evidence Limited to Charge Against Beck.

Barrett testified:

> That Beck met him at Camino on the 7th of November and "told me that the supervisors were about to meet, and that the Little Volstead Act was coming up to be voted on. He said that the vote could be turned, but it would take a little change. He said there were two wet and two dry; that is about all." That Beck said the fifth supervisor "was on the fence."

The witness then answered questions as follows:

"Q. Did or did not, in that conversation, Mr. Beck say to you anything about money or the amount of money which it would take to influence this vote? A. He did. Q. What amount, if any, did he state? A. Twenty dollars. * * * I contended it was too cheap to have anything to do with. Q. During that conversation whose name, if any, was mentioned in connection with this matter—what other name if any? * * * The name of anybody else who would be likely to contribute, or who would be asked to contribute money? * * * A. He mentioned John Zugnoni of Camino and John George, the Ivy House, Pacifico's, and Seymour Hill, * * * himself and Calvert. Q. Did or did not you in response to that request or that suggestion give Mr. Beck any money? A. I did not. * * * He told me it would take $20 apiece, and I took it for granted he was asking me for that amount, but the exact words he used I can't relate. * * * He told me it might take more later on."

Evidence Limited to Charge Against Calvert.

Barrett testified:

That on the 7th of November, after Beck had left, Calvert called at the witness' place of business. That "when he first came in he said: 'I met Beck going down the road' and he wanted to know if he didn't see me; * * * I said, 'Yes,' and I went on to explain to him what he was there for. * * * I gave him my version of it. * * * He told me that Seymour Hill was of the same opinion that I was." That no reference was made to a referendum while Calvert was there.

Hill testified:

That Calvert called on him at El Dorado on the 7th of November and "spoke something about raising a little fund of money for something, and he wanted to know what I thought about it; in fact, he never talked very much to me about it." That he mentioned the name of one of the supervisors, and "I told him I didn't want anything more to do with it. * * * He says: 'I don't think much about it myself.' * * * He mentioned" the name of a supervisor "and I said: 'I don't know anything about what you intend to do, but in my opinion it would not get any further than his pocket anyhow.'"

Charles Hand, sheriff of the county, testified:

That on the 13th of December he called Calvert to the sheriff's office, and "I informed Mr. Calvert of the facts in the case as I understood them, and Mr. Calvert told me that Mr. Zugnoni had contributed $20 and that Mr. Beck had contributed $20 and that he had contributed $20; that there was $60 raised. * * * He said it was for the purpose of influencing the board of supervisors on the vote that was to be taken on the Little Volstead Act. He said, furthermore, * * * that he did not think very much of the proposition, but he did not want to appear cheap and be a piker so he said: 'I just threw them $20.'"

Other witnesses testified to admissions made by Calvert but their testimony is only cumulative and need not be stated.

[2-6] If it be conceded that the statements of Beck and Calvert, as related by Barrett and Hill, were admissible as evidence against both defendants, on the theory that they were statements made in furtherance of the alleged conspiracy, such evidence can be considered only with relation to the charge against the defendant, to whose case it was expressly limited, because the other defendant might possibly have been able to disprove such testimony if it had been admitted as evidence against him. Keeping in mind such limitation, it is fairly to be inferred from the evidence of Calvert, which was not limited, that on the 5th of November the defendants agreed to raise money for the defeat of the proposed ordinance, either by influencing the supervisors to vote against its adoption, or by bringing about a referendum in case of its passage. On the 7th of November they both went out to raise the necessary funds. The fact that they solicited money prior to the time at which the supervisors were to vote upon the ordinance, at a time when they did not know whether a referendum would be necessary, is a circumstance to be considered in determining what use they intended to make of the money. Zugnoni's testimony, which was not limited, shows that Beck solicited and was paid $20 for some purpose, and, still keeping in mind the limitations upon the testimony, the jury was warranted in believing from the evidence admitted against either defendant that this money was solicited and received for the purpose of carrying out the agreement of November 5th. In view of the manner of his testifying and the character of his testimony, the jury may well have believed Zugnoni's statements as to the solicitation and payment of the money and refused to accept his statement that he thought the money was given in payment of a bill which his wife owed to Beck. Then particularly as to the charge against Beck, the testimony of Barrett is sufficient to show that Beck was endeavoring to raise money to bribe one of the supervisors. Calvert's interview with Hill and Barrett and his admissions to the sheriff are amply sufficient to show that he was endeavoring to accomplish the same purpose. It is true that Calvert denied the incriminating statements attributed to him, but this court has to do only with the sufficiency of the evidence, not its weight. The criminal purpose of the defendants was not proved by direct evidence, but may be inferred from their acts and declarations. In cases such as this, the prosecution is usually under the necessity of relying on the testimony of unwilling witnesses for a conviction. As said in Jenkins v. Commonwealth, 167 Ky. 544, 180 S. W. 961, 3 A. L. R. 1522, 1532:

"From the nature of the crime itself it is difficult to prove a criminal conspiracy by direct evidence, and such conspiracies are most always proved by circumstantial and 'piecemeal' evidence."

[7] Section 184 of the Penal Code (as amended by St. 1919, p. 170) provides:

> "No agreement amounts to a conspiracy, unless some act, beside such agreement, be done within this state to effect the object thereof, by one or more of the parties to such agreement."

[8] The overt acts here charged are: (1) The payment of $20 by each defendant; (2) the solicitation of money; (3) the receipt of $20 from Zugnoni. The evidence is sufficient to establish all of these alleged overt acts as against Calvert but only the second and third as against Beck. It seems clear that these acts are sufficient to make the alleged crime of conspiracy complete. The first step necessary to effect the object of the conspiracy was to solicit and collect the money to be given as a bribe, and these acts were certainly done in pursuance of the conspiracy.

> "A mere conspiracy, without overt act done in pursuance of it, is not punishable criminally, yet the overt act need not be in and of itself a criminal act; still less need it constitute the very crime that is the object of the conspiracy." Pierce v. United States, 252 U. S. 239, 40 Sup. Ct. 205, 64 L. Ed. 542, 546; United States v. Rabinowich, 238 U. S. 78, 35 Sup. Ct. 682, 59 L. Ed. 1211.

In Donaldson v. United States, 208 Fed. 4, 125 C. C. A. 316, plaintiff in error was convicted of conspiracy to receive, conceal, and facilitate the transportation of opium unlawfully imported into the United States. The court said:

> "The plaintiff in error performed the overt act of requesting Powers to aid in unloading certain specified opium then in the harbor on the steamship Siberia, and he took him to the steamer and introduced him to the Chinaman who had the opium in charge. Thereafter Gallagher [a coconspirator] went with Powers from San Francisco to Oakland to accomplish the object of the conspiracy. These were acts which tend to effect the object of the conspiracy, and it was enough if one of the acts charged was proven to have been done."

The following have been held sufficient overt acts under charges of conspiracy: Provisioning and sailing of a vessel in a conspiracy to smuggle Chinese into the United States. Daly v. United States, 170 Fed. 321, 95 C. C. A. 107. Telegraphic orders by one conspirator to another to make shipments of intoxicating liquors in a conspiracy to unlawfully ship such liquors. Witte v. Shelton, 240 Fed. 265, 153 C. C. A. 191. Cutting telegraph wires and going to or near the place at which the offense was to be committed in a conspiracy to rob the United States mail. Collier v. United States, 255 Fed. 328, 166 C. C. A. 498. Calling upon a coconspirator in pursuance of and to effect the object of the conspiracy. Gruher v. United States, 255 Fed. 474, 166 C. C. A. 550. Registration of an illegal voter in a conspiracy to procure such person to vote. State v. Nugent, 77 N. J. Law, 84, 71 Atl. 485.

[9] Appellant contends that the court abused its discretion in permitting proof of declarations by defendants without first requiring independent evidence of the alleged conspiracy.

> "Generally conspiracies cannot be proved as an independent fact, such as the execution of a promissory note, but are shown from circumstances, some testified to by one witness, and others by other witnesses. It is largely in the discretion of the court as to how much evidence of the existence of the conspiracy shall be required before receiving evidence of the acts and declarations of one of the alleged conspirators in the absence of the other." People v. Daniels, 105 Cal. 262, 265, 38 Pac. 720, 721.

It does not appear that the court abused its discretion as to the order in which the evidence was produced, or that the defendants suffered any possible prejudice on account of such order of proof.

[10] In answer to a question whether Beck had asked him to contribute money the witness Barrett replied:

> "He told me it would take $20 apiece, and I took it for granted he was asking me for that amount, but the exact words he used, I can't relate."

[11] Counsel for defendants moved the court to strike out the answer. The motion was denied. The motion was directed to the answer in its entirety. The only objectionable part of the answer at most is the statement, "I took it for granted he was asking me for that amount." The motion to strike out should have been directed specifically to the objectionable part since the other parts were entitled to stand. People v. Ho Kim You, 24 Cal. App. 451, 459, 141 Pac. 950. In any event, it is to be inferred from Beck's statements, as testified to by Barrett, that he was in fact seeking a contribution from the witness, and it does not appear that the denial of the motion resulted in a miscarriage of justice. The controverted issues were resolved against the appellants by the jury, and, since there was sufficient evidence to support the conclusion of guilt, this court cannot interfere with the verdict.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

60 Cal. App. 464

ALLEN'S COLLECTION AGENCY v. MEANS. (Civ. 3918.)

(District Court of Appeal, Second District, Division 1, California. Jan. 18, 1923.)

1. Brokers 🔑86(1)—Finding that no agreement to pay commission for procuring purchaser was made sustained.

Evidence *held* to sustain finding that no agreement to pay a commission for procuring a purchaser for a business was made.

2. Costs 🔑260(4)—Appeal held for delay warranting allowance of damages.

In an action where the evidence clearly preponderated in favor of defendant and an appeal was taken by plaintiff on the sole argument that the testimony is overwhelmingly in his favor, *held*, that the appeal was for delay and damages in excess of cost allowable.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by Allen's Collection Agency against P. P. Means. Judgment for defendant, and plaintiff appeals. Affirmed.

T. F. Allen, of Bakersfield (Dorris & Henderson, of Bakersfield, of counsel), for appellant.

Emmons, Aldrich & Heck, of Bakersfield, for respondent.

CONREY, P. J. Plaintiff brings this action as assignee of one B. F. Cooper to recover commissions alleged to have been earned under a contract whereby the defendant agreed to pay Cooper a commission for the sale of defendant's cleaning and dyeing business to any customer or purchaser procured by Cooper. It is alleged that pursuant to that agreement Cooper did procure a purchaser, one Charles T. May, to whom the defendant sold said business.

[1] It is conceded that there was no written contract. The plaintiff and another witness testified to conversations between Cooper and defendant, which conversations we will assume (without deciding) would have been sufficient to constitute a contract. But the defendant in his testimony stated that he never asked Cooper to sell his plant for him, never asked Cooper to see if he could find a buyer for him, and never agreed to pay Cooper a commission for any such service. It is true that after said alleged conversations Mr. May learned from Cooper that said property of the defendant probably was for sale and, after learning that fact, May went to defendant and bought the business. Cooper was not engaged in any brokerage or agency business. His connection with this sale was only of a casual nature. In substance, the only ground of appeal is that the evidence is insufficient to sustain the finding of the court that the alleged contract between defendant and Cooper was not made, and that Cooper did not, pursuant to any agreement, procure a purchaser for said business. The sole argument in support of this point arises from appellant's claim that the testimony is "overwhelmingly in favor of the plaintiff's contention." The rule against this contention, in cases where there is a substantial conflict in the evidence, is so thoroughly established by innumerable decisions that we are forced to the conclusion that the appeal in this case was made for delay.

For that reason the judgment is affirmed, with damages hereby allowed to the respondent on account of said appeal, in the sum of $50 in addition to the costs.

We concur: JAMES, J.; HOUSER, J.

---

60 Cal. App. 445

ANDERSON v. STANDARD LUMBER CO. (Civ. 2534.)

(District Court of Appeal, Third District, California. Jan. 15, 1923.)

1. Appeal and error 🔑2—Code provisions as to appeal should be liberally construed, to promote the disposition of courts to hear appeals upon merits.

The disposition of the courts is to hear appeals upon their merits, and the Code sections relating to the subject should be liberally construed, with the view of promoting such purpose.

2. Appeal and error 🔑417(1)—Notice of appeal may be part of same paper that directs clerk to prepare record.

It is no objection to a notice of appeal that it is a part of the same paper that directs the clerk to prepare a record.

3. Appeal and error 🔑417(1)—Notice that plaintiff "desires and intends" to appeal held sufficient to confer jurisdiction on appellate court.

A notice of appeal that plaintiff "desires and intends to appeal" *held* sufficient to confer jurisdiction upon the appellate court under Code Civ. Proc. § 940, providing that "an appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof."

Motion to Dismiss Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by George A. Anderson against the Standard Lumber Company. Judgment for defendant, and plaintiff appeals. On motion to dismiss appeal. Motion denied.

H. W. Zagoren, of Sacramento, for appellant.

J. B. Curtin, of Sonora, for respondent.

BURNETT, J. Respondent has moved to dismiss the appeal upon the ground that no actual notice of appeal was ever given. The language adopted by appellant to effect his purpose is as follows:

> "You and each of you will please take notice that the plaintiff in the above-entitled action desires and intends to appeal to the District Court of Appeal of the state of California, Third Appellate District, from the judgment made and entered in said action," etc.

It is the contention of respondent that the foregoing is not equivalent to a notice that the plaintiff "does appeal," but that it simply expresses a purpose or intention to appeal in the future. Respondent calls attention to various Code sections, among them, section 941b, Code of Civil Procedure, and the decisions of the Supreme Court in Boling v. Alton, 162 Cal. 297, 122 Pac. 461, and Wall v. Hunter, 186 Cal. 473, 199 Pac. 775. Said section 941b provided:

> "Any person to whom the right of appeal from any judgment, order or decree of the superior courts of the state is granted, may appeal therefrom by filing with the clerk of the court in which the judgment, order or decree is rendered, a notice entitled in the cause in which said judgment, order or decree was made, which said notice shall state that the person giving the same does thereby appeal to the Supreme Court or District Court of Appeals as the case may be, from the judgment, order or decree, or some specific part thereof," etc.

It is to be observed, however, that this section was repealed in 1921 (Stats. 1921, p. 194) before said notice was given herein, it being dated December, 1921, and section 940 of said Code was amended (St. 1921, p. 193) so as to read:

> "An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof."

This repeal seems to have escaped the attention of counsel, and it may be important, since the statute does not now prescribe so definitely what the notice of appeal shall contain. In the Boling Case, supra, the only notice was:

> "You will please take notice that the defendant in the above-entitled action, Thomas Alton has appealed to the district court of appeal," etc.

Therein it was truly said:

> "It does not comply with the provisions of section 940 or 941b prescribing the method of taking an appeal. It states, in effect, that an appeal had been theretofore taken, which was not true."

Manifestly, by no reasonable construction could it have been held that an untrue statement, namely, that an appeal had been taken, was equivalent to a notice of an actual appeal. The same infirmity appeared in Wall v. Hunter, the notice being as follows:

> "You will please take notice that the plaintiff in the above-entitled action has appealed to the Supreme Court of the state of California from the order entered," etc.

On the other hand, appellant claims that the decision in the Estate of Nutt, 180 Cal. 419, 181 Pac. 661, is directly in point and requires that the motion herein be denied. It is true that the notice therein considered does not appear in the report of the case, but an examination of the original record shows that the purported notice of appeal was as follows:

> "Notice is hereby given by W. Roy Simpson, proponent in the above-entitled matter, that he desires to appeal to the Supreme Court of the state of California from the whole of that certain judgment made and entered," etc.

The only difference, it will be observed, between that notice and the one before us is that herein we have the additional words "and intends." To the claim that said decision is controlling herein, respondent answers:

> "Appellant endeavors to sustain his position by citing Estate of Nutt, 180 Cal. 422, 181 Pac. 661, but in that case the principal point considered was the question of not serving the notice of appeal on one party who was there held not to be an adverse party, and service was not necessary and while the court does not set out the notice of appeal as there before the court, the appellant has taken pains to examine the record on appeal in that case, and from the instruments copied and annexed to his points it would seem that on hearing of the motion, an affidavit was then before the court showing omission and the court concluded to allow the appeal to stand, and hence the notice of appeal was not set out in the decision, but be that as it may, the court where the question was squarely before it held in both Boling v. Alton, 162 Cal. 299, 122 Pac. 461, and Wall v. Hunter, 186 Cal. 473, 199 Pac. 775, that the notice as given was insufficient and the appeal was dismissed."

Respondent is mistaken as to the principal point considered therein. It was only one of the reasons urged for the dismissal of the appeal. The other was the same as is presented herein, viz. that there was no actual notice of appeal, and this consideration the Supreme Court treated as follows:

> "The other ground of the motion to dismiss was that no sufficient notice of appeal was ever filed. As to this ground, we orally stated our views from the bench at the time of the hearing of the motion, to the effect that the notice should be held to be sufficient. No useful purpose would be subserved by further discussion of this point."

It is true that an affidavit was filed in the Supreme Court by the appellant stating, among other things:

> "That said notice was filed, as aforesaid, for the express purpose, and with the intention of appealing from the decision of the trial court to the Supreme Court; that through inadvertence of the clerk in affiant's office, who prepared said notice of appeal, the words 'desires to appeal' were used, instead of the words 'does appeal.' "

But it is difficult to understand how the notice could be aided by such an affidavit, and it seems the Supreme Court paid no attention to it. Herein, a similar affidavit has been filed, but, as we understand it, the motion must be determined by the consideration alone of the language used in said notice. The case of Wall v. Hunter, cited by respondent, is a later case, but it cannot be held to overrule the decision in the Estate of Nutt, since there was no statement therein whatever indicating a present intention to appeal.

[1, 2] Of course, the disposition of the courts is to hear appeals upon their merits, and the sections of the Code relating to the subject should be liberally construed with a view of promoting such purpose. Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69. It may be added that it is no objection to the notice that it is a part of the same paper that directed the clerk to prepare a record, as the dual purpose may be accomplished by one paper. In re Estate of Faber, 168 Cal. 491, 143 Pac. 737. It may be also added that this was the situation in the Estate of Nutt, supra, wherein the notice was almost identical with that herein.

[3] While it would be more satisfactory, if the notice had been more explicit, under the authority cited, it must be held sufficient to give the appellate court jurisdiction and the motion to dismiss the appeal is therefore denied.

We concur: HART, J.; FINCH, P. J.

(60 Cal. App. 477)

PEOPLE v. ESTRADA. (Cr. 934.)

(District Court of Appeal, Second District, Division 1, California. Jan. 19, 1923.)

1. Criminal law 🔑1144(13)—Evidence on appeal, presenting conflict, must be resolved against appellant.

Since the appellate court can consider only errors of law, if evidence on appeal presents a conflict, it must be resolved against appellant.

2. Homicide 🔑244(2)—Statement made by accused held not to indicate anything other than self-defense.

A statement made by accused after arrest *held* not to indicate anything other than a killing in self-defense.

3. Homicide 🔑118(2)—Defendant, attacked with knife and club, held not required to retreat.

Defendant, who had been attacked with a knife and club by one partially intoxicated and quarrelsome, *held* not required to retreat, since no duty to retreat is imposed on one who is without fault exposed to a sudden, felonious attack, and though the killing, to be excusable, must be under absolute necessity, actual or apparent, such a condition exists as a matter of law when an innocent person is placed in sudden jeopardy.

4. Homicide 🔑151(1)—Statutory burden of proving mitigating circumstances held inapplicable.

Where the evidence shows an excusable homicide, the state's case is not strengthened by reference to Pen. Code, § 1105, which places the burden of proving mitigating circumstances on accused, after it is shown he committed the homicide, since by its very terms the statute is inapplicable, where the proof tends to show only manslaughter or justifiable or excusable homicide.

5. Homicide 🔑244(2)—Evidence held to show self-defense.

Evidence, including a statement of accused, *held* to show an excusable homicide, and insufficient to support a finding of manslaughter.

6. Homicide 🔑174(7)—Rejection of evidence showing defendant did not conceal flight held not error.

Where the state made no point of or argument on accused's flight, though it was shown that after the killing he left home, the rejection of evidence that, when he left, he left word where he was going and made no effort of concealment, was not error.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Tom Estrada was convicted of manslaughter, and he appeals from the judgment and the order denying him a new trial. Reversed.

R. C. Noleman, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was charged with the crime of murder, and a verdict was returned finding him guilty of the crime of manslaughter. He appeals from the judgment, and from an order denying his motion for a new trial.

[1] It is first claimed that the evidence was insufficient to justify the verdict. The killing of Eduardo Murillo by appellant on the 3d day of July, 1921, in Clearwater, in the county of Los Angeles, was admitted; but appellant contends that, upon all of the evidence, but one conclusion can be drawn, and that is that the act was done in necessary self-defense. Necessarily, as this court, in its consideration of questions presented, is limited

to errors of law alone, if the evidence presents a conflict, the facts must be resolved against the defendant. The only direct evidence showing that the deceased was killed by the defendant consisted of a written statement, made by the defendant shortly after his arrest. On the morning of the 4th of July, 1921, the dead body of Murillo was found on the public roadside. There was a wound in his back on the left side, which the autopsy surgeon determined had been made by a knife which had penetrated the abdominal aorta. Close beside the dead man lay a club of eucalyptus wood, about 2½ to 3 inches in diameter and about 3 feet long. There were no wounds or bruises noticeable upon the body of Murillo, except that which has already been referred to. Around the body, and for a distance, in one direction at least, of approximately 12 feet, the grass which grew there had been trampled or beaten down, and there was blood in several places within the trampled area. The knife with which the fatal wound was inflicted was not found. Relations between the deceased and defendant had been friendly. The deceased boarded at the house of the mother of defendant, where the latter also lived. During the afternoon of the 3d of July the two men had been together, and called upon several of their friends in the neighborhood, and had had several drinks of intoxicating liquor. There was evidence showing that the deceased had been drinking during the month preceding the day of the tragedy, although as to the quantity and kind of liquor drunk by him the evidence does not show, nor does it show how often he drank. At about 10 o'clock of the night of the 3d of July, the man at whose house deceased and defendant last called walked some distance down the road with them, when he left the two men together. This man testified that deceased was quarrelsome, and that deceased said to defendant, "I am going to do you up, you and your mother, too."

As to what occurred between the two men from that point on to the time when the fatal blow was struck no witness was produced to tell, and the jury had only the statement of the defendant to advise them of the details of the encounter. That statement will shortly appear. On the following morning defendant requested a friend to drive him several miles away to an old adobe house on a neighboring ranch, at which place he was arrested shortly after the discovery was made of the dead body of Murillo. When the arresting officer informed him of what the charge was, he replied, "I don't know anything about it." He was immediately taken to the county jail. Before being incarcerated therein, it was noticed that when he was touched on his left side he winced, although he had up to that time made no complaint of any injuries. Upon the officer's inquiring of him what was the matter, he said that he had been injured, and after his shirt had been taken off a very large bruise was discovered on his left breast and across his left shoulder. The bruise on the chest was described as being about as "big as a man's fist." The officers thereupon inquired of him as to whether he was willing to make a statement, and he said that he was so willing, and proceeded to tell what had happened between him and Murillo after they had been left on the road by the friend. The prosecution introduced this statement as a part of its testimony at the trial, and the defendant did not testify.

The matter of the sufficiency of the evidence suggests two questions: First, upon the facts as shown by the statement made by the defendant at the jail after his arrest, was the defendant shown to have been justified in the killing of Murillo as an act of self-defense? Second, if the conclusion on that proposition is in the affirmative, were any other facts shown (and we have given the gist of all of them) which would furnish ground for the finding of guilt by the jury? We here quote the statement as made by the defendant in the presence of the arresting officers at the county jail in full, as it is shown in the transcript, except that a word of vulgar import is omitted, as indicated by the parentheses. The term employed is sufficiently apparent from the context without being literally reproduced.

"Q. What is your name? A. Tomas Estrada. Q. Where were you born? A. In the United States. Q. What town? A. Los Angeles. Q. Are you willing to make a statement, free and voluntary, without duress, or threats of any kind? A. Yes. Q. Where were you on Sunday night, July 3d? A. In Clearwater, I was with Ed Murillo and Samon Maccias. Q. Where did you meet them? A. I met them at four o'clock in the afternoon and we went to Samon's house, and from Celestin's house went to Acevedo's house. We stayed there at Acevedo's house two or three hours. Q. Did you have anything to drink? A. Yes, but Acevedo had some— He gave us a few drinks. Q. After you had your drinks what did you do? A. He gave us a half a gallon of potato wine. Q. It has a good kick? A. I think it has. Q. What did you do then, what happened? A. Then we started for the house. Q. Whose house? A. I was going to my house and Samon was going to his house. Q. Where was the deceased? A. He was with us, that is, Samon, the deceased and us; Ed started to abuse me and wanted to fight. Q. What did he say? A. He told me to go and (———) my mother and it was not the first that he owed. Q. What did you understand when he told you to go and (———) your mother, and it was not the first he owed, what did you understand? A. I understood it, that being he had killed my half-brother, he could kill me. Q. Is that what you understood? A. Yes, sir. Q. When did he kill your half-brother and where? A. He killed him between

San Pedro and Wilmington. Q. How long ago? A. About four or five years ago, I think; then right after that he struck me a blow. Q. Where did he hit you? A. On the jaw, and then we clinched and I broke away, and he went over and got a club, and when he was coming back he had a knife in his hand. Q. In what hand? A. I could not tell you what hand it was in. Q. How do you know he had a knife? A. I saw it. Q. You don't know in what hand he had it? A. I think he had it in his left hand, because he had the club in his right hand. Q. What did he do? A. He struck at me with the club, and he hit me with the club on the left hand, and the second blow (indicating) he hit me on the left breast, and then he struck me another blow on the right arm, a glancing blow, I saw the knife drop, and then I grabbed the knife, as he swung to strike me, he swung around and as he did I shoved the knife in him, and stuck him on the side (indicating). Q. And what did you do? A. And then I left. Q. What did you do with the knife? A. I dropped the knife. Q. Where? A. Close to the body of the deceased. Q. And what next? Where did you go? A. I went to my house, to my mother's house. I did not want to tell my mother what had happened, and I went over to the adobe, and then I stayed there until the officers came for me. Q. Had you had any trouble with this man before? A. No, not any trouble, but he always tried to belittle me, he always had it in for me. Q. How do you know he had it in for you? A. I don't know why he had it in for me. I never done him anything. I never done him any harm. I done him good. For a fact he owe me $6 that I loaned him. He had not been working for some time. Q. Did you have a coat on when you went over to Acevedo's house? A. He had a thin coat on, and he said he was cold, and I loaned him my coat. Q. Where were you when you loaned him your coat? A. I was leaving Acevedo's house. Q. Was this your book and coat found near the body of the deceased? A. Yes."

[2, 3] In our opinion there is nothing indicated by the narrative, as expressed in the statement of the defendant, to warrant the conclusion that defendant, in repelling the attack of Murillo, acted other than in necessary self-defense. The deceased was quarrelsome and threatening, and, while the facts of that occurrence are not made to appear, it does not appear that the defendant knew that at a prior time the deceased had killed a half-brother of defendant. A further fact appeared in evidence, which may be added to the preceding statement, and that is that deceased was a young and vigorous man of about 27 years of age, heavier and more muscular than the defendant, who was at the time about 35 years old. As the defendant pictured the encounter, no particular interval of time elapsed between the acts of assault committed by deceased until the fatal blow was struck. There was no duty resting upon the defendant to retreat under the circumstances.

"Our law nowhere imposes the duty of retreat upon one who without fault himself is exposed to a sudden felonious attack, and that the duty of withdrawal or retreat is imposed upon him alone who is the first aggressor, or has joined in a mutual combat. * * * This state has upheld a defendant's right to stand his ground and meet by force a sudden and violent attack. So that while the killing must be under an absolute necessity, actual or apparent, *as a matter of law* that necessity is deemed to exist when an innocent person is placed in such sudden jeopardy." People v. Lewis, 117 Cal. 191, 48 Pac. 1089, 59 Am. St. Rep. 167, citing People v. Hecker, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403.

It was not necessary that the defendant should have in words pictured his state of mind as it was at the time of the attack, for under his statement of the encounter the circumstances were such as to indicate nothing else but that by doing what he did he was defending himself against a murderous assault then being made by the deceased. That the attack made by Murillo was of that character, the defendant's swollen and bruised body and the production of the club used by the deceased furnished sufficient evidence, if defendant's own statement was not conclusive on that proposition.

[4, 5] The case for the prosecution is not aided at all by reference to the provisions of section 1105, Penal Code: rather the contrary. That section provides as follows:

> "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, *unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.*"

The proof on the part of the prosecution (referring now to the statement of the defendant) did, as we have indicated, show a case of justification, and there is nothing in any of the other evidence presented which in any wise tends to contradict or dispute defendant's version of the affair. The fact that upon the ground there were signs of a struggle, indicated by the trampling down of grass, and that spots of blood were distributed in several places away from the body, is wholly consistent with the story told by defendant. The latter was not asked to describe precisely what movements were made and what ground was covered by the two men engaged in the encounter. The distribution of blood at the several places may have been occasioned by the movements of the deceased after he had been cut by the knife and before he fell to the ground. The surgeon who made the post mortem examination testified that a man wounded as deceased was might die very quickly or not for some time thereafter—even several hours. We conclude that defendant's first contention is well made, and that the verdict of the jury is not supported by the evidence.

Other errors are urged, which refer to instructions as given and refused, and to the ruling of the trial judge in excluding offered evidence showing that at the time defendant left his customary abode on the morning after the tragedy and went to the adobe house he left word as to where he might be found if he was wanted. The instructions of the court, taken as a whole, must be said to correctly state the law. While conceding this, it may be added that in their tenor the instructions of the court were critical of the self-defense claim. The court might well have given more comprehensive instructions on the right of self-defense, as viewed from the standpoint of the accused.

[6] As to the rejected evidence, error does not appear, because no contention appears to have been made by the prosecution that defendant's act in going away and to the adobe house on the morning after the tragedy was a circumstance tending to show flight and hence indicating a consciousness of guilt. No instruction was given the jury to advise them that evidence of this act of the defendant should be considered as showing an attempt to escape arrest. If the prosecution had relied upon the fact as showing flight, and the court had predicated an instruction upon it, it would seem clear that the rejected testimony should have been admitted. Flight involves concealment, and, if there was no concealment, evidence of the departure of an accused person from his customary place of abode could hardly be considered as a guilty circumstance.

We have adverted to the latter contentions of appellant because of their being the subject of serious argument in the briefs. Our conclusion on the first point considered necessarily and by itself disposes of this appeal.

The judgment and order are reversed.

We concur: CONREY, P. J.; HOUSER, J.

190 Cal. 433

CALIFORNIA CASUALTY INDEMNITY EXCHANGE v. INDUSTRIAL ACCIDENT COMMISSION et al. (L. A. 7410.)

(Supreme Court of California. Feb. 17, 1923. Rehearing Denied March 16, 1923.)

1. Master and servant ⚷375(1)—Truck driver returning from lunch held not to have received compensable injury "arising out of and in course of employment."

Where a driver of an ice truck was killed while crossing the street from a cigar store just after having obtained lunch at a place where his duties did not call him, the employer permitting him to take his lunch where and when he desired, the injury did not arise out of or happen in the course of his employment so as to warrant an award of compensation to his dependents, under Workmen's Compensation Act 1917, § 6(a), as amended by St. 1919, p. 912, § 2.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

On Petition for Rehearing or Modification of Judgment.

2. Master and servant ⚷417(9)—Effect of determination on appeal.

A decision of Supreme Court, in reviewing on certiorari an award of the Industrial Accident Commission, that facts shown did not warrant an award of compensation, and annulling the award, *held* to set the matter at large, and the commission could admit additional evidence.

In Bank.

Proceeding by Mrs. Lena Young and Merle Wayne Young, a minor, by Mrs. Lena Young, his guardian ad litem, under the Workmen's Compensation Act, to obtain compensation for the death of Charles W. Young, husband and father, opposed by the Union Ice Company, employer, and the California Casualty Indemnity Exchange, insurance carrier. There was an award of compensation, and the insurance carrier brings certiorari. Award annulled.

Willis I. Morrison, of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

WASTE, J. This is a proceeding to review and have annulled an award of the Industrial Accident Commission against petitioner, the insurance carrier of the Union Ice Company, employer of Charles W. Young, deceased, made in favor of his widow and his minor son, in the maximum amount for death benefit allowed under the Compensation Act.

[1] The facts are undisputed. Petitioner's statement thereof, accepted by the respondents, is as follows:

"The Union Ice Company is engaged in the manufacture and delivery of ice in Los Angeles and vicinity, with plants at Hollywood and elsewhere. Delivery routes are laid out by its route foreman to enable its customers to be supplied in the most efficient and economical manner, and so laid out as to avoid the necessity of covering the same streets twice in any one day. Each driver is assigned to a designated route, and one that he can cover in an average day, usually fairly early in the afternoon, and is through for the day and at liberty to go home as soon as the assigned route has been covered. The drivers are given more or less leeway in the time and manner of covering the route, and are expected to get their lunch during the day. No specified hour is set aside for lunch, the drivers being allowed to procure lunch as and whenever desired, in a public restaurant, at home, or elsewhere.

"The deceased was an old employee of the Union Ice Company, thoroughly familiar with the particular route assigned to him. Frequently he covered a part of his route which would bring him to a cafeteria located at Palm avenue and Santa Monica boulevard, Sherman, about 7 a. m., made a delivery of ice to the cafeteria, and got his breakfast, then covered another portion of the route, returning to this same cafeteria about noon for lunch. Neither his assigned route nor the requirements of his customers necessitated his return to the cafeteria during the noon hour, this return being for the sole purpose of obtaining his noonday meal. As stated, he could have gone home for lunch, had he so desired, or obtained it elsewhere, the only requirement being that he make his route in average time, with considerable latitude to him. If he wanted to get home very early, he might hurry over his route, or otherwise could take his time.

"On the day of the accident, as on frequent other occasions, the deceased was accompanied over his route by his minor son, the respondent Merle Wayne Young, the two taking breakfast at the cafeteria, at which time a delivery of ice was made there, and then returning to the cafeteria for lunch at about 11:30 a. m., and for no other purpose, the deceased having no business to transact in that vicinity at that time for his employer. The truck was parked on the opposite side of the street, and the two crossed the street to the cafeteria for lunch. After luncheon at the cafeteria, the father left his son in the cafeteria, and went on down the street to a cigar store to get a 'smoke.' The boy crossed the street in safety to the truck, but the father, upon starting across after coming out of the cigar store, was run down and killed after proceeding but a little way into the street, and before he crossed to the side on which his truck was parked."

The finding of the Industrial Accident Commission on these facts is that the "injury occurring as above set forth arose out of and happened in the course of the employment of said employee." But such finding is not supported by the concurrence of the necessary conditions of compensation required by the act. Stats. 1919, p. 912, § 6 (a). To entitle the representative of the deceased to recover in this case it must be shown that

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the employee, at the time of the injury, was not only "performing service growing out of and incidental to his employment, and acting within the course of his employment," but also that the injury was proximately caused by such employment. In the very broadest sense, of course, it is true that the injury to the decedent grew out of and was incidental to his employment, since it was necessary that he should return from the place where he lunched to the truck. The right to an award is not alone founded upon the fact that such is the case, but upon the fact that the service the employee is rendering at the time of the injury grows out of and is incidental to the employment. For instance, it is the rule that an employee going to and from his place of employment is not rendering any service, and begins to render such service only when he arrives at the place of his employment, and proceeds to use some instrumentality provided, by means of which he immediately places himself in a position to perform his task. Ocean Accident, etc., Co. v. Ind. Acc. Comm., 173 Cal. 313, 322, 159 Pac. 1041, L. R. A. 1917B, 336. It was not intended by the Compensation Act that the employer who comes within its provisions shall be the insurer of his employee at all times during the period of his employment.

The employer is liable for compensation only when an injury occurs to the employee while performing some act for the employer in the course of his employment, or incidental to it. Fairbank Co. v. Ind. Comm., 285 Ill. 11, 13, 120 N. E. 457. There must be some connection between the injury and the employment other than the mere fact that the employment brought the injured party to the place of injury. There must be some causal connection between the employment and the injury in the sense that, by reason of the employment, there was an unusual or additional exposure of the injured party to the kind or character of hazard and danger (in this case an ordinary street risk) which caused the injury. The injury must have its origin in a risk connected with the employment, and must have flowed from that source as a rational and natural course. In re Betts, 66 Ind. App. 484, 118 N. E. 551. In that case the employee, a furnace repairman, was returning from lunch to the place where he was working. He was riding with his employer. He said: "I want to get off and get some tobacco." As the driver stopped the horse, Betts stepped from the wagon into the street to go across to a store. He had taken but two or three steps when he was struck by an automobile and killed. His heirs were awarded compensation against the employer. In reversing the award the court said (at page 487 of 66 Ind. App. at page 552 of 118 N. E.):

> "We understand that all of these cases recognize and in effect hold that: 'It is not enough for the applicant to say, "The accident would not have happened if I had not been engaged in that employment, or if I had not been at that particular place." He must go further and must say, "The accident arose because of something I was doing in the course of my employment, or because I was exposed by the nature of my employment to some particular danger."'"

Other cases affirming the rule which prevails in this state are Clark v. Voorhees, 231 N. Y. 14, 131 N. E. 553; Taylor v. Binswanger, 130 Va. 545, 107 S. E. 649.

On the day on which the injury occurred Young, the decedent, breakfasted at the cafeteria located on Palm avenue and Santa Monica boulevard, at which time he made his delivery of ice. Neither his assigned route nor the requirements of his customers necessitated his return to that place. He had no business to transact for his employer in that vicinity. His movements during the time he was getting his noonday lunch were dictated wholly by his own desires and as the convenience of the route admitted. Had he gone home for lunch, and been injured while returning to the place of his employment, the situation would be plain. We see no distinction between such a case and this. When he ceased delivering ice, deviated from his route, and returned to the cafeteria for lunch, he was not doing anything required by or incidental to the employer's business. When struck down by the automobile and injured, his relation to his employment had not changed. It has been suggested that the injury to the deceased was the result of a hazard and risk to which he was exposed equally with the general public. That is unquestionably so, but, in view of the conclusion we have reached, it is not necessary to further consider that question.

Respondents rely very largely upon Burton Transfer Co. v. Ind. Acc. Comm., 37 Cal. App. 657, 174 Pac. 72. In that case Fickett, the employee, was directed by his employer to haul a quantity of pipe to the depot. He procured his load, and was on his way to his destination when the noon hour arrived. Because he knew the depot was closed from noon until 1 o'clock, Fickett stopped at the premises of his employer, which were directly on his way, parked the loaded truck on the opposite side of the street, and went across to the office. Shortly before 1 o'clock the employer ordered him to proceed and take his load to the depot, in order that he might be there "at the time they open the doors and get away a little quicker." The employee left the office, started to cross the street toward his truck, and was run down by a passing automobile. In affirming an award of compensation for his injuries the District Court of Appeal held that Fickett was injured in the regular and usual discharge of his duties, and while obey-ing an instant direction of his employer. The mere statement of the facts is sufficient to differentiate that case from the one at bar. The decision in Papineau v. Ind. Acc. Comm., 45 Cal. App. 181, 187 Pac. 108, also relied upon by respondents, is so far at variance with the recognized legal principle accepted and followed in this state that it cannot be regarded as having any weight of authority. The facts underlying the decision in Judson Mfg. Co. v. Ind. Acc. Comm., 181 Cal. 300, 184 Pac. 1, clearly differentiate that case from this.

The award is annulled.

We concur: WILBUR, C. J.; KERRIGAN, J.; MYERS, J.; LENNON, J.; SEAWELL, J.

On Petition for Rehearing or Modification of Judgment.

PER CURIAM. [2] The Industrial Accident Commission petitions for a rehearing or a modification of the judgment of this court, so that the commission can admit additional evidence. It is unnecessary to modify the judgment for this purpose. The effect of our decision is to vacate the judgment heretofore rendered by the Industrial Accident Commission and to set the matter at large, for proceedings not inconsistent herewith. Carstens v. Pillsbury, 172 Cal. 572, 578, 158 Pac. 218.

The petition for a rehearing is denied.

WILBUR, C. J., and LAWLOR, LENNON, WASTE, SEAWELL, KERRIGAN, and MYERS, JJ., concur.

---

190 Cal. 475

In re PARKINSON'S ESTATE. (L. A. 7549.)

(Supreme Court of California. Feb. 24, 1923.)

1. Appeal and error 🔑1010(1)—Finding amply justified by the evidence not reviewed.

A finding by the trial court amply justified by the evidence cannot be reviewed on appeal.

2. Wills 🔑164(1)—Evidence that property in name of person alleged to have procured will by undue influence was in fact decedent's held inadmissible.

In proceedings to revoke the probate of a will on the ground of undue influence, evidence that certain property standing in the name of a sister of decedent, who it was alleged procured the execution of the will by undue influence, was in fact the property of decedent, *held* not admissible on the theory that the sister would have been more greatly tempted to influence decedent to make a will in her favor if the property to be derived by her was greater than she would have if it were less.

3. Appeal and error 🔑232(2)—Reason for admissibility of evidence not made in trial court not considered.

A reason for the admissibility of evidence not made in the trial court will not be considered on appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

In the matter of the estate of Charles A. Parkinson, deceased. On petition for the revocation of the will of deceased. From an order refusing to revoke the probate of the will, the petitioners appeal. Affirmed.

Albert Sidney Brown and Arthur E. T. Chapman, both of Los Angeles, for appellants.

Stewart & Stewart, of Los Angeles, for respondents.

WILBUR, C. J. [1] Appellants filed a petition for the revocation of the will of deceased, and the issue of undue influence raised by them was tried and determined adversely to them in the trial court. They claim on this appeal from the order refusing to vacate the probate of the will that the finding that the will was not procured by the undue influence of Ida J. Parkinson is contrary to the evidence. Even upon the view of the evidence on this subject most favorable to the appellants, it is clear that there is a conflict of the testimony. Ida J. Parkinson testified, in effect, that she did not exercise any influence whatever upon the decedent in connection with the execution of the will. Other corroborating testimony was received, and was amply sufficient to justify the finding of the trial court, and therefore that finding cannot be reviewed by us. No useful purpose would be subserved by an analysis of the testimony upon this issue.

[2, 3] Appellants also claim that the trial court erred in its refusal to receive testimony concerning the character and value of the estate of the deceased. The trial court permitted the introduction of evidence showing the value and character of the estate in California. The value, as shown by the inventory, was $5,550. Appellants claim that they had a right to show that certain property standing in the name of the sister, Ida J. Parkinson, was, in fact, the property of the decedent. The reason given the trial court for the introduction of this evidence seems to be, in substance and effect, that the sister would have been more greatly tempted to influence the decedent to make a will in her favor if the property to be derived by her was greater than she would have if it were less. The evidence was not admissible for that purpose. Upon the argument in this court it was claimed that the evidence was also admissible to show a trust relation between the decedent

and his sister. It is a sufficient answer to this claim on appeal to state that it was not made in the trial court as a reason for the admissibility of the evidence when that matter was under discussion.

It is next claimed that the trial court erred in not requiring respondents to produce a document purporting to be a former will of the decedent, and in not permitting the appellants to introduce the same in evidence. It appears from the record that the document in question was produced and shown to appellants' attorney, and that it was not offered in evidence.

The judgment is affirmed.

We concur: WASTE, J.; MYERS, J.; KERRIGAN, J.; SEAWELL, J.; LENNON, J.; LAWLOR, J.

---

190 Cal. 458

BLOOM et al. v. COATES et al. (L. A. 7013.)

(Supreme Court of California. Feb. 23, 1923.)

1. Principal and agent 🔑132(1)—Record owner held not bound by written agreement to level land not made in her behalf.

Where defendant, a record owner of land exchanged it for other lands with plaintiffs, and defendant's son, who was claimed by plaintiffs to have an interest in the land, agreed in writing to level part of the land so that it could be rented, the writing purporting to be solely the agreement of the son, defendant could not be bound thereby; plaintiffs knowing at the time that she was the record owner, and the writing not purporting to be made in her behalf.

2. Principal and agent 🔑194(3)—Instructions as to effect of written agreement not binding on record owner held erroneous.

In an action for breach of defendant's agreement to level land taken in exchange by plaintiffs in accordance with an agreement made by defendant's son, who had an interest in the land, but not made on behalf of defendant, who held the record title at the time of the exchange, instructions that, if the son had no interest in the land, defendant could not be bound unless she acquiesced therein and received the benefits thereof, *held* erroneous, as in effect instructing the jury that, if they should find that defendant had knowledge of the agreement prior to the exchange and acquiesced therein and received the benefits thereof, she would be liable upon the agreement, notwithstanding that she was the sole owner and the agreement did not purport to refer to her as a party to be bound.

3. Principal and agent 🔑166(2) — Owner of land held not to have authorized agreement by purported agent to level land.

Where defendant exchanged land with plaintiffs, and defendant's son, who was claimed to have an interest in the land, agreed to level part of it at his expense, defendant could not be held to have ratified such agreement, where she had not authorized it nor had any knowledge or notice thereof, in view of Civ. Code, § 2310.

4. Judgment 🔑240—Judgment against two defendants for damages not segregated held erroneous.

Where defendant and her son exchanged property with plaintiffs, the son agreeing to level the land so that it could be rented, a judgment, holding defendant liable upon her agreement to level her share of the land, was erroneous, where the damages were not segregated.

In Bank.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by Walter R. Bloom and others against Eliza J. Coates and others. Judgment for plaintiffs, and defendant named appeals. Reversed as to defendant named.

Fred Horowitz, of Los Angeles, and Walter E. Barry, of Ventura, for appellants.

John B. Haas, of Los Angeles, for respondents.

MYERS, J. The following is the opinion of the District Court of Appeal herein, prepared by Mr. Presiding Justice Conrey:

"In or about the month of March, 1919, a 320-acre tract of land, the same being the north one-half of section 25, township 12 south, range 15 east, in the county of Imperial, was conveyed by deed of grant from one Launspach, the owner thereof, to the defendant Eliza J. Coates. The other defendant, R. M. Arnold, is her son. In April, 1919, Mrs. Coates executed to two Japanese tenants a lease covering 120 acres of said land at a specified rental to be paid. The lease contained a further agreement that the lessor would forthwith cause to be leveled an additional described 80 acres of her said land, which likewise she agreed to lease to said tenants at a separate stated rental to be paid by them. As to each of said tracts the lease was to be for a term of three years. In September, 1919, Mrs. Coates conveyed said land to the plaintiffs in exchange for certain land in San Bernardino county, and upon other considerations. The alleged cause of action of the plaintiffs upon which they have recovered judgment herein, arises out of alleged agreements incidental to the transaction of exchange. By the complaint it is alleged that on September 10, 1919, the title to 120 acres (being the same 120 acres first described in said lease) stood in the name of Eliza J. Coates, but that the defendant R. M. Arnold, at all times mentioned in the complaint, held a beneficial interest in and to said property, 'the extent of which is unknown to the plaintiffs.' The complaint then set forth a copy of the lease made by Mrs. Coates to the Japanese tenants, and alleged that she made it in her own name, but in fact for herself and for and on behalf of R. M. Arnold. It is then alleged that defendant Coates did for herself and on behalf of R. M. Arnold further expressly agree to carry out the terms of said lease by agreement in writing indorsed on the back of said lease in words and figures as follows, to wit: 'September 10, 1919. For value received I hereby assign, transfer and set over unto J. S. Pritchard and Walter R. Bloom, their heirs, or assigns, all my right, title and interest in and to the within lease. Eliza J. Coates.' 'It is hereby understood and agreed that all leveling is to be done as per terms of the within lease. Eliza J. Coates.' It is then alleged that on or about September 10, 1919, defendant Coates, on her own behalf and on behalf of R. M. Arnold, did grant, bargain, sell and convey unto the plaintiffs, by grant deed, said 320-acre tract of land. It is next alleged: (8) That on the 10th day of September, 1919, R. M. Arnold, as beneficial owner and in consideration of the sale of said land to the plaintiffs, made, executed, and delivered to J. S. Pritchard and Walter R. Bloom the following agreement:: 'September 10, 1919. Messrs. J. S. Pritchard and Walter R. Bloom. Gentlemen: In consideration of the sale to you of the following described land I hereby agree to level and put in position to rent balance of unleveled portion of the N. ½ of section 25, twp. 12 S., range 15 E., Imperial county, California. Work to be started within 15 days after this deal on said land is closed. R. M. Arnold. Work to be completed within 6 months from this date.' (9) That the said agreement was made, executed, and delivered by the said defendant R. M. Arnold as part consideration of the transfer of the beneficial interest and title of the said R. M. Arnold to the plaintiffs and in consideration of the purchase of the legal title and interest to the said land by the said plaintiffs from said defendant Eliza J. Coates. (10) That plaintiffs have performed all the conditions, terms, and covenants upon their part agreed to be performed. (11) That the said defendant Eliza J. Coates has failed and refused and still does fail and refuse to comply with her agreement to level or cause to be leveled the property as set out in the lease, which property is embraced in and included in the property as set out in the agreement executed by defendant R. M. Arnold, although repeated demands have been made on said Eliza J. Coates so to do. (12) That said defendant R. M. Arnold has failed and refused and still does fail and refuse to level or cause to be leveled the land set out in the agreement executed by said R. M. Arnold, which land embraces and includes therein the land which said defendant Eliza J. Coates agreed to level or cause to be leveled, although repeated demands have been made on said defendant R. M. Arnold so to do. (13) That by reason of said failure of said defendants to comply with the terms of their respective agreements, plaintiffs have been damaged in the sum of $10,000, the reasonable cost of leveling the said land, and in the further sum of $2,000, the reasonable rental value of the said land.

"The defendants having separately demurred to the complaint, and their demurrers having been overruled, they answered separately, and Mrs. Coates also filed a cross-complaint, seeking damages arising out of false representations concerning the San Bernardino county property received by her from the plaintiffs. Plaintiffs answered to the cross-complaint. The case was tried before a jury, which rendered a verdict in favor of the plaintiffs against both of the defendants, and awarded damages in the sum of $8,000. Judgment having been entered in accordance with the verdict, the defendant Eliza J. Coates alone appeals therefrom.

"From the record it is apparent that the damages awarded have been assessed equally against both defendants, upon the theory that appellant Mrs. Coates was bound, not only to do the leveling upon 80 acres as provided in the Japanese lease, but that she was also bound by said written agreement of R. M. Arnold, made in the terms hereinabove stated. If the complaint, in so far as it was founded upon a writing signed by Arnold, did not state a cause of action against appellant, then the court erred in overruling her demurrer to the complaint, upon the stated ground that several causes of action were improperly united, in that there was an alleged cause of action against appellant for breach of the contract signed by her, together with an alleged cause of action against Arnold on his several contract. Several causes of action may be united in the same complaint only when they 'affect all the parties to the action.' Code Civ. Proc. § 427.

[1] "Notwithstanding the allegation that the agreement signed by Arnold was made as part consideration of the transfer of his alleged beneficial interest and title to said land to the plaintiffs, 'and in consideration of the purchase of the legal title and interest to the said land by the plaintiffs from said defendant Eliza J. Coates,' we are of the opinion that the complaint did not state facts sufficient to charge appellant with any obligation upon the agreement signed by Arnold. The writing purports to be solely the agreement of Arnold. The several allegations of the complaint, read in their sequence, disclose the fact that at that time the plaintiffs knew that Mrs. Coates was at least the record owner of the 320-acre contract. That being so, she would not be bound as principal upon a writing which did not purport to be made in her behalf, and which was not executed by her. Our conclusion on this point is supported by the opinion of the Supreme Court in Ferguson v. McBean, 91 Cal. 63, 72, 27 Pac. 518, 520 (14 L. R. A. 65), where the court said: 'It is undoubtedly true that when the principal is undisclosed he may sue or be sued, but not when he is known, and especially not when he is present at the making of the contract. * * * Considered independent of authority, we think sound policy requires the enforcement, in cases such as these, of the general rule that a writing cannot be varied by parol. It is as important to know who has made a contract as to know its terms; and when the parties put it in writing, there is no more reason or excuse for omitting the name of a known party, whom it is the intention to bind, than there is for omitting its most important stipulation. To allow such a practice opens the door, in every case, to such conflicts of evidence as this case illustrates upon a point which can be easily and forever set at rest by simply making the written evidence of the contract conform to the mutual understanding of the parties as to matters fully within their knowledge. We think the superior court erred in overruling the demurrers, and in admitting the testimony referred to.'

[2] "We think that the court erred in submitting to the jury the question of liability of

appellant on the agreement signed by Arnold. The court instructed the jury 'that the rights and obligations of each of these defendants may be entirely separate and distinct from the rights and obligations of the other, or said rights and obligations may be joint, as you may conclude from the evidence and under these instructions.' The court further instructed the jury: 'That if you should find from the evidence that the defendant Eliza J. Coates was the owner of the land in Imperial county, and that the defendant Ralph M. Arnold had no interest in said land, and that the defendant Ralph M. Arnold, of his own accord, and without the express consent of the defendant Eliza J. Coates, executed an agreement to level the unleveled portion of the north ½ of section 25, township 12 south, range 15 east, then I instruct you that the defendant Eliza J. Coates cannot be bound by such agreement; unless you find that said defendant Eliza J. Coates had knowledge of said agreement prior to the exchange, acquiesced therein, and received the benefits thereof, the effect of this instruction was to inform the jury that if they should find from the evidence that appellant had knowledge of said agreement prior to the exchange, and acquiesced therein, and received the benefits thereof, she would be liable upon the agreement made by Arnold in his own name, notwithstanding that she was the sole owner of the land, and that the written agreement did not purport to refer to her as a party to be bound thereby, or at all. This is directly in opposition to the law as above set forth in our quotation from Ferguson v. McBean. Moreover, there is no evidence that appellant saw that agreement, or that its terms were communicated to her.

"It appears from the evidence that on August 13, 1919, four weeks prior to the transactions of September 10, defendant Arnold, as assumed owner of said 320 acres, signed a written instrument employing Stacy Realty Company as his agents, and authorizing them to exchange for him the said 320 acres of land, and agreeing to exchange the same for said land in San Bernardino county and other considerations to be paid by Bloom and Pritchard. On this instrument, and at its date, Bloom had signed an acceptance subject to the approval of Pritchard. In said agreement of August 13, immediately following the description of the 320-acre tract, these words occurred: 'Same to be leveled and put in position to rent.' The meeting of the parties at Stacy Realty Company's office on September 10 was arranged by Arnold with the plaintiffs and through the real estate agents for the purpose of carrying out that agreement. Appellant was present at the request of Arnold, who informed her that he had arranged to dispose of the Imperial county land for her.

[3] "It is contended by respondents that these last-mentioned facts concerning the agreement of August 13 take the case out of the rule declared in Ferguson v. McBean, supra, because at that time Mrs. Coates was an undisclosed principal of Arnold, who then and there was her agent; that Mrs. Coates relied upon Arnold and ratified his acts, and was thus bound by the statement in the agreement of exchange that the land was to be leveled; and that she accepted the benefits of the transaction and was thus bound to assume the burdens and to bear the obligations. From these stated facts, together with the fact, which respondents contend has been proven, that Arnold owned an interest in the land, it is argued that appellant should be held bound by Arnold's agreement for the leveling of the land. But there is a total absence of evidence that appellant at any time knew of the existence of said agreement of August 13, or that she had at any time given him written authority (the only legal authority) to exchange or sell her land for her. We do not know of any principle of law by which she can be held to have ratified a contract which she had not authorized, of which she had no knowledge, and concerning which she did not have knowledge of circumstances sufficient to put her upon inquiry. Said agreement of August 13 is thus wholly irrelevant as to the question of appellant's liability to plaintiffs in this action. Civ. Code, § 2310.

[4] "Assuming, without deciding, that appellant is liable upon her alleged agreement to level 80 acres of the land, exclusive of the 200 acres covered by Arnold's agreement, nevertheless the entire judgment against appellant must be reversed, since the damages have not been segregated."

The application for a hearing by this court was granted because of the earnest insistence of counsel for respondents that the district court had overlooked or disregarded substantial evidence which entitled them to recover against Mrs. Coates as an undisclosed principal, also evidence which bound her under the rule of ratification of a contract by acceptance of the benefits thereof, and evidence which brought into operation the principles of estoppel in pais. Further examination of the record convinces us that the foregoing opinion contains an accurate statement of the essential facts and a correct application of the rules of law thereto.

Mrs. Coates could not be in the position of an undisclosed principal herein, because it appears conclusively from the evidence that the plaintiff Bloom, who acted for both plaintiffs in this transaction, knew, before the deal was made, that she was the owner of the land. This fact brings the case squarely within the rule of Ferguson v. McBean, supra. The so-called contract of August 13th was not a contract at all. It was merely a proposal on the part of Arnold which was tentatively accepted by Bloom, "subject to approval of J. S. Pritchard, my partner." It was never approved by Pritchard, and never became binding upon anybody—nor does it appear ever to have been considered by any of the parties as binding any one. This disposes also of the claim of ratification of the contract of August 13th by the acceptance of the benefits thereof. There being no such contract, of course, there were no benefits thereof. In addition is the circumstance pointed out above that there is no evidence that Mrs. Coates ever had any knowledge of said so-called contract. Plaintiffs cannot claim an estoppel, because the plaintiff, Bloom, who was acting for both of them, testified expressly that he expected Arnold, and Arnold alone, to do the leveling.

The judgment is reversed as to the appealing defendant.

We concur: WILBUR, C. J.; WASTE, J.; LENNON, J.; SEAWELL, J.; KERRIGAN, J.; LAWLOR, J.

60 Cal. App. 466

TREAT et ux. v. LOS ANGELES GAS & ELECTRIC CORPORATION.

(Civ. 3875.)

(District Court of Appeal, Second District, Division 2, California. Jan. 18, 1923.)

Master and servant 🔑388—Complaint by parents for death of minor employee held to show they were "dependents" within Compensation Act.

A complaint by parents seeking recovery under Code Civ. Proc. § 376, for the death of a minor son from injuries arising out of his employment, alleging that deceased was contributing the sum of $10 per week to their support, shows that they are "dependents" within Workmen's Compensation Insurance and Safety Act, § 14, par. b, and their right of recovery is barred by that act providing in section 6 that recovery of compensation shall be the exclusive remedy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dependent.]

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Harold L. Treat and wife against the Los Angeles Gas & Electric Corporation. From a judgment for defendant, plaintiffs appeal. Affirmed.

John C. Miles and Bertrand J. Wellman, both of Los Angeles, for appellants.

Paul Overton, S. W. Guthrie, and Samuel Poorman, Jr., all of Los Angeles, for respondents.

WORKS, J. This is an action commenced by parents to recover damages for the death of their minor son. The young man was an employee of defendant, and at the time of the injury which caused the death was engaged in a work which both arose out of and in the course of his employment. The trial court sustained a general demurrer to the complaint, with leave to amend, and afterward, plaintiffs electing not to amend, rendered judgment for defendant. Plaintiffs appeal from the judgment. The only question to be determined on the appeal, it will be observed, is whether the complaint states facts sufficient to constitute a cause of action.

Appellants contend that the action is maintainable under the terms of section 376, Code of Civil Procedure, which provides:

> "A father, or * * * the mother, may maintain an action for the injury or death of a minor child, * * * when such injury or death is caused by the wrongful act or neglect of another. * * *"

Judgment was rendered against appellants in the trial court, however, upon the theory that the allegations of the complaint were such that a recovery under section 376 was barred by the provisions of the Workmen's Compensation, Insurance and Safety Act (Stats. 1917, p. 831; and as amended in part, Stats. 1919, p. 910. See Stat. as amended. Deering's Consol. Suppl. to Gen. Laws, 1917–1921, p. 1555), enacted by the Legislature many years after section 376. It is provided in paragraph (a) of section 6 of the Compensation Act, italics being ours, that—

> Upon the concurrence of several conditions which need not now be specified, "liability for the compensation provided by this act, *in lieu of any other liability whatsoever to any person*, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any such employee if the injury shall proximately cause death. * * *"

Paragraph (b) of the same section is to the effect, with certain provisos not of present interest, italics again being ours:

> "Where such conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this act, *shall be the exclusive remedy* against the employer for the injury or death. * * *"

Paragraph (c) of section 6 provides that—

> In cases "where the conditions of compensation do not concur, the liability of the employer shall be the same as if this act had not been passed."

Appellants point out that the act does not provide for compensation to be made to the survivors of those whose lives are lost through injuries received in the service of their employers, where such survivors are not "dependent" upon the deceased persons, and it is claimed by them that the complaint does not show that they were dependent upon their son during his lifetime. They quote an allegation of the pleading, "that by reason of the death of said child the plaintiffs have been deprived of the comfort, society, protection, love and affection of said child, to the plaintiffs' damage in" a certain sum, and insist that the terms thus employed do not show a dependency of the parents upon the son. The language quoted, however, is not the entire ad damnum clause of the complaint. That language is immediately preceded by this allegation, with a semicolon

---

between the two statements, "That said minor child of the plaintiffs resided with the plaintiffs and was a dutiful, obedient and home-loving child, and was contributing the sum of ten ($10.00) dollars per week to the support of the plaintiffs."

Taking the entire ad damnum clause together, it is apparent that the dependency of appellants upon the son appears upon the face of the complaint. It is provided by paragraph (b) of section 14 of the Compensation Act that—

> "Questions as to who constitute dependents * * * shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employee."

It appears plain to us, looking no further than this statute, that the fact is shown by the ad damnum clause, in its averment that the son was contributing $10 the week "to the support" of appellants, that they were dependant upon him. In a note to Temescal Rock Co. v. Industrial Acc. Comn., 13 A. L. R. 686–692, there is set forth a long list of cases showing what proof is necessary to show dependency under compensation laws when the question of dependency is an issue. Here the question is one of pleading, and we have no doubt that the allegation of the ultimate fact that the deceased minor "was contributing the sum of ten ($10.00) dollars per week to the support of the plaintiffs" is sufficient to embrace all the probative facts necessary to show dependency. In other words, it can hardly be said that one person is not dependant upon another person when the latter contributes to the support of the former. When money is contributed, not lent nor advanced, to the support of another, it is surely a factor in his support or maintenance. No more than that is necessary to prove dependency under the authorities collated in the note to which we have referred. We are satisfied that the provisions of the Compensation Act deprive appellants of all right of recovery under the terms of section 376, Code of Civil Procedure, and that the trial court ruled correctly is sustaining the demurrer to the complaint.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

60 Cal. App. 474

TRUBE v. KATZ. (Civ. 4067.)

(District Court of Appeal, Second District, Division 1, California. Jan. 19, 1923.)

1. Fraud 🔑47—Complaint held not to disclose grounds of recovery by employee for deceit causing loss of position; "alter her position to her injury."

Where plaintiff, who had been employed by the firm of which defendant was a partner as saleslady at a salary of $200 a month, brought suit against defendant for wrongfully deceiving plaintiff "to alter her position to her injury" alleging that defendant transferred her from such position to that of assistant buyer at $300 per month, which necessitated a railroad journey during which defendant attempted to have unlawful sexual intercourse with her, to which she refused to consent, and that by reason of the deceit plaintiff lost her position as saleslady *held*, that the action was not maintainable, as plaintiff did not, by accepting the employment, alter her position to her injury within Civ. Code § 1709, the last contract of employment being binding.

2. Assault and battery 🔑21—Action for assault held barred after one year.

An action for assault not commenced until one year after the offense is barred by the express provisions of Code Civ. Proc. § 340, subd. 3.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Georgina Rose Trube against Arthur Katz for damages. Judgment for defendant on demurrer, and plaintiff appeals. Affirmed.

Frank A. McDonald, of Los Angeles, for appellant.

Isaac Pacht and Newby & Palmer, all of Los Angeles, for respondent.

CONREY, P. J. The court having sustained defendant's demurrer to the plaintiff's third amended complaint, without leave to amend, entered judgment in favor of the defendant. Plaintiff appeals from the judgment.

Appellant admits that the complaint did not state a cause of action for damages resulting from an assault. Her only contention is that she has stated a cause of action on account of deceit, whereby she was caused to alter her position to her injury. Civ. Code, § 1709.

The complaint alleged that the defendant was a member of the firm of Katz Bros., engaged in merchandising business; that from the first day of July, 1919, to the 18th day of December in that year she was employed by said firm as saleslady at a salary of $200 per month; that on the 18th day of December, 1919, "defendant for the purpose of willfully deceiving the plaintiff with the intent to deceive her to alter her position to her injury or risk," stated to the plaintiff that he was transferring her from the position of salesday to the position of assistant buyer for the stores of the firm, and that from that day her salary would be the sum of $300 per month; that he instructed her to go with him to the city of New York for the purposes of her said employment as assistant buyer; and that they left the city of Los Angeles for the city of New York on the 20th day of the said month of December. She alleged certain attempted immoral conduct of the defendant toward her on said train on the night of December 21, 1919, to which she refused to consent; "that she then and there and thereupon discovered and learned for the first time that she had not been appointed such assistant buyer at said salary, or any other sum or salary, and that in said or any other capacity, it was not necessary for her to leave Los Angeles, * * * and that said representations made to her as aforestated by the defendant that she was transferred, appointed to, and given said position of assistant buyer at said salary, and that in and about her duties as such she would be required to leave Los Angeles over said Santa Fé route were wholly untrue, and so made by defendant for the purpose of deceiving plaintiff that he might have her on said train for the sole purpose of having said unlawful sexual intercourse with her;" further, "that by reason of said deceit practiced upon the plaintiff by the defendant, she was discharged from her position as such saleslady in which position she was earning the sum of $200 per month, and ever since has been without such or any other position, being wholly unable to obtain such, or any other position, to her actual damage in the sum of $2,500."

[1] It is not alleged that the plaintiff was discharged from her position as assistant buyer, or that the defendant made said contract employing her as assistant buyer without any intention to perform the same. Since the defendant was one of the partners in the firm of Katz Bros., he had authority to enter into a contract on behalf of the firm, whereby she was so employed. Since by such employment her salary was increased, she did not, by accepting such employment, "alter her position to her injury." If she has any cause of action, it is a cause of action against said firm arising out of a contract made in its behalf. The allegation that she learned that she had not been appointed such assistant buyer is contradicted by the particular facts alleged, which show that in fact she was so appointed.

[2] As we have noted, appellant concedes that she did not state a cause of action for assault. Aside from any defects in the statement of the facts concerning the assault, it is admitted that the action was not commenced until more than one year after the 21st day of December, 1919, and that therefore any cause of action for assault is barred by the provisions of section 340, subd. 3, of the Code of Civil Procedure.

The judgment is affirmed.

We concur: JAMES, J.; HOUSER, J.

60 Cal. App. 452

GUY v. BRENNAN et ux. (Civ. 3876.)

(District Court of Appeal, Second District, Division 2, California. Jan. 17, 1923.)

1. Appeal and error 🔑1170(10) — Technical objection that finding not sustained by evidence held not ground for reversal.

Where the proofs showed plaintiff broker was employed to find a purchaser of a five-year lease, as well as of the furniture and equipment, but the complaint alleged and the findings referred only to securing a purchaser for furniture, furnishings, and equipment, contention that the finding that plaintiff was employed to sell "furniture, furnishings, and equipment" was not supported by the evidence because plaintiff's employment extended to the procurement of a purchaser of the lease, as well as the furniture and equipment, *held* not sustainable, the gist of plaintiff's cause of action being the performance of services in bringing about a sale of defendant's property; that the allegation in the complaint and the finding of the court did not describe all that was to pass to the purchaser in the event a sale should be effected through plaintiff's efforts could not have misled defendant as to the nature of services for which plaintiff was employed and seeking compensation, nor injured defendant by the failure of the complaint and findings to make mention of the lease; such error to be disregarded under Const. art. 6, § 4½, and Code Civ. Proc. § 475.

2. Brokers 🔑43(2)—Contract employing broker to procure purchaser of estate for years need not be in writing, not being "real estate."

A lease for years, though a chattel real, is personal property, and, though it may be an estate of interest in real property, it is not "real estate" within Civil Code, § 1624, subd. 6 (Code Civ. Proc. § 1973, subd. 6), enumerating when contracts of agency to sell real estate must be in writing to be valid, and hence a contract employing a broker to procure a purchaser of an estate for five years need not be in writing to be valid.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Real Estate.]

3. Landlord and tenant 🔑70—What "estate for years" embraces stated.

"Estates for years" embrace all terms limited to endure for a definite and ascertained period, however short or long the period may be; they embrace terms for a fixed number of weeks or months or for a single year, as well as for any definite number of years, however great.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Estate for years.]

4. Statutes 🔑178 — Term "real estate" as used in statute to be construed under Code definition.

Where the words "real estate" as used in Civil Code, § 1624, subd. 6 (Code Civ. Proc. §

1973, subd. 6) may be construed in two ways, and each construction leads to an anomaly, that construction will be adopted which accords with the Code definition of the term "real estate" as defined in Civil Code, § 14, subd. 3 (Code Civ. Proc. § 17, subd. 3).

5. Landlord and tenant ⚷70—"Conveyances" as defined in recorded statute held not to make leasehold interest an interest in real estate.

Because a written instrument whereby a leasehold interest is created shall be deemed under Civil Code, §§ 1213, 1214, 1215, to be a "conveyance," does not make such leasehold interest thus conveyed "real estate."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conveyance.]

6. Property ⚷4—Terms "real estate" and "real property" held not convertible terms technically.

The terms "real estate" and "real property" technically are not convertible terms.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Real Property.]

Craig, J., dissenting.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Charles E. Guy. trading as the Century Investment Company, against H. W. Brennan and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Walter E. Burke, of Los Angeles, for appellants.

John H. Miller, of San Francisco, for respondent.

FINLAYSON, P. J. Plaintiff, a realty broker, brought this action to recover the commission earned by him in the sale of defendants' apartment house. Judgment passed for plaintiff, and defendants appeal.

[1] The first point advanced by appellants against the judgment is more technical than meritorious. The complaint alleged, and the trial court found, that defendants employed plaintiff to find a purchaser for the "furniture, furnishings, and equipment" of the apartment house. Defendants, who had leased the house from the owner, held a five-year lease thereon. Plaintiff, as the proof showed, was employed to find a purchaser of the lease as well as of the furniture and equipment. It now is claimed that the finding that plaintiff was employed to sell the "furniture, furnishings, and equipment" is not supported by the evidence, for the reason that plaintiff's employment extended to the procurement of a purchaser of the lease as well as of the furniture and equipment. We can see in this objection no good reason for disturbing the judgment. The gist of plaintiff's cause of action is the performance of certain services in bringing about a sale of defendants' property. The fact that the allegation in the complaint and the finding of the court did not describe all that was to pass to the purchaser in the event that a sale should be effected through plaintiff's efforts could not have misled defendants as to the nature of the services which plaintiff was employed to perform, and for which he now is seeking compensation; and we are unable to see how defendants could have been injured by the failure of the complaint and findings to make mention of the lease. Under the familiar and oft-cited sections of the Code and Constitution (Code Civ. Proc. § 475; Const. art. 6, § 4½), the error will here be disregarded.

[2] Appellants' second point is that the contract of employment, which was oral, was invalid under that provision of our statute of frauds which provides that an agreement employing an agent or broker to sell "real estate" for a compensation or commission is invalid unless the same or some note or memorandum thereof be in writing, and subscribed by the party to be charged, or by his agent. Civ. Code § 1624, subd. 6; Code Civ. Proc. § 1973, subd. 6. In this particular subdivision of the statute the words "real estate" are used, whereas in the preceding subdivision the words "real property" occur. Appellants' contention, stated in the language of their brief, is:

> "We contend that by the use of the term 'real estate, rather than 'real property' in this subdivision (subdivision 6) the Legislature referred to 'estates in real property.'"

And because a lease for years is an estate (Civ. Code, § 701, and section 761, subd. 3), and a broker employed to sell a lease for years is therefore employed to sell an "estate," it is argued that respondent was employed to sell "real estate" within the meaning of subdivision 6 of the statute of frauds. This argument loses sight of the significance of the word "real" in the expression "real estate." It may be conceded, as appellants contend, that by the words "real estate" as here used the Legislature did refer to "estates" in, i. e., interests in, "real property," and not to the land itself—the corpus. But, even so, the words "real estate" do not connote any and every estate or interest in real property. They embrace only such an estate or interest in real property as reaches to the dignity of real estate. And a lease is not "real" estate. The Legislature was dealing with terms of art, and is presumed to have used them in their technical sense.

> "The term 'real estate,'" says Kent, "means an estate in fee or for life in land, and does not comprehend terms of years, or any interest short of a freehold." 3 Kent's Commentaries, p. 401.

"They [the words 'real estate'] import a freehold interest, either an estate for life or in fee simple." Bourn v. Robinson, 49 Tex. Civ. App. 157, 107 S. W. 873.

"A leasehold interest is not real estate, but merely a chattel real, which is personal property." Townsend v. Boyd, 217 Pa. 386, 66 Atl. 1099, 12 L. R. A. [N. S.] 1148.

See, also, Mayor v. Mabie, 13 N. Y. 151, 64 Am. Dec. 538; Scogin v. Perry, 32 Tex. 21, 29; and Harrington v. Sharp, 1 G. Greene (Iowa) 131, 48 Am. Dec. 365.

If we turn to the definitions which are to be found in our Code, we shall be led to the same result. An estate is an interest in real property. Civ. Code, § 701. A lease—an estate for years—is an estate in real property. Civ. Code, § 761, subd. 3. But, though a lease is an "estate," i. e., an interest in real property, it is not "real" estate. It is a chattel. Civ. Code, § 765. True, it is a chattel real (section 765); but all chattels are included within the Code definition of personal property (Civ. Code, § 14, subd. 3; Code Civ. Proc. § 17, subd. 3). It follows, therefore, that, under the definitions to be found in our Codes, a lease for years, though a chattel real, is personal property, and therefore, though it may be an estate or interest in real property, it is not such an estate or interest as is connoted by the words "real estate."

"A term for years is only personal property —a chattel real. * * * An assignment of a term for years is, therefore, governed generally by the rules applicable to the sale of personal property." Jeffers v. Easton, Eldridge Co., 113 Cal. 352-353, 45 Pac. 680, 681.

See, also, Summerville v. Stockton Milling Co., 142 Cal. 538, 539, 76 Pac. 243.

[3] If the term "real estate," as used in this subdivision of our statute of frauds, were held to include a lease for years, a singular anomaly might arise. Neither an agreement for, nor the actual transfer of, a lease for one year or less need be in writing. This is because our statute of frauds, by appropriate qualifying language, in effect exempts from its operation all leases for a term not longer than one year. Code Civ Proc. § 1973, subd. 5, and Civ. Code, § 1624, subd. 5, and section 1091. But the words "real estate" as used in subdivision 6 of sections 1624 of the Civil Code and 1973 of the Code of Civil Procedure, are not thus limited by any qualifying word or phrase. The result is that those words, as used in subdivision 6, include any and every interest in real property, which property may be denominated "real estate." So that, if it were proper to classify an estate for years as "real estate," then no agreement authorizing or employing an agent or broker, for a compensation or a commission, to find a purchaser of any lease, even of a lease for one month, would be valid unless the employment were in writing.

"Estates for years embrace all terms limited to endure for a definite and ascertained period, however short or long this period may be; that is to say, they embrace terms for a fixed number of weeks or months, or for a single year, as well as for any definite number of years, however great." 24 Cyc. 958.

Thus in Stoppelkamp v. Mangeot, 42 Cal. 316, it was held that a lease for one month is technically a tenancy for years. Since a parol lease for a year or for a shorter definite period is valid, what an anomaly it would be if an agreement employing a broker to find a purchaser for such a lease were invalid unless it or a memorandum thereof were in writing! And yet such an anomalous situation is inescapable if the words "real estate," as used in subdivision 6 of the statute, shall be held to include leasehold interests.

[4] We are, of course, aware that there is a reverse side to the picture which we have painted of an anomalous situation, and that under our construction of the words "real estate" an oral employment of a broker to secure a purchaser of a lease for a term longer than one year will be valid, although the lease which is the subject-matter of the employment must be in writing in order to be valid. But because either construction of the words "real estate" will involve what appears to be somewhat of an anomaly, we think there is all the more reason why those words should be construed in the light of our Code definitions—definitions which, as at common law, make all chattels real as well as personal to fall within the definition of personal property.

[5] There is nothing in Commercial Bank v. Pritchard, 126 Cal. 600, 59 Pac. 130, which conflicts with the foregoing views. That case, following the reasoning in Garber v. Gianella, 98 Cal. 527, 33 Pac. 458, holds that an instrument whereby a lease is created must be deemed to be a "conveyance" for all the purposes mentioned in sections 1213 and 1214 of the Civil Code. The court was obliged so to hold because, by section 1215 of the Civil Code, there is an express legislative declaration that the term "conveyance," as used in sections 1213 and 1214, shall embrace every instrument, except wills, whereby any estate or interest in real property is created, aliened, mortgaged, or incumbered. But because the Legislature has said in effect, that, for the purposes of the law respecting the recordation of conveyances, a written instrument whereby a leasehold interest is created shall be deemed to be a "conveyance," it does not necessarily follow that the leasehold interest conveyed by such instrument is "real estate."

[6] The words "real property" as defined by section 14 of the Civil Code (subdivision 3) are "coextensive with lands, tenements and

hereditaments." The learned author of the majority opinion in Commercial Bank v. Pritchard, supra, seems to have used the terms "real estate" and "real property" interchangeably. It doubtless was in view of this laxity in the commissioner's use of two expressions which, technically, are not convertible terms that Mr. Justice McFarland was prompted to write a separate but concurring opinion so as to avoid any possible future misconception as to the real purport and extent of the court's decision. That this was the purpose of the concurring opinion seems evident from its language, Mr. Justice McFarland saying:

> "I concur in the judgment; but the opinion of the Commissioner *might, perhaps* [italics ours], be construed as holding, generally, that an estate for years in land is real property, which, of course, is not so. An estate for years is, in its nature, personal property—a chattel real; and it is subject for most purposes to the law which applies to personal property. See Jeffers v. Easton, 113 Cal. 345, where the subject is discussed and our Code division of property into real and personal is shown to be substantially that of the common law."

We think it clear that whether we look to the common law or to our Code definitions the term "real estate" as used in subdivision 6 of sections 1624 of the Civil Code and 1973 of the Code of Civil Procedure, must be held not to embrace such an estate or interest in real property as amounts only to an estate for years.

The judgment is affirmed.

I concur: WORKS, J.

CRAIG, J. I dissent. In doing so it will serve no useful purpose to write an extended opinion, or one which will more than outline my reasons.

Unquestionably the term "real estate" has been construed as of narrower or broader meaning according to the context in which it is used. This is true of words of similar application, as "conveyance" and "grant." San Pedro, etc., R. R. Co. v. Hamilton, 161 Cal. 610, 119 Pac. 1073, 37 L. R. A. (N. S.) 686. According to Tiffany on Real Property (2d Ed.) § 3, the expression "real estate" is frequently used by Legislatures and courts as applying to any estate in lands. It is elementary that an estate is the interest one owns in either real or personal property; that a real estate is one whose duration is indefinite, as for life or in fee; and that interest in property of a fixed duration are personal estates. Robinson's Elementary Law, §§ 60 and 62. As used in this common-law sense, "estate" is a noun, and "real" a descriptive adjective. But the words "real estate" may be so employed as to jointly constitute a term in effect a single word in the nature of a noun; and in my opinion it was the intention of the Legislature to apply this meaning to the term when it said that "an agreement authorizing or employing an agent or broker *to purchase or sell real estate* for compensation or a commission" is invalid unless the same or some note or memorandum thereof be in writing, etc. Subdivision 6, § 1973, Code Civ. Proc. (Italics mine.) Commercial Bank v. Prichard, 126 Cal. 600, at page 603, 59 Pac. 130, holds that a lease for a term of five years with provision for its cancellation and renewal is a "conveyance of real estate." It is true that in the opinion of Mr. Justice McFarland, concurring, the meaning assigned the term by the opinion of the court was justified only because of sections 1214 and 1215 of the Civil Code. However, it is equally clear that the majority of the court did not entertain the same view of the matter as that able jurist. Sections 1214 and 1215 of the Civil Code have to do with the recording of instruments, whereas in that part of the opinion of the court where it is said that "the lease by the railway company to Prichard was a conveyance of real estate" no reference to rights based upon the recording of the instrument was made. That phase of the case was not then being discussed. The opinion states that "the lease * * * is real estate," and upon that fact predicates the proposition that the warehouse placed upon the land by the owner of the lease went with a conveyance of the lease. To my mind the purpose of subdivision 6 was clearly intended to have general application in the prevention of fraud as between real estate agents and their customers, not only in disposing of estates in real property for life or of greater duration, but to accomplish the same purpose in connection with all of the transactions involving interests of any kind in land which are daily a part of the real estate agent's business. If an anomaly is thereby created, as pointed out in the majority opinion, it is the not unusual result of piecemeal legislation.

60 Cal. App. 305

JUDSON MFG. CO. et al. v. WYCKOFF et al.
(Civ. 4304.)

(District Court of Appeal, First District, Division 2, California. Dec. 29, 1922. Rehearing Denied Feb. 26, 1923.)

1. Corporations 🔑337—To make a director personally liable, he must be shown to have been present when debts in excess of subscribed stock are authorized.

To charge a director for debts of the corporation under Civ. Code, § 309, making directors liable for the creation of debts in excess of the subscribed stock, except when they dissent or are not present, he must be shown to have been present when the debts were authorized, the statute as to the directors being penal and strictly construed.

2. Corporations 🔑337—Director's presence at a meeting when indebtedness in excess of capital stock was authorized before he was elected held not to make him personally liable.

A director, who was present at a meeting in which indebtedness in excess of the amount of subscribed capital stock was authorized, and who was thereafter elected director at such meeting, is not liable under Civ. Code, § 309, making directors liable for debts incurred in excess of the subscribed capital stock, unless they dissent or are absent, since, not being a director when the resolution was passed, his presence was without significance, and he had no power to control the actions of the corporation, and was under no obligation to dissent.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by the Judson Manufacturing Company, a corporation, and others against A. C. Wyckoff and others, executors of J. A. Elston, deceased. From judgment for defendants, plaintiffs appeal. Affirmed.

Elbert W. Davis, of San Francisco, J. Raegen Talbot, of Oakland, and J. O. Davis, of Los Angeles, for appellants.

Elston, Clark & Nichols, of Berkeley, for respondents.

LANGDON, P. J. This is an appeal by the plaintiffs from a judgment against them in an action brought under section 309 of the Civil Code. Plaintiffs are creditors of the Keystone Construction Company and seek to charge the defendants' testator with liability for the indebtedness of the said company, which indebtedness, it is alleged, is over and above the amount of its subscribed capital stock, and was incurred while defendants' testator was a director of said corporation. The action was originally brought against J. A. Elston in his lifetime, but, upon suggestion of his death, the executors of his last will and testament were duly substituted as defendants in his place and stead.

The following facts were stipulated and agreed to as evidence in the case: At all times herein mentioned, down to 1912, the Keystone Construction Company was a corporation duly organized and existing under the laws of this state, with a total authorized capital stock of $25,000, divided into 250 shares of the par value of $100 each, fully subscribed and issued at the times mentioned. On March 31, 1911, W. A. Hackley, P. B. Hackley, and R. C. Hackley were the owners of all of the capital stock of said company. On said last-named date there was held a special meeting of the board of directors of said corporation. The minutes of said meeting recite that there were present W. A. Hackley, P. B. Hackley, and R. C. Hackley. By resolution, Guy Hyde Chick was employed as general manager of the corporation, such employment to continue until the completion of certain outstanding contracts which the company had entered into. By resolution duly carried, the three Hackleys were then employed to act as superintendents in the construction work being carried on by the company, and the president was authorized to borrow, from time to time, from the First National Bank of Berkeley such amounts of money for the use of the company as he might deem necessary, such loans not to exceed the aggregate sum of $10,000. Thereupon P. B. Hackley tendered his resignation as a director and vice president of the corporation, which was accepted, and J. A. Elston was, thereupon, unanimously elected director and vice president. Mr. Elston, thereupon, took his place as a member of the board and the meeting continued. R. C. Hackley tendered his resignation as director and secretary of the corporation, which resignation was accepted, and R. R. Smith was elected to serve in his place. Thereupon the following resolution was unanimously adopted:

> "Resolved that all checks and drafts executed by or in favor of this corporation, be signed by the president, W. A. Hackley and countersigned by the secretary R. R. Smith or Guy Hyde Chick."

The meeting then adjourned. At the time of said meeting (March 31, 1911), the debts of the Keystone Construction Company amounted to approximately $105,587.95. Between April 1, 1911, and September 8, 1911, Guy Hyde Chick, acting in his capacity as manager of said corporation, incurred debts amounting to $66,757.27. The details of this indebtedness are immaterial under our view of the rights of the parties.

[1] The only resolution of the directors authorizing the borrowing of money which was introduced in evidence was one which was carried before the election of J. A. Elston as a director of the corporation. The mere fact that an indebtedness in excess of the amount of the subscribed capital stock was created

during the time that J. A. Elston was a director is not sufficient to warrant a recovery against him. It is also necessary to prove that he was present when the indebtedness was created. This burden has not been sustained by the plaintiff. In the case of Irvine v. McKeon, 23 Cal. 475, it was said, in considering a similar question:

> "It was necessary for the plaintiff to prove also that these debts were contracted under the administration of the defendant, as one of the directors or trustees of the corporation, and that he was 'present when the same did happen'; for 'those who were not present when the same did happen' are expressly excepted from the liability imposed by the statute. In this case, there was no evidence whatever upon this material point."

In the case of Moss v. Smith, 171 Cal. 777, 155 Pac. 90, the case of Irvine v. McKeon, supra, was expressly approved, and attention was called to the numerous cases in accord therewith.

[2] Section 309 of the Civil Code, while remedial in so far as the creditors are concerned, is penal in its nature, when considered from the standpoint of the directors (Moss v. Smith, supra), and its provisions are to be strictly construed. In the present case there is an entire absence of any evidence to show that J. A. Elston was present as a director at the time of the creation of the debts of which complaint is made. Appellant relies upon the evidence in the record that Elston was present at the meeting of March 31, 1911, at which he was elected a director, and that before his election as such director, a resolution was passed empowering the president to borrow money from the bank. Obviously, this cannot strengthen the case of plaintiff. Elston was not a director at the time this resolution to borrow money was passed, and his presence at the meeting was without significance. Not being a director, he had no power to control in any way the actions of the corporation, and he was under no obligation to enter his dissent to a proceeding which in no way concerned him at that time.

The trial court has found that Elston did not—

> "either as a director of the Keystone Construction Company or otherwise, create, or act with any one else in creating, any indebtedness of the Keystone Construction Company, nor did any one else ever create or authorize the creation of any indebtedness of said company on any occasion when he was both present and an officer of said company."

This finding, we think, is sustained by the evidence, and compels the judgment which was entered for the defendants.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

(60 Cal. App. 623)

GRIMES v. LAMAR et al. (Civ. 4079.)

(District Court of Appeal, Second District, Division 1, California. Jan. 27, 1923.)

1. New trial 🔑138—Premature notice of entry of judgment held ineffectual so that notice of intention to move for new trial held not made too late.

Notice that judgment had been entered at a time previous to its actual entry has no force whatever, and a notice of intention to move for new trial within the time limited by Code Civ. Proc. § 660, after actual entry, was on time.

2. Appeal and error 🔑1072—Party may be deprived of substantial rights by erroneous refusal to grant motion for new trial.

Since the trial court, unlike the appellate court, is not required to affirm a judgment where the evidence is conflicting, defendant is deprived of a substantial right by an erroneous refusal to grant a motion for new trial.

3. Appeal and error 🔑790(3)—When appellate court will set aside appeal from judgment pending outcome of trial court's action on motion for new trial.

Where appellate court reverses an erroneous order refusing a motion for new trial on ground not made in time, it will set aside the appeal from the judgment, since, if the lower court should grant the motion for new trial, the effect of that order would be to set aside the judgment, and a dismissal of the appeal from the judgment would follow, while, if the motion for new trial is denied, the order denying it may be brought into the record on appeal from the judgment and reviewed in connection with appeal from judgment. Code Civ. Proc. § 956.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Anna Wilson Grimes against Sarah Ann Lamar and another. Judgment for plaintiff. From the judgment and an order dismissing motion for new trial, defendants appeal. Order refusing motion for new trial reversed, and appeal from judgment set aside.

Porter C. Blackburn, of Los Angeles, for appellants.

R. E. Bledsoe, of San Bernardino, and Geo. B. Ross, of Los Angeles, for respondent.

CONREY, P. J. [1] In this action judgment against the defendants was entered on the 13th day of September, 1921. On the 9th day of that month the plaintiff gave notice to the defendants that judgment had been entered on the 6th day of September, 1921. On the 23d day of November, 1921, the defendants served upon the plaintiff and on the 26th day of that month filed a notice of intention to move for a new trial. On the 3d day of December, 1921, the plaintiff moved for dismissal of the motion for a new trial on the ground that the notice of intention to move for a new trial was not given within the time allowed by law. This motion was granted. On December 13, 1921, the defendants gave notice of appeal from the judgment and from the order granting plaintiff's motion to dismiss the motion for a new trial.

The notice of entry of judgment was premature and ineffectual for any purpose, since there could be no valid notice of the existence of something which did not in fact exist. North American Co. v. Outer Harbor Co., 178 Cal. 406, 173 Pac. 756. Therefore the notice of intention to move for a new trial was not too late, and, at the time when the order of dismissal was made, the time within which the court might act on the motion for new trial had not expired. Code Civ. Proc. § 660.

[2] Without attempting to contest the proposition that the order dismissing the proceedings for a new trial was erroneous, respondent claims that such action of the court was harmless error, and not prejudicial to the rights of appellant, because there is an appeal from the judgment, and because, as respondent contends, "there is nothing in the record to detract from the righteousness of the judgment rendered in respondent's favor," and that there could not have been any warrant for the granting of a new trial on any of the grounds asserted in the motion.

One of the grounds stated in the proposed motion for a new trial was that the evidence is insufficient to justify the decision. Under the rule that on appeal this court will not reverse a judgment on account of insufficiency of the evidence if there is a substantial conflict in the evidence, it may be that we would be required to affirm the judgment. But the trial judge, in considering the motion for a new trial, would not have been bound by that rule. It might be (although we are not to be understood as intimating that it would be) that in reviewing the evidence he would have been dissatisfied with the findings and would have granted the motion. This he would have had authority to do. It follows therefore that by refusal to consider the motion for a new trial on its merits, and by dismissal of that motion, the defendants have been deprived of a substantial right which cannot be corrected on appeal from the judgment as the record now stands. Therefore it is our conclusion that the order dismissing the motion for a new trial should be reversed.

[3] It seems to us that in this condition of the case we should not at this time proceed to determine on its merits the appeal from the judgment. If, pursuant to the reversal of the order, and on hearing of the motion for a new trial, the lower court should make an order granting that motion, the effect of that order would be to set aside the judgment, and a dismissal of the appeal from the judgment would appropriately follow. If, on the other hand, the motion for a new trial is denied, the order denying that motion may be brought into the record here on appeal from the judgment, and we may then review the merits of the order denying the motion for a new trial in connection with and as a part of the appeal from the judgment. Code Civ. Proc. § 956.

The submission of the appeal from the judgment is set aside. The order dismissing the motion for a new trial is reversed.

We concur: JAMES, J.; HOUSER, J.

---

60 Cal. App. 4[illegible]9

HUSSEY v. LOEB. (Civ. 4364.)

(District Court of Appeal, First District, Division 2, California. Jan. 19, 1923.)

1. Pleading 🔑120(1) — Answer denying any indebtedness for wages raises issue.

The allegation of a complaint that certain wages are due and unpaid is sufficiently denied by an answer which, in addition to a categorical denial of the allegations of the complaint, denies that there was due plaintiff on account of wages the sums alleged, or any sum at all, to put in issue the allegation of wages due.

2. Appeal and error 🔑843(2)—Where nonsuit is properly granted on other grounds, question of defective plea of limitations not determined.

It is unnecessary on appeal to determine the sufficiency of a plea of limitations for failure to refer to the subdivision of the statute relied upon, where a nonsuit was properly granted on other grounds.

3. Witnesses 🔑178(4)—Executrix waived incompetency of plaintiff as to transactions with testator by taking plaintiff's deposition.

Where the executrix of the estate of a deceased person takes the deposition of the adverse party incompetent to testify under Code Civ. Proc. § 1880, subd. 3, the provisions of such section are thereby waived, and such adverse party may put such deposition in evidence on the trial.

4. Appeal and error 🔑1056(6)—Exclusion of testimony which would not have avoided nonsuit harmless.

In an action against the estate of a deceased person, where plaintiff's deposition was erroneously excluded under Code Civ. Proc. § 1880, subd. 3, such error was harmless where the evidence therein contained was insufficient had it been admitted to avoid a nonsuit ordered by the court.

5. Account 🔑18—Evidence held insufficient to warrant recovery.

In an action in which plaintiff sought an accounting for wages and profits due him under an alleged agreement by which he was to receive a percentage of the profits of his work in refinishing, polishing, and varnishing, repairing and upholstering old furniture, evidence *held* insufficient where no attempt was made to prove the amount of profits of the finishing business during the period covered by the contract.

6. Executors and administrators ⚷221(3) — Evidence as to where decedent procured money to start in business, immaterial.

In an action against an executrix for wages due and an accounting of profits under an alleged agreement, testimony of a brother of deceased as to where decedent obtained his money to start in business was properly excluded as immaterial to any issue; such testimony not tending to show that decedent's estate was subject to accounting at the instance of plaintiff.

7. Executors and administrators ⚷221(3)— Testimony of offer by witness to sell decedent's books of account inadmissible as not binding on executrix.

In an action against an executrix for an accounting of wages and profits alleged to be due, testimony of a brother of defendant's decedent as to his offer to sell decedent's books of account was properly excluded as not binding upon the executrix, in the absence of her refusal after demand to produce such books for the purposes of accounting.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Charles B. Hussey against Henrietta Loeb, as executrix of the last will of Otto Loeb, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

C. W. Eastin, of San Francisco, for appellant.

Theo. L. Breslauer, of San Francisco, for respondent.

NOURSE, J. This is an appeal from the judgment following defendant's motion for nonsuit. The appeal was taken to the Supreme Court, and by that court transferred to this court for hearing. It was taken under the provisions of section 953a et seq., Code of Civil Procedure, but plaintiff's counsel has not made any effort to comply with the provisions of the Code nor with the rules of court covering such an appeal. As the main consideration for an appellate court upon an appeal from a judgment of nonsuit is whether plaintiff's evidence was sufficient to support his own case, it should be apparent that the attention of the appellate court should be directed to at least some of that evidence. The court has been assisted to some extent by the voluntary act of the defendant in printing some of the testimony upon which plaintiff relies.

The facts of the case material to the opinion are that plaintiff claimed to have been a partner of one Loeb, deceased, under a written agreement made on November 25, 1911, by the terms of which Loeb agreed to employ Hussey as a finisher in Loeb's furniture business and to pay him for his services the regular union scale rate of wages paid to finishers for the actual time of his employment; also 25 per cent. of the net profits of the finishing business done by Loeb. The parties went to work under the agreement and continued until October 31, 1918, which was about the time of Loeb's death. The first cause of action alleged that there was due plaintiff on account of wages the sum of $942.20. The second cause of action alleged, upon information and belief, that 25 per cent. of the net profits of the said business amounted to $2,000, and that there had not been an accounting therefor. It was not alleged that this sum remained unpaid to plaintiff, or that any amount was due under this cause of action.

All the material allegations of the first cause of action were denied, and a special defense was interposed to the effect that plaintiff had been fully paid all moneys due him under said contract, and also that the contract on which the cause of action was based had, by mutual consent of the parties, been abrogated and canceled in the year 1912. To the second cause of action the same defense was made, and it was also denied that no accounting had been had, or that plaintiff was entitled to any accounting at this time. The provisions of section 337 and of subdivision 1 of section 339, Code of Civil Procedure, were also pleaded as barring both causes of action. The motion for a nonsuit was made upon the grounds of failure of proof and the bar of the statute.

[1, 2] Appellant contends that his allegation that $942.20 was the balance due on account of wages was not denied, but the answer categorically denied the allegations of the complaint, and, in addition, denied that there was due appellant on account of wages the sums alleged in the complaint "or any sum or at all." In addition to this the answer alleged that appellant had been fully paid all moneys coming to him under the contract, as well as for any and all work that appellant did for the decedent or for the respondent. This sufficiently raised the issue on the allegations of the first cause of action. It is true, as argued by appellant, that payment and abrogation of the contract are defenses, the burden of proof of which is upon the defendant; but we are now discussing the question of pleading, and not of proof. It is also argued that the pleading of the statute of limitations is defective in that the answer fails to refer to the subdivision of section 337 upon which the pleader relied. It is unnecessary to determine this because the nonsuit was properly granted on the ground of failure to prove either cause of action.

[3] Prior to the trial appellant's deposition was taken by the respondent, and this was offered in evidence by the appellant at the trial. Respondent objected to its introduction on the ground that the appellant was barred from testifying in the case by the provisions of section 1880, subdivision 3, Code of Civil Procedure. The objection was sustained, and the deposition was excluded. Thereafter the Supreme Court, in the case of McClenahan v. Keyes, 206 Pac. 454, 455, held that, when a party took the deposition of a witness who was incompetent to testify under section 1880, he waived the provisions of the section, and that the deposition so taken was admissible in evidence at the time of the trial. The trial court was therefore in error in excluding this deposition.

[4] However, we have read the deposition, which is appended to respondent's brief, and find that this error was not a substantial one. So far as the first cause of action is concerned, there is nothing in the deposition which tends to prove that anything was due appellant. The other evidence does not prove the allegations of this cause of action. Reference is made to the testimony of two witnesses who were called by the appellant to show that he had been working steadily under his contract of employment. One of these witnesses was a policeman who walked upon the beat where the place of business was located. Another was an undertaker who had maintained his place of business next door to Hussey and Loeb for the first two or three years of the seven-year period over which appellant's employment extended. From the testimony of these witnesses appellant insists that he intended to prove that he had commenced work under the contract on December 1, 1911, and had continued thereunder until October 31, 1918, working every day, Sundays and holidays included, during that entire period. Of course, the testimony of these witnesses did not tend to prove any such thing, and the testimony of appellant himself at the time of taking his deposition was to the effect that he worked very often on Sundays and holidays. It is also argued that a paper, which appellant designated as a "bill of particulars," and which was filed in response to a demand therefor, proves the first cause of action. This paper is merely a statement of receipts from Otto Loeb, presumably of moneys received by appellant over a period extending from December, 1911, to October, 1918. It does not show any time of employment or any sum due to appellant. From the entire record it is apparent that appellant did not prove any cause of action for wages due, and that he was not prevented from making such proof by any action of the trial court. Judgment for nonsuit as to the first cause of action was therefore properly granted.

[5] As to the second cause of action, although the pleading is not a model in any sense of the word, there are facts pleaded which, in the absence of objection, were sufficient to maintain a cause of action for an accounting. By the terms of the written contract upon which appellant relies he was entitled to 25 per cent. of the net profits of the finishing business. He alleged in his complaint that he was entitled to 25 per cent. of the net profits of appellant's business. He testified in his deposition that the finishing business "pertains to furnishing, that is, refinishing, taking the wood, the new wood, and finishing up; polishing, varnishing, and that sort of thing; and old work, repairing, upholstering; that is finishing business;" but that Loeb was also engaged in the business of buying and reselling furniture, and that he was engaged in "everything pertaining to a shop of that kind." Appellant made no effort whatever to prove the amount of profits of the finishing business covering the period of his contract, and was not prevented from doing so by any action of the trial court. The nonsuit was therefore properly granted as to the second cause of action.

Criticism is made of rulings of the trial court in the examination of the witness Fredericks. There was no error in any of these rulings. In fact, all the testimony of this witness might have been stricken out without affecting appellant's case.

[6, 7] The witness Jules Loeb, a brother of deceased, was asked if the deceased had borrowed money from him or his mother, or from some other person to start in the business with Hussey. He answered that he could not say. He was then asked if he knew where the deceased got the money to put into that business. The objection to this question was sustained. Appellant argues that this was error, as it was essential for him to prove that whatever estate the deceased had was the proceeds of the business with Hussey, and that the deceased had no business or means at the start. We are unable to perceive how the inquiry had any possible bearing upon appellant's case. The same witness was asked if after the death of decedent he had offered to sell the books of account of the business. Objection to this was sustained and this ruling is claimed to be error. The trial court properly ruled that this was not binding upon the estate as the witness had no authority to sell the books. In the absence of a refusal, after demand, to produce these books for the purpose of an accounting, the inquiry had no bearing upon the issues raised in either cause of action.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

60 Cal. App. 626

PEOPLE v. SAPIENZO. (Cr. 1082.)

(District Court of Appeal, First District, Division 1, California. Jan. 29, 1923.)

1. Criminal law 🔑982—Formal order declaring sentences suspended is unnecessary.

Pen. Code, § 1203, authorizing the court or judge to suspend the imposing or execution of sentence and to direct that such suspension may continue for a time not exceeding the maximum possible term of such sentence, does not require that the court should enter a formal order declaring the imposition of sentence to be suspended.

2. Criminal law 🔑982—Granting probation is equivalent to suspending sentence.

The effect of an order granting probation to one who had pleaded guilty of an offense and releasing him from custody was to suspend the order of sentence.

3. Criminal law 🔑1137(2)—Defendant is not prejudiced by suspension of sentence at his request.

A defendant was not prejudiced by reason of not being sentenced within the time required by Pen. Code, § 1191, where the various continuances for the imposition of sentence were at his request and probation was granted on his request within the time limited provided by that section.

4. Criminal law 🔑982—Probation can be revoked for misconduct without proof of violation of terms.

The granting of probation is an act of grace subject to withdrawal, if clemency is abused, under the terms of Pen. Code, § 1203, subd. d, as amended by St. 1921, p. 1298, and the court did not abuse its discretion in withdrawing probation on undenied affidavits defendant had been guilty of a new crime, though there was no proof of violation of terms of the probation.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Nazzareno Sapienzo pleaded guilty to a charge of assault with a deadly weapon, and from an order denying his motion for a new trial and revoking a previous order granting probation, and from the judgment entered on his plea, he appeals. Affirmed.

F. L. Simons, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

TYLER, P. J. This is an appeal from an order denying a motion for a new trial, and from an order of the court revoking its prior order granting appellant probation, and from the judgment which was thereupon rendered.

The defendant was on January 10, 1922, duly arraigned upon a charge of assault with a deadly weapon. He pleaded guilty at that time to the charge, and the date for pronouncing judgment was fixed for January 28, 1922. An application for probation was made, and the matter was referred to the probation officer on the same day. Thereafter and from time to time at defendant's request imposition of sentence was continued until finally upon April 1, 1922, the court made an order releasing the defendant on probation. The order provided that defendant be released for 10 years on condition that he give a bond in the sum of $1,000 and that he remain in Fresno until April 10, 1922, and if released on bond that he report to the probation officer during such period, and unless detained that he go east and remain out of California during the term of his probation.

Subsequently the district attorney served notice upon defendant and his counsel that he would on July 8, 1922, move the trial court to revoke the order of probation.

The motion was based upon four affidavits of different persons, which indicated that the defendant had committed the crime of arson. At the hearing the defendant made no countershowing, and the order of probation was thereupon revoked.

Defendant appeals from such order, and contends that the court was without jurisdiction to revoke its former order and pronounce judgment upon him over his objection for the reason that no prior judgment had ever been pronounced or rendered against him, as provided by section 1191 of the Penal Code, and that no order had ever been made suspending the same; that the time within which judgment might have been pronounced had expired when sentence was suspended; and it is claimed, therefore, that the court was without jurisdiction to pronounce judgment, and this court must in consequence grant a new trial by reason of section 1202 of the Penal Code. It is further urged that the court below abused its discretion in revoking the probation of defendant without any evidence showing the violation of the terms of probation.

[1] The first contention is based upon the fact that at the time of the granting of probation no formal order was made by the court expressly declaring the imposition of sentence to be suspended.

We do not think the probation law requires such formal order. Section 1203 of the Penal Code provides:

> "The court, judge or justice thereof, may suspend the imposing, or the execution of sentence, and may direct that such suspension may continue for such period of time not exceeding the maximum possible term of such sentence, except as hereinafter set forth, and upon such terms and conditions as it shall determine."

It will be noticed that nowhere does this provision require that the court expressly declare that it suspends the imposition of sentence. The statute only declares that the court "may suspend the imposing" of sentence. It then proceeds and provides that the court "may direct that such suspension may continue," etc., which is the first direction as to what the order shall contain. This is precisely what was done.

[2] Moreover, the effect of the order granting probation and releasing the defendant from custody was to suspend the order of sentence. This is its manifest and necessary result. In Ex parte Slattery, 163 Cal. 176, 124 Pac. 856, it was held that under the so-called probation act the withholding of a commitment upon a judgment of conviction was the equivalent of suspending the execution of the sentence. We are of the opinion that the reasoning in that case applies with equal force here, and that there is no merit in this contention.

[3] Nor did the defendant suffer prejudice by reason of not being sentenced within the time required by law under the provisions of section 1191 of the Penal Code. The various continuances had for the imposition of sentence were at his request. The number of days between January 10th, when defendant pleaded guilty, and April 1st, when probation was granted, amount to 81, which is within the time limit provided by section 1191 for such imposition.

[4] Equally without merit is the contention that the court abused its discretion in revoking the probation of the defendant. The granting of probation is an act of grace subject to withdrawal if clemency is abused. Subdivision (d) of section 1203 of the Penal Code, as amended by St. 1921, p. 1298, provides in part as follows:

> "The court shall have power at any time during the term of probation to revoke or modify its order of suspension; of imposition or execution of sentence."

If any reviewable question may arise under the provisions of this act, they must always be confined to the fact as to whether or not the court abused its discretion. People v. Dunlop, 27 Cal. App. 460, 150 Pac. 389. The case does not present a situation where the court without justification has arbitrarily revoked its order of probation. The evidence upon the hearing for the revocation showed that the court had been deceived and imposed upon in granting the order. To hold under such circumstances that the order could not be revoked would be to sacrifice reason, justice, and the public welfare to technical refinement.

No other questions are here raised.

For the reasons given, the orders and judgment are affirmed.

I concur: RICHARDS, J.

---

60 Cal. App. 612

PEOPLE v. EATON. (Cr. 656.)

(District Court of Appeal, Third District, California. Jan. 26, 1923.)

1. Criminal law 🔑834(2)—Court not required to give instruction in language of defendant.

The trial court is not required to give a pertinent instruction in the language of defendant, or because so requested, if it is substantially covered by a given charge.

2. Criminal law 🔑829(3)—Refusing instruction covered by those given not error.

The refusal of defendant's instruction, stating the nature of the charge covered by those given by the court, is not error.

3. Criminal law 🔑789(4)—Refusing instruction objectionable as requiring acquittal, if jury had doubt as to defendant's having committed any one of acts alleged, not error.

In a prosecution under the Criminal Syndicalism Act, it was not error to refuse an instruction objectionable, in that it required an acquittal, if there was a reasonable doubt whether defendant "organized or assisted in organizing," or knowingly became a member of the proscribed organization, it not being sufficient to justify a verdict of not guilty, if a doubt was entertained whether defendant committed any one of the acts alleged in the information, as a conviction might be had if the jury believed that any of the conditions existed, although there might be a reasonable doubt as to others.

4. Insurrection and sedition 🔑2—Refusing misleading instruction not error.

In a prosecution under the Criminal Syndicalism Act, where all that the law required for conviction was that the organization advocated and taught criminal syndicalism at the time defendant organized or assisted in organizing or knowingly became a member of it, it was not error to refuse an instruction which required the jury, in order to convict, to believe that the organization at the time and subsequent thereto, advocated and taught criminal syndicalism.

5. Insurrection and sedition 🔑2 — Refusing instruction held not error.

In a prosecution under the Criminal Syndicalism Act, it was not error to refuse an instruction "that the mere advocacy of a change of industrial ownership or political change to be accomplished by lawful means is not a crime," that being so evident that the jury would need no such direction.

6. Criminal law 🔑829(12)—Instruction that personal opinions could not be foundation of verdict covered by instruction given.

In a prosecution under the Criminal Syndicalism Act, it was not error to refuse an instruction that the jury's personal opinions as to the facts proven on the trial could not properly be considered as a basis of their verdict, neither could their suspicions, it being sufficiently covered by a given instruction.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

O. J. Eaton was convicted of violation of the Criminal Syndicalism Act, and he appeals. Affirmed.

H. L. Ford and J. S. Burnell, both of Eureka, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was convicted of a violation of what is known as the "Criminal Syndicalism Act" (St. 1919, p. 281), and he appeals from the judgment and the order denying his motion for a new trial. It is not disputed that the evidence warrants the verdict, and the only claim for a reversal is that the court prejudicially erred in refusing to give certain instructions proposed by the defendant.

[1] That it is the duty of the trial court to instruct the jury as to every legal principle involved in the case is made plain by the statute (Pen. Code, § 1127), and the decisions of the courts, but it is also established that the trial court is not required to give a pertinent instruction in the language of the defendant or because so requested, if it is substantially covered by the charge which is given.

With these admitted propositions in view we may examine the three proposed instructions which were refused.

[2] The first simply states the nature of the charge against the defendant and contains a definition of the terms "criminal syndicalism" and "sabotage." This instruction was clearly and fully covered by those given by the court and found on pages 22 and 28 of the transcript, and no further consideration of it is required.

[3] The second reads as follows:

> "If you find from the evidence to a moral certainty and beyond a reasonable doubt, that, at the time and place mentioned in the information, the defendant, O. J. Eaton, did willfully organize or assist in organizing, or did knowingly become a member of any organization, or society or group or assemblage of persons organized or assembled to advocate or teach or aid and abet criminal syndicalism, then and under such circumstances you should find the defendant guilty as charged in the information. But, on the other hand, if you do not find from the evidence to a moral certainty and beyond a reasonable doubt, or, if from all the evidence in the case you entertain a reasonable doubt that said defendant did organize or assist in organizing, or did knowingly become a member of any organization or society or group or assemblage of persons, organized or assembled to advocate or teach or aid and abet criminal syndicalism, then and under such circumstances you should find the defendant not guilty.
>
> "You are further instructed that, even though you do find that the defendant did willfully organize or assist in organizing or did knowingly become a member of a society or group or assemblage of persons, that of itself is not sufficient to convict him of the offense charged, you must further find from the evidence to a moral certainty and beyond a reasonable doubt that such organization, if he did organize or assist in such or become a member of such organization, that such organization at the time and subsequent thereto advocated, or taught, or aided and abetted criminal syndicalism. And if you entertain any reasonable doubt that such organization advocated or taught or aided and abetted criminal syndicalism, then your verdict must not be guilty."

Manifestly it was not of much concern to appellant whether the court gave the first paragraph of said instruction, although, as a matter of fact, in other instructions, the court thoroughly covered that hypothetical phase of the case. There is no doubt that the prosecution's theory of guilt was abundantly presented. It is not so certain that equal consideration was paid to defendant's contentions.

However the second paragraph is objectionable in that it required an acquittal if the jury had a reasonable doubt whether the defendant "organized or assisted in organizing" or knowingly became a member of such proscribed organization. It was not sufficient to justify a verdict of not guilty, if the jury entertained a reasonable doubt that he committed any one of these acts as alleged in the information. A conviction might be had if the jury believed beyond a reasonable doubt that any of these conditions existed, although there might be a reasonable doubt as to the others. But, according to the proposed instruction, the jury must believe beyond a reasonable doubt that all these conditions existed before they could convict.

[4] The third paragraph was also defective and misleading, in that it required the jury, in order to convict, to believe that the organization at the time and "subsequent thereto" advocated and taught criminal syndicalism. All the law required was that the organization was of that character at the time defendant organized or assisted in organizing or knowingly became a member of it, since all these acts are alleged to have taken place subsequent to the enactment of the "syndicalism statute." The trial court was therefore justified in declining to give this instruction.

But whether so requested or not, the trial court should always be careful to set forth clearly to the jury that the burden of proof is upon the prosecution to establish all the elements of the crime to a moral certainty and beyond a reasonable doubt, also that the defendant is presumed to be innocent until his guilt is so established and if, after a consideration of all the evidence in the case the jury entertain a reasonable doubt of the guilt of the defendant, they should find him not guilty.

These fundamental principles were not presented as directly and explicitly as they should have been, but, after reading all the instructions, we are satisfied that the jurors, as men of average intelligence, could not have misunderstood the requirements of the law in these respects. Indeed, as to reasonable doubt, it was clearly defined, and the jury was directed that "the defendant is entitled to the benefit of every reasonable doubt which you may have on the evidence." In connection with other instructions, which we need not quote, this would necessarily be understood as a direction to find the defendant not guilty if, after a consideration of all the evidence, there was in their minds a reasonable doubt of his guilt. It must be remembered, also, that these elementary matters are always stressed in the examination of the jurors and in the arguments of counsel. In view of all the facts, it would be an unwarranted reflection upon the intelligence of the jury to hold that they did not fully understand their duty in the premises.

[5] The second proposed instruction, "that the mere advocacy of a change in industrial ownership or political change to be accomplished by lawful means is not a crime," etc., is so evident that the jury would hardly need such direction, but, as a matter of fact, the identical language was used in a given instruction.

[6] The third, "I charge you that your personal opinions, if there be any, as to facts not proven upon the trial cannot properly be considered as the basis of your verdict in this case, nor can your suspicions. You can only act on evidence introduced upon the trial, and from that evidence and from that alone you must form your verdict unaided, unassisted, and uninfluenced by any opinions not found in the evidence," was sufficiently covered by the given instruction, "I instruct you that you are to be guided in your deliberations solely by the law and the evidence in this cause, and no other consideration must influence you in reaching a verdict."

As before stated, no question is raised as to the sufficiency of the evidence to justify a conviction, nor is it argued that the trial court committed error in any other respect, and it is apparent that the point made is not decisive and fatal.

The judgment and order are therefore affirmed.

We concur: FINCH, P. J.; HART, J.

---

60 Cal. App. 542

PEOPLE v. GOULDING. (Cr. 937.)

(District Court of Appeal, Second District, Division 1, California. Jan. 23, 1923.)

1. Criminal law 🔑1137(3), 1172(7)—Prejudicial error cannot be based on instruction favorable to defendant and given at his request.

In a prosecution for robbery, an instruction that, "If there is one single fact proved to the satisfaction of the jury by a preponderance of the evidence, which is inconsistent with the guilt of the defendant, this is sufficient to raise a reasonable doubt, and in such a case the jury should find the defendant not guilty," being given at defendant's request and being in his favor, did not constitute prejudicial error.

2. Criminal law 🔑829(12)—Instruction as to degree of proof held properly refused as covered by other instructions.

In a prosecution for robbery, refusal to instruct that defendant need not establish his defense beyond a reasonable doubt, nor even to establish it by a preponderance of the evidence, *held* not erroneous; the substance thereof being amply covered by other instructions given.

3. Criminal law 🔑814(12)—Instruction as to general reputation for peace and quiet held proper, although no evidence thereof.

In a prosecution for robbery, it was not error to give an instruction that, if the jury found from the evidence beyond a reasonable doubt that defendant was guilty, they should so find "notwithstanding proof of his good reputation for peace and quiet," although no evidence was offered affecting the reputation of defendant.

4. Criminal law 🔑787(2)—Instruction that defendant could not be compelled to testify against himself held not improper.

In a prosecution for robbery, it was not error to instruct that defendant in a criminal case is not required to take the stand and testify, and that his neglect or refusal to be a witness cannot in any manner prejudice him nor be used against him on the trial or proceeding; the instruction being in practical conformity to Pen. Code, § 1323, and being for the benefit of defendant.

5. Criminal law 🔑1186(4)—Exclusion of evidence as to attempts to dispose of proceeds of robbery held harmless error.

In a prosecution for robbery, where among other things a ladies' hunting-case gold watch had been taken, exclusion of evidence that one who had been in defendant's company at the alleged time of the offense had tried to sell such a watch, and had later procured a loan on a watch of that description, *held* harmless error, in view of other evidence showing defendant's guilt beyond a reasonable doubt, and in view of Const. art. 6, § 4½, providing that no judgment shall be set aside for error in rejection of evidence unless it has resulted in miscarriage of justice.

6. Robbery 🔑24(1)—Evidence held to sustain conviction.

In a prosecution for robbery, evidence *held* to show defendant's guilt.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

W. R. Goulding was convicted of robbery, and he appeals. Affirmed.

W. W. Judd, Stanley Visel, and Wm. Durham, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

HOUSER, J. [1] Defendant was convicter on a charge of robbery. The case comes to this court on the clerk's transcript and the reporter's transcript only. In other words, no briefs on either side have been filed in the case. However, defendant's counsel on oral argument has submitted several reasons for a reversal, the first of which being that the learned judge of the trial court erred in giving a certain instruction to the jury, which was requested by defendant. It is as follows:

> "If there is one single fact proved to the satisfaction of the jury by a preponderance of the evidence, which is inconsistent with the guilt of the defendant, this is sufficient to raise a reasonable doubt, and in such a case the jury should find the defendant not guilty."

No reason was assigned by appellant's counsel, and none appears to this court, showing how or in what possible manner defendant was, or even might have been, prejudicially affected by the giving thereof. It is altogether in appellant's favor—not a word nor a syllable which does not suggest the propriety, if not the absolute duty, of the jury to find the defendant not guilty, provided there be a single fact established by a preponderance of the evidence inconsistent with his guilt. It would seem unnecessary to point out that a defendant who offered such an instruction and which was given at his request, should be estopped to claim any damage to his case by reason of its having been submitted to the jury for its consideration. He must at least show that prejudice resulted to him. Reason is abundant and authorities numerous to the effect that an appellant is in no position to complain of instructions, even though erroneous, which are given at his own request. A familiar principle to the effect that no man may profit by his own wrong, would seem to be a sufficient answer to appellant's contention in this regard.

[2] The second alleged error of which appellant complains deals with the refusal of the court to give the following instruction:

> "It is not necessary for the defendant to establish his defense beyond a reasonable doubt, nor even to establish it by a preponderance of proof; it is sufficient for him to raise a reasonable doubt of his guilt, and in such a case it is your duty to return a verdict of acquittal."

The essential elements of this instruction, at least as far as defendant is to be benefited thereby, are amply covered by other instructions given by the court. But counsel contends that the instruction in question, while accurate in its statement of the law, conflicts with the first instruction which has already been noticed. If it may be considered as conflicting with any instruction which was offered by the defendant and given by the court, appellant is in no position to complain. He cannot even unintentionally (and the court absolves defendant's counsel from any intentional wrongdoing in the premises) set a trap in that manner for the court and assume that he may reap the benefit of the court falling into it. A litigant who presents to the court two instructions, and such that, if one of them be given, consistency demands that the other be refused, cannot be heard to complain of the action of the court in erroneously deciding between them. It is a sound principle, as well as a most salutary one, that a party cannot be heard to complain of an error which he himself has been instrumental in bringing about. Missouri Pac. R. Co. v. Fox, 60 Neb. 531, 83 N. W. 744.

[3] Following the oral argument presented by counsel for appellant, the next alleged error consists in the giving of the following instruction, which was requested by the people:

> "The court instructs the jury that if you find from the evidence beyond a reasonable doubt that the defendant is guilty, then you should so find, notwithstanding proof of his good general reputation for peace and quiet."

Appellant complains that there was no evidence offered affecting the reputation of defendant for peace and quiet; but the presumption of law is that his reputation for these traits is good, and until such presumption be overcome by credible evidence the jury is bound to so consider it—just the same as though without such presumption evidence has been introduced to that effect. Indeed, counsel for defendant presented an instruction, and which was given by the court, covering, among other things, the matter completely in the following words:

> "* * * And in this case defendant is presumed to be of good character for the traits involved, namely, for peace and quietness, until such presumption is overcome by credible evidence in the case."

In the circumstances it is difficult if not impossible, to conceive of any possible prejudice resulting to defendant from the giving of the instruction of which appellant complains.

[4] The last instruction given by the court at the request of the people and of which complaint is made by appellant, reads as follows:

> "You are instructed that the defendant in a criminal action is not required to take the stand and testify. His neglect or refusal to be a witness cannot in any manner prejudice him, nor be used against him on the trial or proceeding."

Section 1323 of the Penal Code provides, in part:

> "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself. * * * His neglect or refusal to be a witness cannot in any manner prejudice him nor be used against him on the trial or proceeding."

It will thus be seen that there is no practical difference between the instruction given and that part of the section of the Penal Code herein set forth. Counsel for appellant contends that defendant was prejudiced, in that the court thereby emphasized the fact that defendant did not testify, and further suggested at least that he had a right to be heard if he desired to do so, but that he was "not required to take the stand and testify." Ruling upon a similar objection in the case of State v. Fuller, 34 Mont. 12, 85 Pac. 369, 8 L. R. A. (N. S.) 762, 9 Ann. Cas. 648, the court, by Brantly, C. J., said:

> "The defendant was not sworn as a witness. This fact was apparent to the jury. The court was perhaps not bound to instruct the jury with reference to this fact. It was entirely proper, however, if the court chose to do so, to inform the jury as it did, that the fact that the defendant failed to testify could not be used to his prejudice. In any event, the instruction was favorable to the defendant, and for that reason he has no right to complain of it."

Within the presumption that every one knows the law may safely be included the knowledge on the part of the individual members of the jury that the defendant is a competent witness in his own behalf. All jurors do not know that it is optional with a defendant whether or not he take the witness stand; and certainly the average person, without any experience as a juror in criminal cases, does not know that the neglect of a defendant to be a witness cannot be used in any manner against him. Indeed, it is common knowledge that the everyday citizen, upon having his attention directed to the fact that a given defendant has failed to avail himself of an opportunity to take the witness stand, immediately construes such failure on the part of the defendant as an admission of guilt. The jury must take the law of the case from the court. The law containing the instruction on which error is predicated is clearly in favor of defendant. It suggests to the jury the danger to the defendant, and warns the jury not to construe against the defendant his failure to take the stand in his own behalf. The instruction is altogether salutary, for the benefit of the defendant, and of which he ought not to be heard to complain. See State v. De Witt, 186 Mo. 61, 84 S. W. 956; Lamb v. State, 69 Neb. 212, 95 N. W. 1050.

In order that the next alleged error may be better understood, it becomes necessary to make a somewhat lengthy review of the principal facts as shown by the evidence: An elderly man named Griffin, Mrs. Griffin (who was the daughter-in-law of Griffin), a Mrs. Leslie, and a man named Hicks left Los Angeles on or about April 1, 1922, in an automobile for the purpose of visiting some friends of theirs named Humphries, who lived in the town of Tujunga. They arrived at their destination at about 4 or 5 o'clock in the afternoon, and remained there until about 8:30 or 9 o'clock p. m. of the same day. While at the Humphries home the guests, together with the hosts and some others who were present, partook of a repast consisting of sandwiches and some sort of intoxicating liquor. On the return trip the automobile containing the party was driven by Mrs. Leslie until the city of Glendale was reached. None of the members of the party was familiar with the roads in that locality, and somewhere within the city of Glendale the auto was stopped for the purpose of ascertaining the road to Los Angeles, at which time defendant Goulding, who had been standing on the sidewalks, accompanied by two men named Allen and Brown, respectively, jumped onto the runing board of the automobile in which Mr. Griffin and his party were riding, and, after stating that he was the chief of police of Glendale and that his companions were officers, inquired, among other things, what was wanted. He stated that because of the actions of the party, the members thereof might be arrested, etc. Being informed they had lost their way, defendant offered to drive them to their home in Los Angeles, which was actually done by Brown (one of defendant's companions)—he taking Mrs. Leslie's place at the wheel alongside of Hicks, and Mrs. Leslie, together with defendant Goulding and Allen, riding in the tonneau of the automobile with Mr. Griffin and the young Mrs. Griffin. On arriving at their destination in Los Angeles at about 10:30 o'clock p. m., an alleged robbery by defendant Goulding of Mr. Griffin took place; Mr. Griffin and Mrs. Griffin testifying that defendant, by means of force, took from Griffin his pocketbook containing a $20 bill and a stickpin; that he then backed out of the auto and ran away; Mr. Griffin was calling out, "Stop that man; he robbed me"; and Mrs. Griffin, while the robbery was taking place, trying to hold defendant's arm and asking, "What are you doing that to that old man for?" No effort was made at the time to apprehend defendant, for the reason apparently that he was a much larger and stronger man than any of the others in the party. After the robbery had occurred and all but Mr. Griffin had gone into the house where they were living, it is in evidence that defendant returned to the scene and robbed Mr. Griffin the second time, on which occasion he secured a ladies' small gold hunting-case watch and a silver dollar. The second robbery took place between the house at which Mr. Griffin was stopping and another house about 12 feet distant, and the entire second robbery was witnessed by a Mrs. Holmes from her bedroom, which was directly opposite the scene of the second robbery. Her testimony is in clear corroboration of Griffin's testimony as to what occurred at that time, and her identification of defendant is clear and positive. Defendant was not the chief of police of Glendale, nor an officer at all, but two or three days after the robbery, when defendant was in the office of the real chief of police of Glendale, in the presence of the chief and two other officers, he denied that he was in the automobile with Griffin and his party, or with them at all. Defendant did not take the witness stand; neither did either Allen or Brown, the two men who were with defendant—the only evidence of any real importance introduced in defendant's behalf being that of Mrs. Leslie and Hicks. Mrs. Leslie, whose testimony is mainly negative, is contradicted in many details by disinterested witnesses. Both she and Hicks declared that they neither saw nor heard on the part of Griffin and Mrs. Griffin anything that would indicate that a robbery was taking place in the automobile, although Mrs. Leslie was in position where she might readily have seen all that was transpiring had it not been, according to her own testimony, for the attentions which she was receiving from Allen, consisting of her being hugged and kissed by him, which attentions on the part of Allen she said she generously divided between herself and Mrs. Griffin; also that she had had 8 or 10 more drinks of brandy while she was in the Humphries home. Her testimony also showed that she had considerable feeling against Mrs. Griffin at the time of the trial. Hicks had his back to the scene. He testified that when the auto stopped at Mrs. Leslie's home, there was some commotion in the back of the car; Goulding, the defendant, backed out first; did not see any robbery; could not see very well; it was dark there; there was no scream nor any blows struck that he knew of; didn't hear the remark ascribed to Mrs. Griffin: "What are you hitting him for?" Hicks said he wasn't drunk, but that he had had a couple of drinks of whisky and 4 or 5 drinks of wine. It was also shown that Hicks was very friendly with Mrs. Leslie when the trial took place.

[5, 6] The error complained of in connection with the trial of the case consists in the refusal of the court to admit certain evidence by which defendant offered to prove by one witnes that Allen (the man who was on the back seat with defendant Goulding, Mr. Griffin, and the two women) within a few days after the robbery had tried to sell a ladies' hunting-case gold watch to the witness, and by another witness that Allen had procured a loan from the witness on a watch of that description. In the circumstances the evidence of such facts would have had a tendency to establish either that Allen alone committed the robbery, or that the robbery was the result of a conspiracy, and that Allen was a confederate of or coconspirator with Goulding. Assuming that the jury might have taken the view that Allen was the person who perpetrated the crime, the offered evidence would have been very material to Goulding's defense; hence it should have been received. But in view of all the evidence in the case, it is apparent that, not only was Goulding's guilt shown beyond a reasonable doubt, but that the evidence very nearly approached a demonstration of his guilt. Assuming that there was nothing in the conduct or demeanor of any of the witnesses testifying for the people which would have militated against their good intentions and their desire to tell the truth, it would seem entirely improbable that any fair-minded jury, after listening to all the evidence, including therein the testimony of the witnesses called for the purpose of testifying to the two transactions in question, could have had a reasonable doubt, founded upon either the evidence or the lack of evidence in the case as to the guilt of the defendant. Section 4½ of article 6 of the California Constitution provides that—

> "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, * * * or rejection of evidence, * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

The court is of the opinion that neither the rejection of the evidence referred to, nor the giving of any instruction nor the refusal to give any instruction of which complaint is made by appellant, and upon which appellant bases his appeal herein, resulted in a miscarriage of justice.

The judgment of conviction and the order denying the motion for new trial are affirmed.

We concur: CONREY, P. J.; JAMES, J.

60 Cal. App. 551

SMITH v. RIEDELE. (Civ. 3882.)

(District Court of Appeal, Second District, Division 2, California. Jan. 23, 1923. Hearing Denied by Supreme Court March 22, 1923.)

Work and labor 🔑28(3)—Evidence held insufficient to show implied promise to pay for services.

Evidence *held* insufficient to establish an implied promise to pay for services rendered during a period of eight or nine years by one occupying a position similar to that of a member of the family.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Edward Smith against Philip Riedele. From judgment for defendant, plaintiff appeals. Affirmed.

Hearing denied by Supreme Court; MYERS, J., not participating.

C. E. Joslin, of Los Angeles, for appellant.
O'Melveny, Millikin & Tuller, of Los Angeles, for respondent.

WORKS, J. In this action plaintiff sued to recover for personal services rendered to defendant, relying for a recovery upon an implied promise of defendant to pay. The services were varied in their nature, and many of them were performed about the house and grounds of respondent. Upon a motion for a nonsuit the trial court determined that plaintiff's evidence was barren of a showing of an implied promise. The motion for a nonsuit was granted and judgment went for defendant accordingly. Plaintiff appeals.

Appellant was the only witness at the trial. His testimony showed the rendition by him of various services for respondent, it is true, these items of performance on his part extending over a period between eight and nine years in extent; but respondent contends that under all the circumstances disclosed by the testimony the trial court was justified in determining that there was no implied promise to pay. In this view we are bound to concur. During the entire period mentioned, between eight and nine years, appellant resided in the household of respondent. Not only did he have a room in the family residence, but he ate his meals at the family table. When there were guests at table he usually sat with them. He made no payment whatever, during all of this period, for either room or board. On various occasions respondent furnished appellant with clothing. The two sometimes fished together, and when they did appellant used tackle bought by respondent. The latter paid for appellant's fishing license, on one occasion at least, and perhaps more, as the evidence on the subject is not clear. During these years respondent frequently gave money to appellant, the total sum so disbursed being over $400, but it was neither given nor received as compensation for any service, being a pure gratuity. Appellant had some money from other sources, as his testimony discloses that he was under at least one outside employment during the period of his residence with respondent. The evidence does not show how long this employment lasted, but it was with a corporation in which respondent was interested. At the end of the period which we have twice mentioned the relationship which had existed between the parties was terminated and appellant left respondent's home. The evidence discloses no reason for the severance, but it was then, for the first time, that appellant made claim that respondent was indebted to him for services.

The record before us reveals a situation which is concluded by a mass of decided cases all over the country, a number of which are found in the reports of our own state. A mention of two of these latter will suffice to dispose of the appeal. In a recent case in which a niece had long resided with her uncle, practically in the capacity of a daughter, and had brought suit against his personal representative to recover the value of services rendered, the Supreme Court approved the following language of a text-writer:

> "Ordinarily, where services are rendered and voluntarily accepted, the law will imply a promise upon the part of the recipient to pay for them; but where services are rendered by members of a family, living in one household, to each other, or necessaries are supplied by one near relation to another, the law will presume that they were gratuitous favors merely, prompted by friendship, kindness, and the relationship between them. And in such case, before the person rendering the service can recover, the express promise of the party served must be shown or such facts and circumstances as will authorize the jury to find that the services were rendered in the expectation by one of receiving, and by the other of making compensation therefor."

The court then cited authorities to the effect that the rule applies to children by adoption as well as to children by blood, and to orphans received into the family. Ruble v. Richardson (Cal. Sup.) 204 Pac. 572. In an earlier case of the same nature the Supreme Court used the following language:

> "It has been said many times that the question [of plaintiff's right to recover] is one that must be determined on the circumstances of the particular case, the question in each case being whether it can reasonably be inferred that pecuniary compensation was in the view of the parties at the time the services were rendered. * * * In the consideration of such circumstances, the degree of the relationship may strengthen or diminish the implication that the services are acts of gratuitous kindness and affection, according to its proximity or remote-

ness. * * * Our own decisions appear to support the doctrine that to authorize compensation in such cases the circumstances must be such as to warrant the inference that it was the expectation of both parties that compensation should be made." Crane v. Derrick, 157 Cal. 667, 109 Pac. 31.

While the stituation of appellant in respondent's family was perhaps a little different from that of the persons contemplated by the Supreme Court in its opinion in Ruble v. Richardson, we are convinced that his testimony brings his case within the broad doctrine of that case and of Crane v. Derrick, and that there is no evidence in the record which would have supported a finding of an implied promise by respondent to pay him for the services rendered. Therefore the motion for a nonsuit was properly granted.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

60 Cal. App. 560

DUNLAP v. CHATOM et al. (Civ. 2526.)

(District Court of Appeal, Third District, California. Jan. 24, 1923.)

Joint adventures 🔑5(2) — Evidence held to show grain was not purchased by defendants on joint account with plaintiff.

Evidence *held* to show that the relations between plaintiff and defendants were not founded on a contract covering all the grain transactions of defendants, but that the parties were joint adventurers in some of these transactions as to which they made special agreements, and that there was no such agreement as to the transaction on which plaintiff bases suit for conversion of proceeds.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by S. C. Dunlap against A. G. Chatom and others. Judgment for defendants, and plaintiff appeals. Affirmed.

James W. Bell, of Los Angeles, and L. J. Maddux, of Modesto, for appellant.

R. L. McWilliams, and James F. Peck, both of San Francisco, for respondents.

HART, J. This is an action for damages in the sum of $6,000, for the alleged conversion of 500 tons of barley. The complaint is cast in the usual form of an action in conversion, and alleges as follows:

> "That the plaintiff is informed and believes and, on such information and belief, alleges that the defendant T. W. Norcross has, since the time hereinafter alleged, been adjudged an incompetent, and one Cope Norcross is the duly authorized, qualified, and acting guardian of the person and estate of the said T. W. Norcross; that 'Corcoran Mill & Warehouse' is a fictitious name under which the defendants, during all the times herein mentioned, conducted a business of buying and selling grain at Corcoran, in the county of Kings, state of California; that on or about the 1st of June, 1919, the defendants, under the name Corcoran Mill & Warehouse, purchased of one O. C. Heck, and the said O. C. Heck delivered to the defendants under the name Corcoran Mill & Warehouse, in said county, 500 tons of barley on the joint account of plaintiff and Corcoran Mill & Warehouse, at an agreed price of $2 per hundredweight, under and pursuant to an oral agreement between plaintiff and Corcoran Mill & Warehouse to purchase grain on joint account and to sell only on joint agreement, and when so sold the proceeds thereof to be divided in the proportion of one-half to the plaintiff and one-half to the Corcoran Mill & Warehouse, and if a sale could not be made as aforesaid, then by said agreement the grain should be divided in like proportion between them. It was also a part of said agreement that said parties should share equally any losses arising out of any purchase made on joint account; that on or about the said 1st day of June, 1919, at Corcoran, in said county, the defendants then being in possession of said barley unlawfully converted and disposed of the same to their own use to the damage of the plaintiff in the sum of $6,000."

The defendants A. G. Chatom, Thomas H. Chatom, and Corcoran Mill & Warehouse filed separate answers, specifically denying the averments of the complaint. The cause was tried by the court, sitting without a jury.

A default was entered against the defendant T. W. Norcross, and the action dismissed as to the defendant J. C. Walsh. As to the other defendants, A. G. and Thomas H. Chatom and Corcoran Mill & Warehouse, the findings followed the denials of the answers, and the decision, therefore, was in their favor. Judgment for said defendants was accordingly entered. The appeal is by the plaintiff from said judgment.

The important contention of the plaintiff is that the findings are without sufficient probative support, but an examination of the evidence as it is presented here has convinced us that it is the contention and not the findings which the record does not support.

The following facts are extracted from the evidence as it was produced before the trial court: For some time prior to the date of the transaction on which this action is predicated, the defendants A. G. Chatom, T. W. Norcross, and J. C. Walsh were copartners, engaged in the buying and selling of grain under the firm name and style of "Corcoran Mill & Warehouse" at the town of Corcoran, in Kings county. During the period of time mentioned, the Corcoran Mill & Warehouse and the plaintiff did, on different occasions, enter into arrangements whereby they agreed to jointly purchase grain and likewise sell the same, equally sharing the profits of such transactions; or, as the witness A. G. Chatom explained it:

> "Those fellows, my partners down there (referring to Norcross and Walsh), whenever they had a deal that was too large for them to handle, why they would call Dunlap's assistance in for help—probably help finance it."

He further stated that the plaintiff was interested only in those deals with the defendants in which he and his partners thought it advantageous or convenient to allow him to participate. On or very near the 12th day of April, 1919, the defendant T. W. Norcross, presumably acting for the copartnership, entered into negotiations with one O. C. Heck, of Lemoore, Kings county, for the purchase of 500 tons of barley. Heck, testifying on behalf of the plaintiff, stated that he "sold him (Norcross) 500 tons of barley, to be delivered off of the first cutting; that is, the first that the machines cut." There was not made as to this transaction between Norcross and Heck any agreement or memorandum in writing, nor was any payment made to Heck thereon at the time of these negotiations. Heck further testified that either in the latter part of April or early part of May, 1919, he met, by appointment, A. G. Chatom, in the office of the Corcoran Mill & Warehouse in Lemoore. Asked what the conversation or substance thereof was between him and said Chatom, Heck testified:

> "He was there a couple of days, trying to get me to agree to deliver this 500 tons of barley and I told him I wouldn't do it. I told him why. Q. Well, just state what you told him. A. Well, I told him that I figured that Norcross and Walsh was out of it, and, if they were, those were the people that I was doing business with and I didn't owe anybody any 500 tons of barley."

Heck proceeded to say that Chatom insisted that his firm was entitled to the barley and threatened to sue Heck if he did not deliver the same. To this Heck replied:

> "Well, all right; if you think that I owe you 500 tons of barley, and think that I can't deliver it, or won't, I will show you that I will, and on that I delivered the 500 tons of barley. * * * He (A. G. Chatom) made out a little bit of an agreement which was signed by him and I. The next day I asked him for a check for $10,000; and he didn't want to give it to me but he did—his own personal check on this barley."

We return now to Norcross' activities with respect to his transaction. On the 24th day of April, 1919, he addressed to the plaintiff a letter which, among other statements, contained the following:

> "Our records here for joint account are as undernoted: 50,000 sack crop (est.) on 1,600 acres. This is a conservative estimate. 500 tons June barley. Both lots being purchased at $2.00 f. o. b. cars; the 50,000 sacks to be delivered at Corcoran and the 500 tons at Stratford."

It is most probable—in fact, counsel for the defendant so assume in their brief—that the "500 tons of June barley" mentioned in said letter was the Heck barley.

It appears from the evidence that the defendants were also, during all the times above referred to, transacting business with a concern known as the U. S. Trading Corporation. The dealings had with said corporation were always or generally conducted upon the same general terms as were the dealings between the plaintiff and the defendants; that is to say, whenever the U. S. Trading Corporation and the defendants had transactions together involving the purchase and sale of grain, they jointly shared the profits or returns on such transactions. On the 25th day of April, 1919 (the day following that on which he addressed the letter above referred to to Dunlap, and approximately 12 days subsequently to the negotiations he had with Heck), Norcross addressed a letter to the U. S. Trading Corporation, in which he said, among other things: "We beg to confirm sale of 500 tons of barley at $2.00 f. o. b. either Corcoran or Stratford." It should be noted that the letter addressed by Norcross to the plaintiff stating that he had purchased the Heck barley on the joint account with the plaintiff, and the letter addressed to the U. S. Trading Corporation offering it the 500 tons which Norcross evidently thought he had secured from Heck were written within a few hours of each other. And this brings us to a reference to the testimony tending to show that, at the time he was attempting to consummate a deal with Heck for the 500 tons of barley, Norcross was suffering more or less from the result of excessive alcoholic indulgences, and, inferably from the evidence, also from the inordinate use of some narcotic. It should be added here that he was subsequently committed to the insane asylum and that, during the period of time intervening the date on which he was engaged in negotiations with Heck and the date of his commitment to the insane asylum, he was in no mental condition to transact business in a reliable manner.

After Norcross had assured the U. S. Trading Corporation that he would transfer the Heck barley to it, the defendant A. G. Chatom, being of the belief that Norcross was incapable mentally of transacting business, sent a telegram to the Trading Corporation warning it against transacting any further business with Norcross, in so far as the copartnership was concerned, until said Chatom should give said corporation further notice. To this letter the Trading Corporation replied, under date of April 30, 1919, to the effect that when Norcross was in San Francisco he had sold the Heck barley to it. Thereupon said Chatom replied that he would endeavor to carry out any contract made by Norcross with the Trading Corporation with respect to the Heck barley. Chatom explained that the reason he expressed a willingness to let the Trading Corporation have the Heck barley was that said corporation had been one of the very best patrons or customers the Corcoran Mill & Warehouse had and, therefore, he desired to let said corporation have the Heck barley in order to keep its good will. Hunsucker, manager of the Corcoran Mill & Warehouse, and the plaintiff also testified that the Trading Corporation had been one of the best customers the defendant had during the years of the existence of the copartnership.

Said Chatom testified that, upon learning that Norcross had told the plaintiff that the Heck barley had been purchased on the joint account of the latter and the Corcoran Mill & Warehouse and had also about the same time agreed to sell said barley to the Trading Corporation, he communicated with the plaintiff, asking him to call at Corcoran for the purpose of discussing the matter. The plaintiff appeared at Corcoran on the 4th day of May, 1919, and a conference was held between him and A. G. Chatom, in the presence and hearing of Thomas H. Chatom, the son of said A. G. Chatom. At this time there was another deal on between the defendants and one Peterson for the purchase of the latter's barley, amounting to 1,500 tons. As to what occurred between the plaintiff and A. G. Chatom on the 4th day of May, when the former appeared at Corcoran for a conference with the latter with regard to the Heck barley, A. G. Chatom testified:

> "What, if anything, was said by Mr. Dunlap in regard to your letting the U. S. Trading Corporation have the Heck barley? A. Well, that is what he said. He says: 'Let them have it.' He says: 'That is all right.' He says: 'As long as you get the Peterson barley.' He says: 'That is good enough for me. There is ten or twelve thousand dollars in that.' Q. That is the Peterson barley, you mean? A. That was the Peterson barley. Q. Did you afterwards get the Peterson barley? A. Yes, sir; we made a brand new—we had to renew a contract; he telegraphed me from Los Angeles to make a different contract with Peterson, and I had to give Peterson $5 a ton more than the original contract that Norcross was supposed to have made."

A. G. Chatom further testified that on the same occasion the plaintiff said to him: "Go ahead and deliver the Heck barley, don't count me in this." Thomas H. Chatom, in a measure, corroborated the above testimony of his father.

On June 23, 1919, Dunlap rendered a statement to the Corcoran Mill & Warehouse, showing the several transactions occurring between him and the defendants involving the purchase and sale of grain, which covered a period from and including May 1st of the year named to and including June 13th of the same year. Therein no reference was made to the Heck barley. In fact, it was stipulated by counsel for the plaintiff that "there was no account at any time that contains any reference to any 500-ton barley purchased in the year 1919."

Nothing further was said between plaintiff and the defendants relative to the Heck barley until January 29, 1920, some eight or nine months after the purchase of said barley by Chatom, when the plaintiff addressed to the Corcoran Mill & Warehouse a letter, in which, among other things, he said:

> "It has just come to my knowledge to-day that O. C. Heck delivered 500 tons of barley in June at $2 cwt., f. o. b. cars which was joint account with me and I ask for the proper settlement of this lot or delivery of my half of the barley f. o. b. cars whichever is most convenient to you. You will note by letter from your people to me dated April 24 that you confirm 50,000 sacks of one lot and 500 tons in another lot for joint shipment at $2.00 f. o. b. cars."

In reply to this letter, under date of February 2, 1920, A. G. Chatom wrote, in part:

> "How well you knew you had no interest in the Heck 500 tons of barley sold by me to the U. S. Trading Corporation. That matter was fully thrashed out to your satisfaction last spring on your visit to Corcoran, and it was agreed in the presence of three witnesses beside ourselves the Norcross contract of necessity with you was not binding on us, and that was exactly my object in sending for you so as to have a clear understanding. You admitted yourself that Norcross was not responsible for his actions and you, your own self, instructed me to wire my connections to disregard all transactions made by Norcross. * * * Norcross had no writing on the Heck contract, but I signed up Heck myself and advanced him ten thousand dollars out of my personal account. But still I delivered you the Peterson barley and made you, as you call it, a ten thousand dollar Christmas present. * * * We never have continued doing business because the opportunity was never such that we needed to split our profits with any one, as I am plenty able to finance any small business like the Corcoran Mill & Warehouse."

The above comprehends a fair conspectus of the testimony which the defendants claim (and justly so) affords sufficient support to the findings. There was, as might well be expected, contradictory evidence. The plaintiff himself testified that the understanding was that he should have a joint interest in the transaction involving the purchase and sale of the Heck barley. He stated that before writing his letter to the defendants, dated January 29, 1920, he had had telephonic conversations with A. G. Chatom, in which he insisted upon his interest in said transaction; but this testimony was flatly contradicted both by A. G. Chatom and his son Thomas H. Chatom. Each testified positively that at no time over the telephone or otherwise did the plaintiff ever make any suggestion to him that he (plaintiff) claimed an interest in the Heck transaction after the conference between A. G. Chatom and the plaintiff the early part of May, 1919. Of course, it was entirely with the trial court, as the trior of the facts, to weigh the evidence and determine its probative effect. It was within its discretion to conclude that the statement made by the plaintiff to A. G. Chattom at the time of the conference above referred to, that he (plaintiff) could be "counted out" of the Heck transaction, meant that plaintiff himself understood that he was not to be considered as jointly interested in said transaction, and that such was the understanding between the parties. The fact that the plaintiff, after the conference mentioned, remained perfectly silent as to the Heck barley for a period of some eight or nine months, and the further fact that after that transaction he presented an account to the Corcoran Mill & Warehouse of the dealings then between them made no reference to the Heck barley, are circumstances tending strongly to support the conclusion of the trial court upon the proposition that the plaintiff did not consider himself and was not interested in the purchase of the Heck barley. Counsel for the plaintiff, however, besides maintaining that there is no evidence to support the findings, make the further point that the ground upon which the defendants seek to defeat recovery herein involves a question of waiver—that is, that the plaintiff waived his interest in the Heck transaction, and that, since relying upon that defense, it was incumbent upon the defendants to plead and prove such waiver, that no such allegation and proof having been made, the defense was not sustained.

We do not think there is a question of waiver involved in the case. It is merely a question of whether the parties made any agreement as to the Heck barley. As shown above, there is evidence to the effect that the relations between the plaintiff and the defendants were not founded upon a contract covering all the grain transactions of the defendants, but that the latter, whenever they found it more convenient to do so, or, as A. G. Chatom stated it, when they were unable themselves to handle a deal alone, they would enter into an agreement with the plaintiff whereby he was made an equal participant in the profits of the particular transaction. It was not a general partnership between the defendants and the plaintiff, but a mere joint adventure in those particular transactions as to which they did make such agreements.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

---

60 Cal. App. 539

MACKECHNIE BREAD CO. v. HUBER et al.

(Civ. 4025.)

(District Court of Appeal, Second District, Division 2, California. Jan. 22, 1923.)

Injunction 🔑56—Will lie to restrain bakery wagon driver from soliciting old customers for new company.

A bakery company, furnishing an automobile and guaranteeing certain returns to one who sells their products, and aiding him in building up their business in a particular district, acquires a property right in the list of customers procured in the district, which can be protected by injunction restraining the driver from soliciting orders for another company from dealers who have been purchasers through him of the first company.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Suit for injunction by the Mackechnie Bread Company against Gus Huber and another. From a judgment for plaintiff, the named defendant appeals. Affirmed.

J. F. Keogh and C. C. Mishler, both of Los Angeles, for appellant.

E. R. Young, of Los Angeles (C. B. Penn, of Los Angeles, of counsel), for respondent.

WORKS, J. For several years before the present action was instituted defendant Huber had been engaged in the sale of commodities in a certain district in the city of Los Angeles. He first sold milk in the territory, and he next engaged in the sale of bread therein for a baking company other than either of the corporation parties to this action. He then entered the employment of plaintiff for the purpose of selling its bread in the same district. His compensation for this service was arranged upon a percentage of sales made by him, although he was guaranteed a compensation of $18 a week. For the first few weeks his percentage compensation did not equal the guaranteed amount, and the guaranty was made good by plaintiff. Plaintiff furnished Huber an automobile by means of which to solicit business and make deliveries in the district, and it also provided him with samples of its bread for distribution among prospective customers. Huber's work in the territory was also aided from time to time by other solicitors and by demonstrators, all employed by plaintiff. In a given week, at about the time of Huber's employment by plaintiff, its sales in the district amounted to $83.64. During Huber's incumbency of his position with plaintiff, the sales steadily increased until the amount of weekly sales reached more than $500. They were maintained at this figure for several months, and until Huber left the employment of plaintiff.

Soon after his relationship with plaintiff was terminated, Huber entered the employment of defendant California French Baking Company in a similar capacity; his operations being conducted in the defined district which he had covered under his employment with the plaintiff. He immediately began to solicit the business of his old customers in the territory, on behalf of defendant corporation. Plaintiff's sales in the district at once fell off tremendously, so much so that during the second week of Huber's new employment the total amount of sales made by plaintiff therein was but $145.87. Plaintiff soon thereafter instituted this suit for an injunction. Judgment went in favor of defendant corporation, but Huber was enjoined from soliciting orders for bread in the district. The injunction was limited in its operation, however, to anticipated activities of Huber among those dealers who had become purchasers from plaintiff during his employment with it. Defendant Huber appeals.

It is contended by appellant that the findings, from which the above statement of facts is produced, do not support the conclusions of law and that the judgment is against law. One legal question only is presented by this contention: Did respondent possess such a property right in the list of customers procured in the district covered by appellant during his employment by it that the right could be protected by an injunction such as was issued against appellant? This question was before the Supreme Court in Empire Steam Laundry v. Lozier, 165 Cal. 95, 130 Pac. 1180, Ann. Cas. 1914C, 628, 44 L. R. A. (N. S.) 1159; the effect of the court's opinion being syllabized by the official reporter thus:

> "An employee of a laundryman, whose duties were to drive a laundry wagon along a designated route in a city, to serve well the customers of his employer, to increase his business, to solicit new business, and keep a complete and confidential list of all the customers on the route, is engaged in an agency of trust and confidence, and such list, even though in part prepared by him, is the absolute, and a valuable part of the property of the employer."

Appellant attempts to distinguish the case cited from the present one. He says in his brief that in Empire Steam Laundry v. Lozier:

> "The information put to use was of a kind which concerned the habits, tastes, and niceties of men and women as to the cleanliness and tidiness of linens and apparel of a more or less intimate and private use and character. Such information was difficult to gather; it was to be searched out in a painstaking way from house to house; and when customers were obtained they were held ordinarily, not by the personal influence of drivers of wagons and solicitors, but by a satisfying personal service rendered by the laundry to its patrons."

Appellant then attempts from the facts in the present case to paint a different picture of his situation. We are convinced that no difference exists. The decision of the court in Empire Steam Laundry v. Lozier was very largely based upon the opinions in two New York cases—one dealing with the rights of a grocery company as against the activities of one of its former canvassing agents; the other with a controversy between a dealer in teas, coffees, and spices and one of its solicitors. Moreover, the Supreme Court has directly applied the doctrine of Empire Steam Laundry v. Lozier to a case exactly like the present. It is said in the opinion in the case we have in mind:

> "When consideration is paid to the undisputed facts that plaintiffs were actively engaged in increasing their own business; that they advertised to this end; that they made over the list of their customers to defendant, increasing the list as new patrons applied; that defendant was really employed as a sales agent on commission, and that it was to his interest, as well as to his principals' interest, to develop the business in every legitimate way; that his wagon was a Cornish's Bakery wagon; that he advertised and used only the products of the Cornish's Bakery—it makes the case too plain for the need of further discussion. The facts fit most aptly and appositely with those of Empire Steam Laundry v. Lozier, 165 Cal. 95." Cornish v. Dickey, 172 Cal. 120, 155 Pac. 629.

The facts here, in their general effect, fit as aptly and appositely with those of both the cases cited. See, also, New Method Laundry Co. v. MacCann, 174 Cal. 26, 161 Pac. 990, Ann. Cas. 1918C, 1022.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

60 Cal. App. 493

BURD v. DOWNING. (Civ. 3904.)

(District Court of Appeal, Second District, Division 1, California. Jan. 20, 1923.)

1. Judgment ⚷252(1)—Courts will grant either legal or equitable relief warranted by the facts and allow amendment of prayer.

Where the facts alleged in the complaint authorize either legal or equitable relief, the courts will administer the appropriate relief and will even allow amendments to be made to the prayer to justify the judgment; a plaintiff being sent out of court only when, upon his facts, he is not entitled to any relief either at law or in equity.

2. Judgment ⚷252(1)—Complaint and prayer held to authorize cancellation of mortgage.

A complaint alleging that defendant's intestate had executed a mortgage to secure the payment of the last month's rent to become due under a lease, that the lease was canceled and the lessee released from all obligations thereunder, and that all rent due had been paid, with a prayer for recovery of damages and for an order directing defendant to execute a release of the mortgage, was sufficient to authorize a judgment requiring the execution of the release of the mortgage.

3. Appeal and error ⚷1170(3)—Failure to state separately legal and equitable causes does not require reversal.

If it were necessary separately to state equitable and legal causes of action, defendant is not prejudiced by failure to do so where he was fully advised of the facts upon which plaintiff relied, so that there could have been no miscarriage of justice within Const. art. 6, § 4½.

4. Landlord and tenant ⚷184(1)—Releasing of lessee held sufficient to require cancellation of mortgage for last month's rent.

Where a lessee had given a mortgage to secure the payment of the last month's rent due under the lease, a release subsequently given him by the lessor after he had surrendered possession of the premises and delivered to the lessor the furniture therein, which released the lessee from all obligations of every kind and nature under the lease, and declared it to be canceled by mutual consent of the parties, entitled the lessee to have canceled the chattel mortgage.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Mattie E. Burd, administratrix of the estate of James Burd, deceased, against J. O. Downing, to compel release of a chattel mortgage and for damages. Judgment for plaintiff, and defendant appeals. Affirmed.

Harry K. Smith and J. O. Downing, both of Los Angeles, for appellant.

W. M. Rex, of Los Angeles, for respondent.

JAMES, J. The judgment in this action was in favor of the plaintiff, and defendant has appealed.

The plaintiff, after showing her appointment as administratrix of the estate of James Burd, deceased, alleged that on the 21st day of January, 1914, the said Burd entered into a lease with the defendant covering certain real property in the city of Long Beach known as the Kensington Apartments; that at the same time the said James Burd and Mattie E. Burd executed to the defendant a mortgage for the sum of $325 to secure the payment of the last month's rent to become due under said lease; that on the 3d day of April, 1914, an agreement in writing was made between the said James Burd and defendant, whereby the said lease was canceled and the lessee released from all obligations thereunder; that the rent due had been paid, "including the last month of the term of said lease." It was further alleged that demand had been made by plaintiff administratrix upon defendant that he release the mortgage, which demand had been refused. By reason of such refusal it was alleged that the estate of James Burd had suffered damage in the sum of $500 and that said estate was entitled to collect a penalty of $100 in addition thereto. The prayer was for recovery of damages in the amounts stated and concluded with the following demand:

> "That an order may be made directing the defendant to execute a release of said mortgage, and for such other and further relief as the court may deem equitable."

There was a demurrer to the complaint, which assigned various grounds in addition to the general ground that a cause of action was not stated. Among the special grounds was that which assigned a misjoinder of causes of action in that "a cause of action sounding in damages and a cause of action in equity" had been misjoined, and that they had not been separately stated. The court made findings determining that all the allegations contained in plaintiff's complaint were true, and further specially found that the lease was canceled on the 3d of April, 1914, and that the debt for which the mortgage was given as security had not become due at that time. Notwithstanding the general findings determining all of the allegations of plaintiff's complaint to be true, the judgment allowed no damages to be recovered; but it was adjudged that the mortgage referred to had been satisfied and discharged.

[1-3] Appellant contends first that the action as framed was one solely for damages and that the judgment of the court, being of an equitable character, is not sustained by the cause of action pleaded. It is a settled rule of practice in this state that where the facts alleged in a complaint authorize either equitable or legal relief, the courts will administer the appropriate kind and will even allow amendments to be made

to the prayer to justify the judgment. "Legal and equitable relief are administered in the same forum, and according to the same general plan. A party cannot be sent out of court, merely because his facts do not entitle him to relief at law, or merely because he is not entitled to relief in equity, as the case may be. He can be sent out of court only when, upon his facts, he is entitled to no relief, either at law or in equity." Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423. "An action does not now, as formerly, fail because the plaintiff has made a mistake as to the form of his remedy. If the case which he states entitles him to any remedy, either legal or equitable, his complaint is not to be dismissed because he has prayed for a judgment to which he is not entitled." Walsh v. McKeen, 75 Cal. 519, 17 Pac. 673. See, also, Angus v. Craven, 132 Cal. 691, 64 Pac. 1091. The complaint contained a statement of facts sufficient to support the judgment of the court. The prayer of the complaint was also sufficient to authorize the relief awarded. If it were to be conceded (and we do not mean to so hold) that the equitable and legal causes of action should have been separately stated, the answer to the contention of error in that behalf is that no prejudice has been suffered by the defendant, for he was fully advised of the facts upon which plaintiff relied. Under the provisions of section 4½ of article 6, there could not have been a miscarriage of justice.

[4] The judgment is amply supported upon the evidence. It was shown that the lease made by the plaintiff's intestate was executed on the 21st of January, 1914, and covered a term of three years; it provided that the rental should be at the rate of $275 per month payable in advance for the first year, and $325 per month in advance for each of the two succeeding years. It further appeared that the mortgage referred to was executed to secure payment of the rental for the last month of the term; that on the 3d day of April, 1914, a little over two months after the making of the lease, the parties mutually agreed to a rescission of lease, and defendant was restored to possession of the property. As part consideration for the release, defendant received the furniture in the apartment house subject to a chattel mortgage of about $1,100. The value of the equity, according to some of the testimony, was several thousand dollars in excess of that sum. The release was made in writing; it referred to the lease and referred to the mortgage made to secure the last month's rent and proceeded then with these statements:

> "Whereas said party of the second part is desirous of withdrawing from said lease and being relieved from all obligations thereunder: Now, therefore, said party of the first part does hereby release said party of the second part from any and all obligations of whatsoever kind and nature under said lease, and does hereby agree that said lease be and the same is hereby set aside, canceled and annulled by mutual consent of the parties thereto and hereto."

Under the express terms of the written release, the defendant as lessor abandoned and relinquished all demands and claims which would have arisen in his favor had the lessee continued to hold the property. Necessarily he relinquished the right to enforce any further demands for the payment of rental. The mortgage was given to secure payment of the rental for the last month of the term, and hence when the release was executed the mortgage debt was discharged. Upon the face of the writing deliberately made by the parties, this conclusion is inescapable.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

---

60 Cal. App. 578

WRIGHT v. PHILLIPS et al. (Civ. 4080.)

(District Court of Appeal, Second District, Division 1, California. Jan. 25, 1923.)

1. Receivers ⟹210—Can sue in foreign state only as a matter of comity.

A receiver has no authority to exercise his powers beyond the jurisdiction of the court appointing him, so that he may be permitted to sue in a foreign state as a matter of comity only.

2. Receivers ⟹210—Foreign receiver will be permitted to sue within state if domestic creditors are not thereby prejudiced.

The privilege of comity will be extended to a foreign receiver to permit him to sue within the state wherever the rights of local or domestic creditors are not prejudiced thereby.

3. Fraudulent conveyances ⟹255(4)—Husband to whom property was fraudulently conveyed is necessary party to suit to subject it to wife's debt.

Even though a husband is not a proper party to an action upon a judgment debt of his wife, he is a necessary party where the complaint alleges that the wife had voluntarily transferred her property to him in fraud of her creditors, and sought to have the conveyance set aside.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by E. E. Wright, receiver of the Washington Motor Sales Company, Incorporated, against Sarah A. Phillips and her husband. Judgment for defendants, and plaintiff appeals. Reversed, with direction to overrule the demurrers to the complaint.

Thomas C. Ridgway, of Los Angeles, and Ward, Ward & Ward, of San Diego, for appellant.

Sweet, Stearns & Forward, of San Diego, for respondents.

JAMES, J. Separate demurrers of the defendants, interposed to the complaint of the plaintiff, were sustained, and the court refused leave to plaintiff to amend. The judgment of dismissal followed, from which plaintiff has taken his appeal.

Plaintiff alleged that on the 26th day of November, 1915, the Washington Motor Sales Company, a corporation, was by a judgment of the superior court of the state of Washington declared to be insolvent, and that an order was made appointing plaintiff as receiver, and that he duly qualified and has ever since been acting as such. The averment next appears that the receiver duly obtained leave to bring this action from the court appointing him. It was alleged that the defendants were husband and wife; that on or about the 3d day of April, 1918, defendant Sarah A. Phillips was indebted to the corporation mentioned on account of a stock subscription in the sum of $5,000; that on the 3d of April, 1918, plaintiff commenced an action in the superior court of the county of San Diego, state of California, against the said Sarah A. Phillips (who was at that time Sarah A. Donovan), which action was based upon the stock subscription contract, and that on the 29th of March, 1919, a judgment was in said case made, given, and entered in favor of the plaintiff and against said defendant. It was then alleged that on or about the 4th of June, 1918, after the suit last mentioned had been commenced, and "while defendant Sarah A. Donovan knew of the pendency of said action, and after she had been served with summons in said action," she by deed "attempted to convey" certain described real property to her husband, W. Sinclair Phillips. It was alleged that said conveyance was made without consideration and with intent to prevent plaintiff from levying upon the real property to satisfy the judgment which would be entered in the suit before mentioned, and that by the transferring of said property said Sarah A. Phillips became insolvent, and that she has not since possessed any property which would not be exempt from execution. By the prayer plaintiff requested a decree setting aside the conveyance aforesaid described.

[1, 2] The main ground of the demurrers was that the plaintiff lacked the capacity to sue in this state as receiver, and we must infer that the trial judge reached a conclusion favorable to the defendants on that issue of law. The proposition that a receiver appointed by a court of a particular state can have no authority to exercise his powers beyond the limits of the jurisdiction of the court appointing him appears plainly enough from the bare statement of the question. Receivers appointed under a jurisdiction other than that of the forum may be permitted to sue in a stranger state as a matter of comity only. That this privilege of comity will be extended, wherever the rights of local or domestic creditors are not prejudiced is now the general rule in the United States, notwithstanding that earlier decisions, notably that of Booth v. Clark, 17 How. 322, 15 L. Ed. 164, tended in their holding the other way. See High on Receivers (4th Ed.) § 47; Smith on Receivership (2d Ed.) p. 165; 23 R. C. L. p. 142; 5 Ann. Cas. p. 570. Each state, of course, establishes its own policy on the subject. The policy of this state conforms to the generally recognized rule under which the plaintiff properly claims the privilege of maintaining his action. Iowa & California Land Co. v. Hoag et al., 132 Cal. 627, 64 Pac. 1073. In other California cases, such as Lackmann v. Supreme Council, etc., et al., 142 Cal. 22, 75 Pac. 583, where persons claiming in a representative capacity under appointments made in other states were denied the right to become suitors in the courts of California, it will be found that there were local creditors whose interests were to be first protected. If, at any later stage in the course of this action, it should appear that there are creditors within the state of California whose rights would be prejudiced by allowing the receiver to succeed, the court upon so finding would refuse to award the plaintiff any relief.

Being clear in our minds that the rule of comity recognized by the courts of California requires that the plaintiff be admitted here as a proper party plaintiff, the second contention of appellant need not be given extended consideration. The case of Lewis v. Adams, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423, is cited by the latter to the point that, where a debt owing to an estate is reduced to judgment by an administrator, the judgment may be sued on even in another state by the administrator in his own name, and that any description of his representative capacity appearing in the complaint may be treated as surplusage. Under that authority it would appear that the judgment already obtained in this state as pleaded (which judgment on the allegations made in the complaint is attended by every presumption as to its regularity and validity) could be sued upon by the plaintiff in his own name. However, this is a separate action, not directly on the judgment, although in aid of its satisfaction, and we leave the question open as to whether the authority cited is applicable in such a situation.

[3] It is next argued that as to the husband the action should be dismissed because plaintiff in no event could have a judgment

against that defendant's property. The court would not be authorized under the allegations of the complaint to give any judgment against the property of the husband. Being an alleged recipient of property transferred to him by the wife, without consideration, for the alleged fraudulent purposes, he would be a necessary party to the action.

The judgment is reversed, with direction to the superior court to overrule the demurrers of the defendants as interposed to plaintiff's complaint.

We concur: CONREY, P. J.; HOUSER, J.

---

60 Cal. App. 431

BRKLJACA v. ROSS et al.

(Civ. 4398, S. F. 10142.)

(District Court of Appeal, First District, Division 1, California. Jan. 12, 1923. Hearing Denied by Supreme Court March 12, 1923.)

1. Municipal corporations 🔑706(5)—Evidence held to sustain finding automobile driver was not negligent.

Evidence that an automobile driver approached a street intersection on the right side of the street with his lights burning properly and after sounding his horn, and that he had slowed down to a speed of about three miles an hour before passing plaintiff and his companion, who had stopped in the middle of the street, when plaintiff suddenly started across in front of the automobile, *held* sufficient to sustain the jury's finding that defendant was not negligent.

2. Negligence 🔑117—Plea denying defendant's negligence and alleging plaintiff's negligence was sole cause is sufficient.

A plea denying any negligence on the part of defendant and alleging that plaintiff's negligence was the sole cause of his injury is sufficient, though it is not a plea of contributory negligence by way of confession and avoidance.

3. Municipal corporations 🔑706(8)—Evidence held not to require instruction on last clear chance to avoid striking pedestrian.

Where the evidence was practically undisputed that plaintiff left a safe position and rushed in front of defendant's automobile so close there was no opportunity to stop the car, so that defendant had no clear chance to avoid the collision, it was not error to refuse a requested instruction on the doctrine of last clear chance.

4. Negligence 🔑83—Instruction on last chance must include defendant's knowledge of plaintiff's danger and opportunity to avoid the accident.

Requested instruction embodying the doctrine of last clear chance, which did not require finding that defendant had knowledge of the dangerous position in which the plaintiff had placed himself in time to have prevented the accident by the exercise of reasonable care, omitted elements essential to the application of that doctrine.

5. Municipal corporations 🔑706(4)—Evidence that plaintiff was intoxicated is admissible on issue of care exercised by him.

Though a drunken man is as much entitled to a safe street as a sober one, evidence of plaintiff's intoxication is relevant on the issue as to whether he heedlessly exposed himself to injury from defendant's automobile, so that it was not error to admit evidence of his intoxication or to permit his companion to be impeached by asking whether he had not stated immediately after the accident that he and plaintiff had been drinking.

6. Negligence 🔑88—Instruction on intoxication of plaintiff held correct.

An instruction that, if the jury should find plaintiff was so intoxicated at the time of his injury as to prevent him from using ordinary care for his own protection, and that he did not use such ordinary care and his failure to do so contributed directly to the injury, he could not recover, was correct.

Opinion of Supreme Court Denying Hearing.

7. Appeal and error 🔑843(2)—Plaintiff's negligence in law not considered where defendant found negligent as a fact.

Where the plaintiff's negligence was determined adversely to him by the trial judge and by the jury, who considered both the law and the facts, it is unnecessary to determine on appeal whether he was negligent as a matter of law.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by Stanko Brkljaca against J. S. Ross and another to recover damages for personal injuries. Judgment for defendants, and plaintiff appeals. Affirmed.

A. L. Wessels, of Ukiah, for appellant.

J. A. Pettis, of Ft. Bragg, and Mannon & Mannon, of Ukiah, for respondents.

RICHARDS, J. This appeal is from a judgment in the defendants' favor in an action for damages for personal injuries alleged by the plaintiff to have been sustained by him by being struck by the automobile of the defendant Mendocino Lumber Company while the same was being operated by the defendant Ross, and that the accident occurred through the latter's careless and negligent operation of said automobile. The answers of the defendants, while admitting the accident, deny that same was caused, or that any injuries which the plaintiff may have sustained thereby were occasioned, through any carelessness or negligence on the part of the defendants, or either of them, in the operation of said automobile, or otherwise. They further deny that at the time of said accident the said machine was the property of the Mendocino Lumber

Company, but, on the contrary, allege that the same was the property of the defendant Ross, and that the same was at said time being driven and operated by him solely for his own pleasure and not for or upon any business of the defendant corporation. They further allege that while the said defendant Ross was operating said machine in a careful and prudent manner and in accordance with the traffic regulations, both of the state and of the city of Fort Bragg, and was driving the same upon the right of the center of Redwood avenue in said city, and at a speed not in excess of 15 miles an hour, with the lamps and headlights fully lighted and with the horn or warning signal being sounded, the plaintiff while under the influence of intoxicating liquors, attempted to cross the street upon which said defendant was driving said car, and so carelessly and negligently conducted himself in so doing that he staggered and fell in front of the front wheel of the said automobile, and that whatever injuries and damages were sustained by him were occasioned solely and proximately by his own negligence. The cause was tried before a jury and was, at the conclusion of the plaintiff's case, dismissed as to the defendant Mendocino Lumber Company. Upon the submission of the cause the verdict of the jury was in favor of the defendant Ross. The judgment followed the verdict. A motion for a new trial was denied, whereupon plaintiff took and prosecutes this appeal.

The appellant in the body of his briefs in support of his appeal discusses learnedly, exhaustively, and with much citation of authority the respective rights and duties of pedestrians and of drivers of vehicles upon the public streets. With the law relative to this subject neither the respondent herein nor this court has in the main any quarrel. The difficulty is not with the law but with its application to the facts of the instant case. As to certain important features of the case the evidence is somewhat conflicting, but from a careful examination of the entire record we are satisfied that there is ample and substantial evidence sustaining the following summary of the facts of the case:

On the evening of November 23, 1919, the plaintiff, accompanied by a companion named Borcick, approached Redwood avenue, in the city of Fort Bragg, intending to cross the same toward the northeast corner of Redwood avenue and Franklin street. They were walking and the plaintiff was pushing a little cart or wagon and their course would take them diagonally across Redwood avenue in a northwesterly direction. When about to cross said avenue they observed an automobile approaching along it from the west and waited at the curb for said automobile to pass. They then proceeded on their way over and across Redwood avenue. While they were so doing, the defendant Ross, who was the owner of a seven-passenger Chandler touring car, fully equipped with foot clutch, foot brake, emergency hand brake, electric Klaxon horn, and headlights, all in good working order, drove his car, containing besides himself four other passengers, from McPherson street into Redwood avenue at a point approximately 200 feet easterly from the course which the plaintiff and his companion were pursuing in crossing said avenue. The street was otherwise unoccupied and unobstructed, and as the defendant's machine turned into said avenue the plaintiff and his companion came within the range of the lights of the car and were seen by the driver and the other occupants of the car in the act of crossing said avenue. The car, with its lights thus turned on, were equally visible to the plaintiff and his companion had they looked in that direction. The defendant Ross sounded his horn as he came on down the avenue and diminished his speed as he approached the course which the plaintiff was taking until, as he neared the line of the plaintiff's progress, he was proceeding at a speed not to exceed 3 miles an hour. He sounded his horn several times as he approached and up to the time he was within a few feet of the place plaintiff and his companion were walking toward the center of said avenue and apparently up to that time paying no attention to the approaching car with its lights and sounding horn. When the car was within 20 or 25 feet of where plaintiff and his companion were, the latter stopped his further progress and was in a place of safety. But the plaintiff went ahead and then turned back and then, and when too late for an impact to be avoided, went ahead again immediately in front of the car and was struck before the driver could stop the machine or avoid the impact. The occupants of the car all testified that the car was almost at a standstill when it struck the plaintiff and that it came to a stop immediately thereafter. The undisputed evidence shows that the defendant's car was at all times proceeding along said avenue on the right-hand of the center thereof and well over toward the curb, and that the impact with the plaintiff occurred when he was at a point in his progress across said avenue several feet past the center line thereof. The plaintiff, from the impact, sustained the injuries of which he complains. From the foregoing state of the facts it may not be questioned that as a matter of law it was the duty of the plaintiff as he was attempting to cross Redwood avenue, and particularly as he approached and passed the center line thereof, to have looked to the right and in the direction along the avenue from which danger could be expected from vehicles traveling westerly thereon. Sheldon v. James, 175 Cal. 474, 166 Pac. 8, 2 A. L. R. 1493; Moss v. Boynton Co., 44 Cal. App. 474, 186 Pac. 631. Had the plaintiff thus looked, as he was in duty bound to do, he must have seen the lights of the defendant's approaching car and been aware of its approach. He cannot, therefore, be heard to excuse himself for proceeding across the center line of the said avenue and into the space about to be rightfully traversed by said approaching car, upon the plea that he was not aware of its approach. His act in so doing was therefore, upon the undisputed facts of the case, negligence as a matter of law. Moss v. Boynton Co., supra.

[1] As to the alleged negligence of the defendant, it cannot be reasonably contended by the appellant herein that the defendant was negligent in continuing his progress westerly along the right-hand side of Redwood avenue from the time when upon entering upon said avenue the plaintiff and his companion came within the space made visible by the lights of his car and were observed by him to be proceeding on their course across the avenue. He could not be held negligent in so proceeding so long, at least, as the plaintiff was upon the easterly side of the avenue, since the defendant would have had the right to assume that his car was as visible and observed by the plaintiff as the plaintiff was visible and observed by him. Besides, the undisputed evidence shows that the defendant was proceeding carefully and in obedience to traffic rules and from time to time sounding his horn, after the plaintiff came within the range of his vision. The mere fact that the plaintiff did not stop in his progress before reaching the center of the avenue or even did not show by his actions that he was aware of the defendant's approach, would not of itself require the latter to cease from his further progress along his rightful course upon said avenue, since he would have the right, in the absence of any knowledge to the contrary, to assume that the plaintiff would not cross the center line of the street and enter the danger zone without assuring himself as to his safety in so doing by looking to his right for approaching vehicles. Up to the moment, therefore, that the plaintiff crossed the center line of the avenue, the defendant could not, upon the practically uncontradicted evidence in this case, be charged with any neglect of duty. The question, therefore, of defendant's negligence reduces itself to the limited time and space after the plaintiff had crossed the center line of the avenue and come within the danger line of the defendant's approaching car. The evidence as to what occurred within that space shows, without substantial conflict, that the impact between the plaintiff and the defendant's car occurred by reason of the fact that the plaintiff, whether he was panic-stricken by the sudden sounding of the defendant's horn or by the immediate presence of the approaching car, or whether, as the defendant claimed, he was intoxicated, left the place of safety where his companion stood, and suddenly and unexpectedly rushed in front of the car when it was too late for the defendant to check the progress in time to avoid the impact. The general verdict of the jury implies a finding to this effect, and with such finding in the state of this record we have no right to interfere.

[2] The appellant makes a number of contentions not involving the matter of conflicting evidence and which should be disposed of. He contends that the defendant has interposed no adequate plea of contributory negligence. In the sense that contributory negligence is a plea of confession and avoidance, this contention may be taken to be true, since the defendant nowhere admits any negligence on his own part to which the plaintiff's negligence contributed in causing the collision. The defendant, however, does affirmatively plead that the collision was solely and proximately caused by the plaintiff's negligence and without any fault on the defendant's part. This was a sufficient plea to put in issue the plaintiff's negligence as the sole cause of the accident from which his injuries arose.

[3, 4] The appellant further contends that he was entitled to an instruction upon the doctrine of "last clear chance," which the trial court refused, upon his request, to give. We are satisfied, however, that there was no moment of time to which the doctrine of last clear chance could have been given application in the instant case. Until the plaintiff left the place of safety where his companion was standing, he was obviously in no danger of being struck by the defendant's car. Nor was the defendant under any duty to stop the progress of his car while the plaintiff was in such place of safety. The practically undisputed evidence shows that between the moment when the plaintiff left that safe position to rush in front of the car and the moment of impact there was not sufficient time to stop the car. Under such conditions there was no clear chance open to the defendant to avoid the collision and hence no instant of opportunity to which the doctrine of the last clear chance could apply. The court was not requested to give an instruction upon a subject not embraced within the facts of the case. Furthermore, an examination of the instructions requested by plaintiff, as embodying the doctrine of last clear chance, omit the essential elements necessary to the application of this doctrine; such, for example, as the element that the defendant must have had knowledge of the dangerous position in which the plaintiff by his own negligence had placed

himself, in time to have prevented the impact by the exercise of reasonable care. Cady v. Sanford (Cal. App.) 207 Pac. 45; Young v. S. P. Co. (Cal. Sup.) 210 Pac. 259.

[5, 6] The appellant further contends that the trial court was in error in permitting a certain physician, who was a witness for the defendant, to testify that the plaintiff, when seen by said witness immediately after the accident was in a state of intoxication. There is no merit in this contention, for while it is true that "a drunken man is as much entitled to a safe street as a sober one and more in need of it," it is also true that evidence of the plaintiff's physical and mental condition as to sobriety or intoxication would be relevant to the issue as to whether he had heedlessly and witlessly exposed himself to injury at the immediate moment of the accident. The ruling of the trial court was therefore correct in admitting this evidence. It was also correct in overruling the plaintiff's objection to the impeaching question asked of plaintiff's companion Borcick as to whether he had not stated, immediately after the accident, that he and the plaintiff had been drinking. A similar conclusion must be arrived at as to the instruction of the trial court to the effect that if the jury should find that plaintiff was so intoxicated at the time of his injury as to prevent him from using ordinary care for his own protection, and that he did not use such ordinary care, and that his failure so to do contributed directly to his injury, he would not be entitled to recover. This instruction, taken with the other very full instructions of the court, correctly states the law. 29 Cyc. 642.

We do not find that any of the other points urged by the appellant require separate consideration.

The judgment is affirmed.

I concur: TYLER, P. J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [7] In denying a hearing we wish to state that under the facts as detailed in the opinion the question of whether or not the plaintiff was negligent was a question determined adversely to him by the trial judge and by the jury, who considered both the law and the facts. It is therefore unnecessary for the opinion to be predicated upon the proposition that the plaintiff was guilty of negligence as a matter of law. The jury having found him guilty of negligence as a matter of fact he was not entitled to recover.

Petition denied.

WILBUR, C. J., and LAWLOR, LENNON, WASTE, SEAWELL, KERRIGAN, and MYERS, JJ., concur.

---

60 Cal. App. 554

MITCHELL v. NORTH PAC. S. S. CO.

(Civ. 4311.)

(District Court of Appeal, First District, Division 2, California. Jan. 24, 1923.)

1. Evidence 🔑417(16)—Parol evidence that goods were packed according to direction of carrier's agent held admissible.

In a shipper's action against a carrier for damages to a shipment of postal cards claimed by defendant to have been improperly packed, evidence that prior to the shipment plaintiff consulted defendant's agent as to the method of packing, and the agent told him that the goods were properly packed except a small portion thereof, which was packed by defendant at plaintiff's expense, and that a rope sling would not be used to place the goods on the steamer, *held* properly admitted; the bill of lading being silent as to what constituted proper packing.

2. Carriers 🔑111—Liability of carrier for damages due to improper packing of goods shipped stated.

In view of Civ. Code, § 2175, forbidding a carrier to exempt itself from liability for damage by gross negligence, fraud, or willful wrong, if goods are improperly packed, and this fact is not apparent or known to the carrier, it is not liable for loss or injury due to such improper packing if it is itself free from negligence, but, if the carrier is guilty of negligence but for which the damage would not have occurred, it is liable, even though the improper packing was not apparent.

3. Carriers 🔑111—When carrier liable for damage to goods improperly packed stated.

If goods presented for carriage are not properly packed, and that fact is apparent to the carrier or his servants upon ordinary observation, the carrier may refuse to receive them in that condition, but, if it does accept them, it must handle the shipment with reference to such defective condition, and is liable for loss or injury thereto if negligent in respect thereof.

4. Carriers 🔑134—Finding as to damage to shipment of postal cards sustained.

In an action by a shipper against a carrier for damages to a shipment of postal cards alleged by defendant to have been improperly packed, evidence *held* to sustain a finding as to the extent of damage to the shipment.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Edward H. Mitchell against the North Pacific Steamship Company. Judgment for plaintiff, and defendant appeals. Affirmed.

H. W. Glensor and Glensor, Clewe & Van Dine, all of San Francisco, for appellant.

J. R. Pringle, of San Francisco, for respondent.

NOURSE, J. Defendant appeals from the judgment in the sum of $1,437.65 recovered by plaintiff against defendant in an action for damages to postal cards. Plaintiff is a publisher and dealer in postal cards. Defendant is a common carrier of goods and merchandise by water, owning and operating certain steamboats as such between the ports of San Francisco and San Pedro, Los Angeles county. On or about March 25, 1916, plaintiff delivered to defendant at San Pedro 3,907,850 postal cards for transportation to San Francisco, where they arrived in a damaged condition. The cards were packed for shipment in new double cardboard boxes. About 20 per cent. of these were inclosed in wooden cases. The balance were tied together with small rope, five boxes in a bundle. In all there were 60 wooden cases and 715 bundles. It was to the cards in the bundles that the damage occurred. Upon arrival of the shipment in San Francisco there was a large stack, between two and three feet high in the center, and about six or eight feet in diameter, consisting of loose cards, torn and dirty, with occasional packages of 100 as they had originally been packed, together with pieces of boxes and a large amount of dirt. Around the outer edge of this stack were the bundles of packages which still remained tied together in the manner originally prepared. The court found that the damage was occasioned by defendant carelessly and improperly conducting the loading and stowing of the post cards on the steamer. Supporting this finding there was evidence that the bundles were hoisted aboard the vessel upside down with a rope sling; that this sling broke the boxes on the outside edge of the sling and crushed them in such a manner that the top of the boxes would not cover the entire lower part, thus permitting the cards to fall out of the boxes, and through the mesh of the sling upon the wharf; that the witness watched 8 or 10 slingloads go aboard, and that the same thing happened in each instance; that an employee of the company picked the cards up which fell on the wharf and put them in a grain sack; that the steamship company had a specially prepared sling which, if used, would not have crushed the boxes. The bill of lading contained certain provisions purporting to release the carrier from liability if goods were improperly packed, to wit:

> "Carrier shall not be or be held liable for leakage or wastage of contents of any package nor for breakage of or damage to contents of any package unless shipper first show that such package was of proper strength and in good condition and that such contents were properly packed therein and in good order when delivered to carrier and that the package was, while in possession of carrier, so crushed or broken as to cause such loss or damage; and in no event be liable for loss of or damage to any such contents not specified herein, nor for loss from package or damage to property shipped in tierces, crates, sacks, bundles, bales, * * * unless it be first proven by shipper that such loss or damage was caused by or resulted from carrier's neglect or fault or failure in proper loading, stowage, custody, care or proper delivery of said packages. * * * All property packed in secondhand or weak cases, etc., shall at all times be at owner's risk; and neither fault nor failure nor improper loading nor bad stowage nor improper custody nor want of due care nor improper delivery of or by carrier shall be presumed, but same must if alleged be proven by shipper. * * * Carrier shall never be liable for any loss of or damage to said packages nor for any damage or loss suffered in connection therewith unless its negligence or willful default be shown to have been the sole cause of the same."

Other than this, there were no specifications as to what constituted proper packing. The defense was that the goods were improperly packed and that defendant was released from liability under the terms of the bill of lading. It bears a notation that the bundles and cases were poorly tied and contents part loose. The court found, in accordance with the allegations of the complaint, that said post cards were packed as directed by defendant, and were in good order and condition, and well packed, when received by defendant, except that a small number of said post cards upon delivery to defendant were not securely packed, but all said post cards not so securely packed upon delivery to defendant were by defendant, at plaintiff's cost and expense, well and securely packed, and were so packed before the loading thereof upon said steamer.

The trial court admitted evidence of conversations between plaintiff and defendant's agent occurring prior to delivery of the goods to defendant or issuance of bill of lading relating to the manner of packing these cards for shipment. This evidence shows that prior to shipment plaintiff consulted with defendant's agent in Los Angeles as to the method of packing, and that the cards were packed in bundles, and not inclosed in wooden cases, as above indicated, at the latter's suggestion and upon his assurance that the company could take them that way; also that he agreed not to use a rope sling, which, however, defendant did use, but promised to use a board sling, which he stated would not loosen the packages. As to this plaintiff testified:

> "He (defendant's agent) said: 'We don't use that (the rope sling) for packages that I have advised you to make. * * * We have another kind of sling with heavy boards on the bottom and ropes on the sides; * * * the transport would be the one to load these packages on that; that would drop them inside without loosening them;' and I said, 'Are you absolutely sure you can take these that way?' and he said 'Yes;' and I said, 'Very well, if you can do that.'"

Appellant urges:

That the admission of this evidence constituted reversible error, on the ground that it was an attempt to vary the terms of a written instrument by parol evidence. That "the written contract provides that the carrier shall not be held liable for leakages, wastage, or damage, unless shipper first show that such package was of proper strength and in good condition. That the evidence does not show that the packages were of proper strength, and that it was error for the court to reject defendant's offer to prove that the packages were not of proper strength or in good condition." That the evidence does not sustain certain findings, in particular that there is no evidence whatever to show to what extent the goods were damaged while in the possession of this carrier.

[1] The evidence objected to was properly admitted. The bill of lading was silent on the question of what constituted proper packing, and, under the well-established rule in such cases, parol evidence to this point was admissible. It was then competent to show that the goods were packed in accordance with the directions of appellant's agent. This operated as an estoppel and precluded appellant from introducing evidence for the purpose of showing that, nevertheless, such method of packing was improper. There is no merit in appellant's argument that it told respondent it would accept the goods packed in the manner detailed because by the terms of the bill of lading the goods were to be at shipper's, and not at carrier's, risk if not properly packed, and that such statements were not made for the purpose of indicating to respondent a proper method of packing them.

[2, 3] A carrier in this state cannot by any agreement made in anticipation thereof exempt itself from liability for damage occasioned by the gross negligence, fraud, or willful wrong of itself or its servants. Civ. Code, § 2175. If goods are improperly packed, and this fact is not apparent or known to the carrier, it is not liable for loss or injury due to such improper packing, if it is itself free from negligence. Conversely, if the carrier is guilty of negligence but for which the damage would not have occurred, the carrier is liable even though the improper packing is not apparent. If the goods presented for carriage are not properly packed, and that fact is apparent to the carrier or his servants upon ordinary observation, the carrier may refuse to receive them in that condition; but if it does accept them it must handle the shipment with reference to such defective condition and is liable for loss or injury thereto if negligent in respect thereof. Northwestern Marble & Tile Co. v. Williams, 128 Minn. 514, 151 N. W. 419, 420, L. R. A. 1915D, 1077, 1079; Ill. Central R. Co. v. Rogers & Thomas, 162 Ky. 535, 172 S. W. 948, 949, L. R. A. 1915C, 1220, 1225, Ann. Cas. 1916E, 1201, and cases cited; Duncan v. Great Northern Ry. Co., 17 N. D. 610, 118 N. W. 826, 828, 19 L. R. A. (N. S.) 952, 959; Union Express Co. v. Graham, 26 Ohio St. 595, 598; Atlantic Coast Line R. R. Co. v. Rice, 169 Ala. 265, 52 South. 918, 920, 29 L. R. . (N. S.) 1214, 1217, 1218, Ann. Cas. 1912B, 389.

Here appellant's negligence in loading the goods and the resulting damage were affirmatively shown. In addition, it was shown that the goods were packed as directed by appellant. The finding of the trial court as to this fact was amply supported by the evidence. The goods were carried in motor trucks from respondent's place of business in Los Angeles to San Pedro, and delivered to appellant at the steamer by the Pioneer Truck Company. It is urged by appellant that the evidence shows the cards were delivered to the truck company, an independent carrier acting as agent for the shipper, in good condition, but that it shows they were not delivered by it to appellant in good condition; that there was no evidence as to the extent of the damage to the shipment before its delivery to appellant; and that therefore, the finding as to the extent of the damage done by appellant is not supported by any evidence. But there was no evidence that the cards were damaged when delivered to appellant. The evidence relied upon by appellant is the notation on the bill of lading, "Bundles and cases poorly tied and contents part loose"; also the testimony of a witness that he saw part of the consignment on the wharf at San Predro near the steamer the next day; that there were some loose boxes lying around the dock which were not tied with rope or string at all; and that there were some cards lying on the dock loose around the boxes. But this same witness further testified:

> That, so far as he could observe, with a few exceptions, the cardboard boxes which he saw on the wharf were in the same condition as when placed on the trucks in Los Angeles; that they "were all tied the same as when they left Van Ornum's (where the trucks were loaded in Los Angeles) with the exception of one or two bundles which were lying loose. * * * There were some cards lying on the docks loose around the boxes. The cardboard boxes containing the post cards were not injured so far as I could see. I don't know how the post cards came to get out of the cardboard boxes onto the wharf. They were not more than a hundred or so lying loose. None of the covers were misplaced on any of the cardboard boxes. There were several cardboard boxes on the wharf which were not bound about with a cord or a rope."

The court found, as heretofore stated:

> "That a small number of said post cards upon delivery to defendant were not securely packed but all said post cards not so securely packed upon delivery as aforesaid to defendant were by defendant, at plaintiff's cost and expense, well and securely packed, and were so packed before loading thereof upon said steamer."

[4] The evidence is sufficient to support the finding of the trial court upon the issue as to the extent of the damage by appellant. As

to the condition in which they were packed, the rule above stated applies here. If the goods were obviously poorly packed when delivered to it, appellant might have refused to accept them, but, having undertaken to carry them, it was not excused from liability for damage due to its negligence.

For the reasons stated the judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

190 Cal. 477

HAINES v. FEWKES. (L. A. 7430.)

(Supreme Court of California. Feb. 26, 1923.)

1. Appeal and error ⚷930(1) — Appellate court must take the evidence most favorable to respondent.

Appellate court must take the evidence most favorable to respondent.

2. Municipal corporations ⚷706(5)—Evidence held insufficient to establish contributory negligence of one struck by automobile.

Evidence of one's efforts to cross a street after dark during heavy traffic *held* insufficient to establish contributory negligence.

3. Municipal corporations ⚷706(6)—Evidence held to raise question for jury as to auto driver's negligence while driving in heavy traffic.

Evidence *held* to raise question for jury as to auto driver's negligence while driving in heavy traffic after dark.

4. Appeal and error ⚷999(1) — Appellate court bound by jury's finding on question of fact.

The appellate court is bound by the jury's findings on questions of fact.

In Bank.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Mary P. Haines against John B. Fewkes. From judgment for plaintiff, defendant appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Wm. B. Himrod and S. A. McNeil, both of Los Angeles, for respondent.

WILBUR, C. J. [1, 2] Plaintiff recovered judgment for personal injuries received by her while crossing Figueroa street at Eighteenth street in Los Angeles by reason of a collision with defendant's automobile. The defendant appeals, claiming that the evidence is insufficient to show that he was negligent, and that the evidence affirmatively established the contributory negligence of the plaintiff. Appellant's theory is that the plaintiff suddenly ran in front of his automobile while he was proceeding north on Figueroa at a speed of between 8 and 10 miles per hour, and that the plaintiff, crossing Figueroa street at Eighteenth from west to east, started through the line of traffic going south on Figueroa and ran in front of his machine before he had the opportunity to either observe her or stop his machine. There was evidence to support this view, but in considering the appeal we must take the evidence most favorable to the plaintiff. According to her testimony, the accident occurred about 5:30 p. m. December 10, 1920, when it was comparatively dark, and the headlights of the automobiles were lighted. She passed rapidly and successfully through the stream of traffic on the west side of Figueroa, proceeding south, which she states was an almost continuous procession, reached the center of the street where she stopped midway between the north and south bound tracks of the electric railway on Figueroa street, paused a few moments, and then stepped forward to a position between the rails of the north bound track. There, looking southward, she saw approaching her two automobiles with headlights lighted near the east curb of Figueroa street proceeding northward; that she was not in the line of their travel; that while she remained standing at this point she was struck by the defendant's automobile, which had apparently swerved over toward her from the position in which she first saw it. It is apparent from this statement that she was guilty of no contributory negligence, but that she was making the best of her way across the street through the very heavy traffic on the street at that time.

[3, 4] With reference to the appellant's contention that the evidence fails to show negligence on his part, it is sufficient to say that there was evidence from which the jury might have inferred negligence. On the plaintiff's testimony the jury was justified in inferring that defendant had suddenly swerved to the left, thus bringing the plaintiff in the line of his advance. Defendant testified that the glare of headlights from the automobiles going south affected his vision, and that he did not see the plaintiff until the moment of the impact. Under the evidence adduced, the question of whether or not either of the parties to the action was negligent was clearly a question for the jury, and we are bound by their verdict.

Judgment affirmed.

We concur: WASTE, J; SEAWELL, J; LENNON, J; LAWLOR, J; KERRIGAN, J; MYERS, J.

---

190 Cal. 485

MYLES v. RUSSELL et al. (L. A. 7421.)

(Supreme Court of California. Feb. 26, 1923.)

1. Evidence 🔑598(1)—Testimony of one witness entitled to credit sufficient to prove any fact in civil case.

The testimony of one witness, who is entitled to credit, is sufficient for proof of any fact in a civil case, even though that testimony be uncorroborated and be contradicted by the testimony of any number of other witnesses.

2. Master and servant 🔑80(9)—Finding on issue of amount of services sustained.

In an action by a motion picture director for services, a finding that plaintiff had furnished 14 complete written stories, instead of 6, as alleged by defendants, *held* sustained by evidence of plaintiff corroborated and not substantially contradicted.

3. Master and servant 🔑80(9)—Finding on issue of embezzlement sustained.

A finding against the defendants upon the issue that plaintiff had habitually embezzled defendants' money coming into his hands in the course of his employment so as to bar recovery of wages *held* sustained by the evidence.

4. Costs 🔑260(4)—When damages for frivolous appeal will be awarded stated.

Where an appeal is wholly devoid of merit and is made for delay only, and by its means defendants have succeeded in depriving plaintiff of the fruits of his judgment for nine months, and have subjected him to the additional expense of defending his judgment, damages as for a frivolous appeal will be awarded.

In Bank.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Norbert Myles against William D. Russell and others. Judgment for plaintiff, and defendants appeal. Affirmed.

F. E. Stivers, D. S. McCann, and Wm. B. Ogden, all of Los Angeles, for appellants.

Stephen Monteleone, of Los Angeles, for respondent.

MYERS, J. Defendants appeal from a judgment for plaintiff in an action to recover a balance due upon an account for services rendered by him as a motion picture director, and for moneys expended by him in that connection for the benefit of defendants. One item of plaintiff's account, as found and allowed by the court, was the sum of $2,800 on account of 14 written stories and continuities at the agreed price of $200 each. Defendants contended that 6 only of the 14 stories had been delivered. The court found:

> "That plaintiff prepared, furnished, and delivered to defendants during said period of employment 14 complete written stories and written continuities to accompany the same, instead of 6 written stories, as alleged in defendants' answer."

This finding is claimed by appellants to be wholly unsupported by the evidence. Plaintiff testified that he had prepared the 14 stories, had typewritten an original and 2 carbon copies of each, had used each of the 14 originals in the direction and production of a picture therefrom for the defendants, and had left the 2 carbon copies of each at the studio of the defendants.

[1, 2] It is, of course, elementary that the testimony of one witness, who is entitled to credit, is sufficient for the proof of any fact in a civil case, even though that testimony be uncorroborated and be contradicted by the testimony of any number of other witnesses. It may be noted, however, that in this case plaintiff's testimony on this point was cor-

roborated and was not substantially contradicted.

[3] Defendants alleged, by way of an affirmative defense, that the plaintiff was guilty of dishonesty in the discharge of his duties, amounting to unfaithful service, in that he had in the course of his employment misappropriated and converted to his own use divers sums of money belonging to the defendants, and that because thereof he was barred from recovering herein. Appellants' counsel claim that in support thereof it was shown upon the trial that the plaintiff had in one instance presented to the defendants a voucher for $25 on account of money expended by him, which he had not in fact expended. They do not print in their brief any evidence in support of this claim, nor do they refer to any place in the typewritten transcript where such evidence may be found. They also claim that plaintiff testified at the trial that he had expended $20 in one instance, wherein he had in fact expended only $1. Upon the basis of these two claimed instances of misconduct they assert that he is barred from any recovery herein, and cite a line of cases holding that where a servant has been habitually embezzling his master's money which came into his hands in the course of his employment, he is thereby barred from recovering any balance of the wages which may be due him. It is obvious that such a rule would not be applicable to the facts herein, even if they were as claimed by appellants. Appellants' contention, when analyzed, is in effect this: That because the plaintiff in suing to recover a balance of account running into thousands of dollars, claims two items aggregating $44, to which he is not justly entitled, the court should fine him more than $3,300, and make a gift of that sum to the defendants. If such were the law, this would indeed be a dreary world for creditors. It is, however, sufficient to say that the trial court found against the defendants upon this issue, and that its finding is amply supported by the evidence.

[4] This appeal is wholly devoid of merit, and it appears to us that it was made for delay. By means of the appeal the defendants have succeeded in depriving the plaintiff of the fruits of his just judgment for a period of nine months, and have subjected him to the additional expense of defending his judgment. This court is not disposed to encourage such conduct.

It is therefore ordered that the judgment appealed from be and it is hereby affirmed, and that there shall be added to the costs herein the sum of $250 as damages for this frivolous appeal.

We concur: WILBUR, C. J.; LENNON, J.; WASTE, J.; SEAWELL, J.; KERRIGAN, J.; LAWLOR, J.

---

190 Cal. 492

PERKY v. PERKY. (S. F. 10356.)

(Supreme Court of California. Feb. 26, 1923.)

1. Appeal and error 🔑965—Venue 🔑52(1)—Change of, for convenience of witnesses within court's discretion.

Allowing change of venue for convenience of witnesses is within court's discretion, and an order denying change can only be reversed for a manifest abuse of discretion.

2. Venue 🔑52(1)—Court may consider whole question, rather than any single issue in ruling on application for change of venue.

Where defendant, being sued for divorce, has secured a change of venue and set up a defense by desertion by plaintiff to defeat plaintiff's charge of cruelty, the court, in passing on plaintiff's effort to have the venue changed back for the convenience of witnesses, is not bound to consider primarily the convenience of the witnesses who were to testify to plaintiff's claim, it being but one of the issues, but can consider the whole case.

In Bank.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action for divorce by Emma L. Perky against William J. Perky. Defendant obtained a change of venue, and from an order denying a change back plaintiff appeals. Affirmed.

Perry F. Backus, of Los Angeles, and Everts, Ewing & Wild, of Fresno, for appellant.

B. W. Gearhart and Strother P. Walton, both of Fresno, for respondent.

WILBUR, C. J. [1, 2] This is an appeal from an order denying a change of venue. The plaintiff brought an action against the defendant for divorce in Los Angeles county. The defendant resided in Fresno county, and secured a transfer of the case to that county. Plaintiff sought to have the case retransferred on the ground of the convenience of witnesses. It is conceded by her that her application, based upon the convenience of witnesses, was addressed to the sound discretion of the court and the order denying the change of venue can only be reversed for an abuse of such discretion. Plaintiff's application was opposed by affidavits on behalf of the defendant to the effect that the witnesses by which he expected to prove his allegations of desertion contained in his cross-complaint resided in Fresno. The plaintiff is of the opinion that, as her charge of extreme cruelty, if proved, would be a defense to the defendant's charge of desertion, the order of the court upon her application should have been based primarily upon the convenience of the witnesses who were to testify upon the subject of cruelty. It is a sufficient answer to this proposition to say that the court was not confined in its determination of the question of a transfer to any one of the issues, but had a right to consider the whole question. It is conceded that we are not justified in reversing the order unless there has been a manifest abuse of discretion. We find no such abuse.

Judgment affirmed.

We concur: WASTE, J.; SEAWELL, J.; LENNON, J.; KERRIGAN, J.; LAWLOR, J.; MYERS, J.

---

190 Cal. 505

RITZMAN v. RITZMAN. (L. A. 7427.)

(Supreme Court of California. Feb. 28, 1923.)

1. Partition 🔑56—Law that defendant must set out interest in property held mandatory.

Code Civ. Proc. § 758, providing that a defendant in an action in partition of real property must set forth his estate or interest in the property, *held* mandatory.

2. Appeal and error 🔑151(2)—Defendant, disclaiming interest in land in action below, cannot complain on appeal of adjudicated interest.

Where defendant, in an action in partition, disclaimed any interest in the land sought partitioned, he cannot complain on appeal of the interest adjudicated in him, as aggrieved party.

In Bank. Appeal from Superior Court, Imperial County; Albert Lee Stephens, Judge.

Action by Sylvia E. Ritzman against J. W. Ritzman. From an interlocutory decree in partition, defendant appeals. Affirmed.

C. L. Brown, of El Centro, for appellant.

H. E. Gleason, of Madera, and C. A. Stice, of Los Angeles, for respondent.

MYERS, J. Defendant appeals from an interlocutory decree in partition, which adjudges that the plaintiff and defendant are tenants in common of the real property involved, and that the plaintiff is the owner of an undivided $^{55}/_{100}$ thereof, and the defendant the owner of an undivided $^{45}/_{100}$ thereof. The grounds alleged by defendant in support of his appeal have been variously stated, but, when analyzed, they all resolve themselves into the single contention that the evidence is insufficient to support the finding of the trial court to the effect that the plaintiff is the owner of an undivided $^{55}/_{100}$ interest in the property. Respondent in her answering brief discusses all of the contentions presented by appellant, and, in addition thereto, makes the point that appellant is not entitled to the consideration by this court of any of his contentions, for the reason that he is not a party aggrieved by the judgment appealed from. Section 758 of the Code of Civil Procedure provides, among other things, that a defendant in an action for partition of real property "must set forth his estate or interest in the property."

[1] A consideration of the legislative history of this section, from its enactment as section 270 of the Practice Act to and including the amendment of 1907, together with the Code Commissioner's note in connection therewith, leads to the conclusion that this Code requirement was intended by the Legislature to be mandatory. This conclusion is supported by the decision in Miller v. Sharp, 48 Cal. 394, so holding, in effect, with respect to the corresponding provision in section 753, Code of Civil Procedure, which provided:

> "The interests of all persons in the property, whether such persons are known or unknown, must be set forth in the complaint, as far as known to the plaintiff."

The court there said:

> "The statute concerning partition (section 759) provides that the rights of the several parties, plaintiff as well as defendants, may be put in issue, tried and determined, but it does not provide that rights such as these may be tried or determined without being put in issue."

[2] The plaintiff in her complaint herein alleged that she and the defendant were owners, as tenants in common, of the described land, and that she was the owner of an undivided $^{4}/_{7}$ interest therein, and the defendant owner of an undivided $^{3}/_{7}$ interest therein. The defendant, in his amended answer, not only failed to set forth his estate or interest in the property, but affirmatively alleged, in effect, that he had no estate or interest therein. That this was not due to oversight or inadvertence appears from the circumstance that by his original answer he claimed ownership in himself of the whole interest in the land in question, a claim which he expressly repudiated by his amended answer. We are thus confronted with the situation of an appellant who in the court below expressly disclaimed any interest in the land, and now complains to this court because he was awarded only a $^{45}/_{100}$ interest therein. The decree appealed from relates to the property only, and awards no personal judgment or relief of any kind as against the defendant personally. Under these circumstances we are unable to conceive of any process of reasoning by which the defendant can justly claim to have been aggrieved thereby.

We find no authority in this state expressly in point upon this situation, but in Flannigan v. Towle, 8 Cal. App. 229, 96 Pac. 507, a suit to quiet title, wherein several tax deeds were under attack by plaintiffs, and plaintiffs admitted at the trial that they could show no title to the land described in any of these deeds except one, it was held that they were not aggrieved parties so far as the judgment related to the other tracts. See, also, Mono County Irr. Co. v. State, 32 Cal. App. 184, 167 Pac. 199; 2 Cal. Juris. 212, 217, §§ 54 to 57; Estate of Piper, 147 Cal. 606, 82 Pac. 246; Blythe v. Ayres, 102 Cal. 254, 36 Pac. 522; Myers v. Mahoney, 43 Neb. 208, 61 N. W. 580; Palmer v. Merrill, 70 Iowa, 227, 30 N. W. 494; Hinton v. Winsor, 2 Wyo. 206, 3 C. J. 628.

Appellant has suggested no answer to the point thus raised by respondent, and, finding none ourselves, we are constrained to the conclusion that it is well taken.

The judgment is affirmed.

We concur: WILBUR, C. J.; LAWLOR, J.; LENNON, J.; KERRIGAN, J.; SEAWELL, J.; WASTE, J.

(190 Cal. 487)

POWERS et al. v. SUTHERLAND AUTO STAGE CO. et al. (L. A. 7257.)

(Supreme Court of California. Feb. 26, 1923.)

1. Death ⚷18(1)—Action maintainable for pecuniary loss.

The only damages recoverable by heirs under Code Civ. Proc. § 377, are compensatory damages for pecuniary loss to them by reason of the death of the ancestor.

2. Death ⚷18(3)—Action maintainable by widow deserted by deceased.

The legal liability of a husband for the support of his wife may be the basis of assessing damages for his death, although he has deserted her, and although she knows nothing of his whereabouts.

3. Evidence ⚷364—Mortality tables admissible to ascertain expectancy of life.

Mortality tables are admissible for the purpose of ascertaining the decedent's expectancy of life, in an action for death by wrongful act.

4. Death ⚷99(4)—$3,600 damages to widow held not excessive.

$3,600 general damages to widow living apart from her husband who was 48 years of age, able-bodied, and with a life expectancy of 20 years, *held* not excessive.

In Bank.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Annie Powers and another against the Sutherland Auto Stage Company and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

W. H. Thomas and B. P. Gibbs, both of Los Angeles, for appellants.

Joseph Scott and A. G. Ritter, both of Los Angeles, for respondents.

LENNON, J. This is an action for the pecuniary loss suffered by reason of the death of Frank Powers, brought by Annie Powers, his surviving widow, and Marguerite Powers, his daughter, against the defendant automobile stage company. The death of Frank Powers was caused by the overturning of an auto stage bus owned and operated by the defendant company, which accident it is undisputed was due to the negligence of the defendant. At the trial it was conceded by counsel for plaintiff that the daughter, although joined in the action upon the assumption that she was a proper party under section 377 of the Code of Civil Procedure, was not entitled to any portion of the damages awarded, for the reason that she was over the age of majority at the time of the death of the deceased and was not entitled to support from him.

The case was tried by the court, sitting without a jury, and an award was made of $3,600 as general damages and $330 for funeral expenses and other expenses incurred as the result of the death of the deceased. The item of $330 allowed for funeral expenses is not disputed, and the appeal is from the judgment for $3,600 as general damages. The sole question involved is whether or not the damages awarded by the trial court were excessive.

It is an admitted fact that the deceased and his wife had been living separate and apart, although not legally separated or divorced, for over 13 years, and that during that time she had received no support from her husband, with the exception of several small checks for $5 or $10 which he had sent to her at infrequent intervals, previous to 1915. Since that time she had heard nothing from him nor knew of his whereabouts. During the three or four years just prior to his death he had been living in illicit relations with and supporting another woman. From these facts it is argued that the widow had suffered no damages by reason of his death. And the argument is made that any damages at all allowed to a widow for the death of her husband from whom she had been receiving no support would be excessive. This position is, we think, untenable.

[1, 2] It is well settled in California that the only damages recoverable by heirs under section 377 of the Code of Civil Procedure are compensatory damages "for the pecuniary loss to them by reason of his death." Estate of Riccomi, 185 Cal. 458, 461, 197 Pac. 97, 14 A. L. R. 509. The pecuniary loss suffered by the wife in the instant case is the loss by the death of her husband of her legally enforceable right of support. Despite the fact that the husband had left his wife, had for a long time past contributed nothing to her support, and perhaps may have intended never to return to her, yet so long as the marriage relation existed she was entitled to support from him, in the absence of any evidence that she had forfeited the right by her own wrong. This was a right which she could at any time during his life have legally enforced. It was a right created by the marriage relation, and would exist so long as the marriage relation itself existed. By the negligent act of the defendant, the relation was terminated, and the plaintiff was deprived of the right to support to which she was legally entitled. The defendant having negligently caused the death of her husband cannot deprive her of damages by the plea that her husband had not been fulfilling the duties he owed to her.

The recent case of Shebley v. Peters, 200 Pac. 364, which was an action in damages for the death of a husband and father, while not directly in point, tends to sustain this conclusion. In that case this court, in denying a hearing after judgment in the District Court of Appeal, held that evidence that the widow and children of decedent were dependent upon him for support was inadmissible for the reason that—

> "their loss is the same, regardless of their dependence upon him for support. * * * Such support is the right of every wife and minor child to receive from the husband and father, even if they are not dependent upon him at all, but have ample means of their own. * * * They are entitled to support from him in any event, even if they do not get it."

This same conclusion, viz. that the legal liability of a husband for the support of his wife may be the basis of assessing damages against one who has negligently caused his death, although he has deserted her and although she knows nothing of his whereabouts, has been reached practically without exception in every other state where this point has been presented. Ingersoll v. Detroit & Mackinac Railway Co., 163 Mich. 268, 128 N. W. 227, 32 L. R. A. (N. S.) 362; Galveston, H. & S. A. Ry. Co. v. Murray (Tex. Civ. App.) 99 S. W. 144; Dunbar v. Charleston & W. C. Ry. Co. (C. C.) 186 Fed. 175; Taylor v. San Antonio Gas & Electric Co. (Tex. Civ. App.) 93 S. W. 674; De Garcia v. San Antonio & A. P. R. Co. (Tex. Civ. App.) 77 S. W. 275; Dallas & W. R. Co. v. Spicker, 61 Tex. 427, 48 Am. Rep. 297; Baltimore & O. R. Co. v. State, 81 Md. 371, 32 Atl. 201; Austin v. Metropolitan St. R. Co., 108 App. Div. 249, 95 N. Y. S. 740. See, also, Gulf, C. & S. F. Ry. Co. v. Delaney, 22 Tex. Civ. App. 427, 55 S. W. 538; International & G. N. R. Co. v. Culpepper, 19 Tex. Civ. App. 182, 46 S. W. 922.

The cases of Estate of Riccomi, 185 Cal. 458, 197 Pac. 97, 14 A. L. R. 509, and Burk v. Arcata & Mad River Ry. Co., 125 Cal. 364, 57 Pac. 1065, 73 Am. St. Rep. 52, and kindred cases, cited and relied upon by defendant, were founded upon causes of actions by collateral heirs to whom the deceased owed no duty of support. They have, of course, no application to an action brought by a wife or minor children for whose support deceased was legally liable.

[3, 4] The deceased at the time of his death was an able-bodied man, 48 years of age. Mortality tables were admissible for the purpose of ascertaining his expectancy of life. Dickinson v. S. P. Ry. Co., 172 Cal. 727, 158 Pac. 183. According to those tables the deceased had a life expectancy of over 20 years. The amount of damages awarded the widow was, therefore, only equivalent to a payment of $15 per month to the support of the wife. In view of the fact that the plaintiff and deceased had been living apart, nothing could have been awarded to the plaintiff for the loss of the society, comfort, and protection of the deceased. The amount awarded is solely attributable, therefore, to the loss by the death of the husband of the legally enforceable right of support against him. The amount awarded is not so excessive, in our opinion, as to "shock the moral sense" or to "suggest at first blush passion or prejudice," nor to show a clear abuse of the trial court's discretion when passing upon the motion for a new trial. Lee v. S. P. Co., 101 Cal. 118, 35 Pac. 572.

Judgment affirmed.

We concur: WILBUR, C. J.; SEAWELL, J.; WASTE, J.; MYERS, J.; KERRIGAN, J.; LAWLOR, J.

---

190 Cal. 479

BLAKESLEE v. WILSON et al. (L. A. 7402.)

(Supreme Court of California. Feb. 26, 1923.)

1. Constitutional law 🔑55—Act providing for declaratory relief not invalid as conferring nonjudicial power on court.

Code Civ. Proc. §§ 1060–1062, as added by St. 1921, p. 689, providing for declaratory relief, is not unconstitutional as attempting to confer nonjudicial powers upon the court.

2. Lis pendens 🔑2—Act providing for declaratory relief not invalid for failing to provide for lis pendens.

That Code Civ. Proc. §§ 1060–1062, as added by St. 1921, p. 689, providing for declaratory relief, fail to provide for a lis pendens, does not invalidate it, in view of section 409, providing in what cases a lis pendens may be filed.

3. Pleading 🔑225(1)—Complaint in action for declaratory relief under statute held not so insufficient as to warrant sustaining demurrer without leave to amend.

In an action under Code Civ. Proc. §§ 1060–1062, as added by St. 1921, p. 689, providing for declaratory relief, a complaint alleging that plaintiff entered defendants' employment to conduct certain patent litigation for a one-third contingent fee, that he recovered judgment, and an accounting under such judgment was pending before a master in chancery, and that the original agreement for fees had been superseded by a contract to perform the services for a much smaller sum, which had been tendered and refused, *held* not so insufficient as to justify the trial court in sustaining a demurrer for uncertainty, ambiguity, and unintelligibility, without leave to amend.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Raymond Ives Blakeslee against Elihu C. Wilson and another. Judgment for defendants on demurrer, and plaintiff appeals. Reversed.

Louis J. Euler, of Los Angeles, for appellant.

F. A. Stephenson, of Los Angeles, for respondents.

WASTE, J. The plaintiff brought this action for a declaration of his rights under certain contracts of employment entered into with the defendants. A general and special demurrer to the complaint was interposed, and was sustained without leave to amend. Judgment was thereupon entered dismissing the action and for defendants' costs. Hence this appeal, which squarely presents for our consideration the constitutionality of sections 1060, 1061, and 1062 of the Code of Civil Procedure, providing for declaratory relief in this state. Stats. 1921, c. 463, p. 689. Incidental to the main question—whether or not such an action may be maintained in this jurisdiction—is an examination into the sufficiency of the complaint to determine if it states facts amounting to "a case of actual controversy relating to the legal rights and duties of the respective parties"; for only in such an event may the action be maintained. It is provided in section 1060, supra, that—

> "Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a water course, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought."

The succeeding sections provide that the court may refuse to exercise the power thus granted in any case where its declaration or determination is not necessary or proper at the time, under all the circumstances, and that the remedies so provided are cumulative and shall not be construed as restricting any remedy provided by law. With the provisions of the law in mind, it will be easier to understand the theory of the complaint and the facts on which plaintiff relies for a declaration of his rights and duties in the premises.

It is alleged that plaintiff is an attorney at law. He entered into an agreement in writing with the defendants, by which he was employed to represent defendants in the prosecution of certain patent litigation pending in the United States courts, which actions appear to have been consolidated. He was successful in the prosecution of said causes, and secured for the defendants findings and a decree upholding their rights, and "that the defendants were entitled to an injunction and accounting and for the profits made by their opponents in said cause of action and for their costs." The injunction was issued and, according to the allegations of the complaint, the accounting is now being had before the master in chancery appointed by the federal court, and has not yet been completed. Plaintiff alleges the defendants were to receive as profits and damages for the infringement upon their patent rights approximately $1,000,000. As compensation for his services in prosecuting and conducting the litigation for defendants, plaintiff, so he avers, was to receive certain nominal fees and "a one-third (⅓) contingent interest in any and all recoveries, damages, and profits which might be or were made or moneys which might be received by defendants in said cases." Relying upon that agreement, plaintiff performed the service agreed upon, and prosecuted and defended the actions to judgment, as already stated.

It is further alleged that, subsequent to the commencement by plaintiff of the services for defendants, and prior to the final hearings in said causes, plaintiff proposed to the defendants that they purchase outright plaintiff's contingent one-third interest in the consolidated causes. Defendants refused to do this, but submitted a counter proposition depending upon certain conditions, all of which are set out in the complaint. Plaintiff did not accept this arrangement, but secured the decree for the defendants under the prior agreement for a one-third interest.

Coming to that portion of the complaint which purports to make this a "case of actual controversy," plaintiff alleges that the defendants have admitted in writing the agreement to employ him on the basis of a one-third contingent interest in any recoveries made by them, but now contend that one of the stipulations contained in their counter proposition for the employment of the plaintiff, to wit, to pay plaintiff the sum of $3,500 in full for his services, superseded the original agreement, and is the actual contract under which the employment was rendered by plaintiff. On this basis defendants have offered to pay plaintiff in full, but plaintiff has refused to settle upon those terms, and no part of the recoveries, profits, and proceeds accruing to the defendants under the patent litigation has been paid or received by him.

The sections supra providing for declaratory relief were added to the Code of Civil Procedure by the Legislature at its session in 1921. This is the first time their consideration and construction has engaged the attention of this court.

It is first strongly urged by the respondents that the sections of the Code referred to impose nonjudicial duties upon the courts, thereby rendering the act unconstitutional. It is further contended that a mere declaration of a right and duty, and the determination of any question of construction or validity arising under written instruments and contracts, do not have the effect of a judgment, and are but the invoking of the authority of the court in the performance of an idle act where no dispute or controversy exists. The objection is also made that there is nothing in the act giving the declaration of the court the effect of a lis pendens. None of these objections are sound. The subject of what proceedings are considered judicial in this state was so thoroughly considered and determined in a case involving the construction of "an act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records" (Stats. Ex. Sess. 1906, p. 78) that it were idle to do more than to refer to Title, etc., Restoration Co. v. Kerrigan, 150 Cal. 289, 318, et seq., 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199.

The contention that judicial power should not be exercised except in settling actual disputes and controversies was also disposed of in a case involving "an act for the certification of land titles and the simplification of the transfers of real estate," commonly known as the "Torrens Law" (Stats. 1897, p. 138). Robinson v. Kerrigan, 151 Cal. 40, 47, 48, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829.

While, as previously stated, the particular statute in question has not before engaged the attention of this court, its subject-matter has been considered by the highest court in two other jurisdictions. The Michigan Legislature passed an act to authorize courts of record to make binding declarations of rights. Act 150 of the Public Acts of 1919. That act appears to be more comprehensive than the California statute, but does not provide that its provisions may be invoked only in cases of actual controversy, as is the case in this state. In a proceeding not based on an actual controversy the Supreme Court of Michigan declared that—

> "While the advocates of this measure insist that the proceedings authorized by the act do not constitute a moot case, and while the proceedings may not square in all particulars with the technical definition of a moot case, they are such in every essential. * * * This act confers power not judicial and requires performance of acts nonjudicial in character."

For these reasons it declared the act void in its entirety. Anway v. Grand Rapids Ry. Co., 211 Mich. 592, 179 N. W. 350, 12 A. L. R. 26. Much that is said by the Michigan court is satisfactorily answered by the decisions in Robinson v. Kerrigan, supra, Title Restoration Co. v. Kerrigan, supra, and Hoffman v. Superior Court, 151 Cal. 386, 393, 90 Pac. 939. It therefore seems unnecessary for us to further consider the decision of that court.

[1] In 1921 the Legislature of the state of Kansas also passed a statute authorizing the rendition of declaratory judgments. Laws 1921, c. 168, § 6. It is almost like our own, and its provisions may be invoked only "in cases of actual controversy." Shortly after its enactment its constitutionality was challenged. The objections that were urged against the validity of the Michigan statute, and which are renewed here, were considered by the Supreme Court of Kansas. The court held that the statute was not unconstitutional on the ground of attempting to confer nonjudicial powers upon the court, and further declared that judgments rendered under its provisions might be classed as judicial acts, although rendered in actions admittedly brought before a right had been invaded, and although no consequential relief be given or sought. State ex rel. Hopkins v. Grove, 109 Kan. 619, 201 Pac. 82, 19 A. L. R. 1116. The decision in this case is so readily accessible that we do not need to repeat the argument of the court or to make extracts therefrom. What is there said is applicable to and determinative of the question presented for our own consideration on this appeal. A very exhaustive and scholarly treatise upon the subject of declaratory judgments, particularly with reference to the California legislation of 1921, providing for such relief, will be found in two articles by Professor Maurice E. Harrison, of Hastings College of Law, appearing in the issues of the "California Law Review" for March, 1920, and July, 1921. Other valuable treatises on the same subject are referred to in the decision of the Kansas court, supra. See, also, Board of Education v. Van Zandt, 119 Misc. Rep. 124, 195 N. Y. Supp. 297–300.

[2] The objection that the act makes no provision for anything in the nature of a lis pendens does not warrant further consideration. The Code of Civil Procedure (section 409) provides in what cases a lis pendens may be filed, and we know of no reason for hold-

ing that, because the filing of such an instrument is not required in actions or proceedings brought to obtain declaratory relief, or because the statute does not in terms give to the judgments of a court in such proceedings the effect of a lis pendens, the act is thereby rendered unconstitutional. Respondents advance no sufficient reason in support of the contention.

[3] Coming to a consideration of the last contention of the respondents, that the action of the court in sustaining the demurrer upon the ground of uncertainty, ambiguity, and unintelligibility was warranted by the pleadings, it suffices to say that it very rarely happens upon an initial attempt to state a cause of action that the court is justified in sustaining a demurrer upon those grounds, without leave to amend. Such action is ordinarily altogether too drastic upon a pleader's first attempt to present his cause. Furthermore, in this instance it does not appear to us that the points of the special demurrer are well taken.

The judgment of the lower court is reversed.

We concur: WILBUR, C. J.; LENNON, J.; SEAWELL, J.; MYERS, J.; KERRIGAN, J.; LAWLOR, J.

---

190 Cal. 500

In re LABOR JOURNAL. (L. A. 7218.)

(Supreme Court of California. Feb. 27, 1923.)

1. Newspapers 🔑1(3)—Evidence held sufficient to sustain finding that newspaper one of general circulation.

In a petition to have a newspaper designated by law as a newspaper of general circulation, evidence *held* sufficient to sustain a finding for petitioner.

2. Newspapers 🔑1(3)—Fact that newspaper devoted to particular class will not exclude it from classification as "newspaper of general circulation," if in addition it also publishes news of general character.

The fact that a newspaper is devoted to the interests of a particular class of persons, as for instance those engaged in the same business or calling, and specializes on news and intelligence primarily of interest to that class, will not exclude it from classification as a "newspaper of general circulation," if in addition to such special news it also publishes news of a general character.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Newspaper of General Circulation.]

In Bank.

Petition by John K. Tibbitts to have the Labor Journal, a newspaper designated as a "newspaper of general circulation," opposed by H. S. Webster, for himself and the Sun Company, a copartnership. From an order granting the petition, the contestant appeals. Affirmed.

John A. Hadaller, of San Bernardino, for petitioner.

Leonard, Surr & Hellyer, of San Bernardino, for contestant.

KERRIGAN, J. This is an appeal from an order granting the petition of one John K. Tibbitts that the "Labor Journal," a weekly newspaper published in the city of San Bernardino, be adjudged to be a "newspaper of general circulation" as that term is defined by section 4460 of the Political Code.

Notice of the time and place set for the hearing of such petition having been duly published, H. S. Webster, for himself and for the Sun Company, a copartnership, appeared and filed an answer to said petition in opposition to the granting thereof. In said answer it was alleged that said Labor Journal is not a newspaper of general circulation, for the reason that it is devoted to the interest of a particular class, and therefore comes within the description contained in said section 4460, Political Code, of what is not a newspaper of general circulation, reading as follows:

> "A newspaper devoted to the interests, or published for the entertainment or instruction of a particular class, profession, trade, calling, race, or denomination, or for any number of such classes, professions, trades, callings, races or denominations, when the avowed purpose is to entertain or instruct such classes, is not a newspaper of general circulation."

A hearing having been had, in which evidence was introduced both by the petitioner and the contestant, the court found as facts that ever since the 21st day of November, 1919, and for more than one year prior to the filing of said petition, the Labor Journal has been and now is an established weekly newspaper, printed and published in the city of San Bernardino; that it publishes news of local and general interest and also telegraphic news and intelligence pertaining to affairs throughout the United States; also advertisements of a mercantile and professional nature and of mechanical matters; that it has a bona fide list of more than 1,200 subscribers, over 300 of whom have no affiliation with any labor organization; that said newspaper is on file in many public places for the enlightenment and benefit of the public at large; that the said journal is devoted, not to the interest, nor is it published for the entertainment and instruction, of a particular class, profession, trade, calling, race, or denomination, but that the purpose of the publisher thereof is to have the journal circulate among as many different classes of people as possible.

The contestant appeals from the judgment entered in conformity with these findings, and urges that the essential parts thereof are not supported by the evidence.

A reading of the evidence satisfies us that they are sustained thereby. Briefly, it is as follows: The petitioner, who is the business manager of said newspaper, testified:

> "It (the Labor Journal) is published for all classes. The object of the Labor Journal is to acquaint the people with facts pertaining to general news, local news, and the industrial news, that is, a combination of general news. That is the purpose of it. We do not aim to cater to any particular class or profession or trade or calling."

Another witness testified:

> "I am the editor of the Labor Journal, and have been for approximately two months. During that time we have been publishing news of a local general interest to the people. * * * About 75 per cent. of the news of the Labor Journal in the last two months has been of a local general character. * * * The Labor Journal publishes telegraphic news. * * * I have no instructions from my employers as to how much news I should publish. We ordinarily publish about four columns of telegraphic relay news. That is information of a general character. We print athletic news, society news, club news, and news concerning the municipal affairs of the city of San Bernardino, and also of the county of San Bernardino."

On cross-examination this same witness testified:

> "I would hardly say the chief news we print pertains to organized or union labor. We print some news of the happenings of organized labor, as we consider it news of general interest. It is not a matter of fact that the paper is largely compiled with news that will interest organized labor. I would say that it would interest organized labor but not organized labor alone or only."

Copies of two issues of the paper were admitted in evidence, and a reading of these to some extent confirms the testimony of these witnesses.

[1] While it cannot be denied that a review of all the evidence discloses that the newspaper is devoted primarily to the interest of the labor unions and to the dissemination of union labor news, and that its circulation is principally among members of such unions in the county of San Bernardino, yet it also establishes that it publishes local and telegraphic news of a general character and of interest to the public generally, and that at least one-quarter of its subscribers are persons not affiliated with organized labor.

[2] It is not easy to determine with precision where the line of demarcation should be drawn between a newspaper in the legal and ordinary acceptation of the term and the numerous periodicals devoted to some special purpose, circulating among a particular class, and which are for that reason disqualified from accepting advertisements required by some statutory provision to be published in a newspaper of general circulation. Many publications, such as literary, scientific, religious, medical, or legal, which are obviously aimed to reach a particular and limited class of people, are not newspapers within either the legal or ordinary meaning of the word. But the fact that a newspaper is devoted to the interest of a particular class of persons, as for instance, those engaged in the same business or calling, and specializes on news and intelligence primarily of interest to that class, will not exclude it from classification as a newspaper of general circulation, if, in addition to such special news, it also publishes news of a general character. 20 R. C. L. 201; In re Green, 21 Cal. App. 138, 142, 131 Pac. 91; Lynch v. Judge of Probate Court, 101 Mich. 171, 59 N. W. 409. As is said in the case of Lynn v. Allen, 145 Ind. 584, 44 N. E. 646, 33 L. R. A. 779, 57 Am. St. Rep. 223:

> "As a matter of fact, every newspaper is, in greater or less degree, devoted to some special interest. No one, however, would claim that because a newspaper should, for example, be the organ of a certain political party, and especially devoted to the interests of such party, it would not therefore be a newspaper of general circulation. Yet such a newspaper is, to a large extent, read only by the members of the political party whose doctrines are advocated and expounded in its columns."

There is no substantial merit in the other point urged by the appellant, namely, that the trial court erred in the rejection of certain evidence offered by it. If admissible at all, it was only by reason of the inference it afforded that the Labor Journal was published in the interests of a class only. Such evidence would have been cumulative of what already appeared directly from the copies of the journal which were admitted, but which, nevertheless, the court held to be overcome by the other evidence in the case. No substantial injury, therefore, can be predicated upon the rejection of the testimony in question.

The judgment is affirmed.

We concur: WILBUR, C. J.; SEAWELL, J.; LAWLOR, J.; LENNON, J.; WASTE, J.; MYERS, J.

(190 Cal. 465)

KEESE et al. v. BEARDSLEY et al.

(L. A. 6824.)

(Supreme Court of California. Feb. 24, 1923.
Rehearing Denied March 26, 1923.)

1. Mortgages 🔑109—Evidence held to show mortgage not intended to secure purchases after certain date.

In action to foreclose as a mortgage an absolute deed to secure purchases from plaintiffs, evidence *held* to show that the deed was not intended to secure purchases after a certain date.

2. Mortgages 🔑178—Agreement enlarging terms of security held subject to rights in prior contract of purchase.

Where absolute deed was intended as a mortgage to secure purchases only until a certain date, subsequent agreements between the parties making the conveyance security for subsequent purchases would not be binding upon purchasers under a contract made and recorded prior to such subsequent agreement.

3. Evidence 🔑230(1)—Declarations of owner of fee not binding on prior purchasers of equitable interest.

Declarations by the owner of the fee as to debts secured by mortgage thereon, while binding upon successors, under Code Civ. Proc. § 1849, would not bind purchasers claiming under an agreement which had theretofore vested the equitable title in them.

4. Trial 🔑404(1)—Finding that an agreement was recorded held implied finding that it was acknowledged.

If acknowledgment was essential to the recordation of an agreement, *held* that a finding that it was in fact recorded was an implied finding that it was acknowledged.

5. Vendor and purchaser 🔑231(15)—Recordation of contract of sale not notice to persons claiming under vendor unless acknowledged by him.

Under Civ. Code, § 1161, as to acknowledgment as condition precedent to recording, recordation of a contract of sale is not constructive notice thereof to grantees and mortgagees of the vendor, unless acknowledged by him, and acknowledgment by the vendees is insufficient.

6. Vendor and purchaser 🔑231(6)—Contract of sale properly recorded in book of deeds and not in miscellaneous records.

To be notice, a contract of sale is properly recorded in the book of deeds, rather than in the miscellaneous records.

In Bank.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Samuel J. Keese and others against Volney S. Beardsley and others, in which defendants Linnie L. Truth and another cross-complained. From judgment for plaintiffs, cross-complainants appeal. Reversed.

Kemp, Mitchell & Silberberg and Alex W. Davis, all of Los Angeles, for appellants.

Shelton & Levy, of San Francisco, for respondents.

WILBUR, C. J. On May 12, 1915, the defendants Volney S. Beardsley and wife executed a deed to the plaintiff Samuel J. Keese. This deed was given to secure to the Westinghouse Electric & Manufacturing Company, hereinafter referred to as the "Westinghouse Company," the amount of the purchase price of certain electric motors thereafter to be purchased by the Beardsley Electric Company from the Westinghouse Company. Plaintiffs, treating said deed as a mortgage, brought this action to foreclose the mortgage, making Linnie L. Truth and Francis Truth parties defendant by reason of the fact that subsequent to the execution of the deed, in September, 1915, these defendants entered into an agreement with Volney S. Beardsley and wife for the purchase of the land described in the deed. Judgment was rendered foreclosing the mortgage and decreeing that the claims of the defendants Truth were subject to the lien of the mortgage. From this decree the defendants Truth appeal. They will hereafter be referred to as the appellants. The amount claimed by the plaintiffs to be secured by the mortgage is the amount coming to them as damages by reason of the breach of a contract of purchase of 25 electric motors, entered into between the Beardsley Electric Company and the Westinghouse Company on April 10, 1916.

[1] The first question for determination is whether or not the deed was intended to secure the Westinghouse Company for the purchase price of motors after March 30, 1916. The doubt upon this question arises in the first instance because of the fact that, although the deed is dated May 12, 1915, the letter of the grantor Volney S. Beardsley, in which he declares that the purpose of the deed was to secure the Westinghouse Company, stated that the deed was to secure purchases within "one year from date." This letter was dated March 30, 1915. The respondents contend, however, that as the deed was executed and delivered May 12, 1915, it must be assumed that the letter was also delivered on that date, and that the year runs, not from the date of the letter, but from the date of the deed. Inasmuch as there was no direct evidence as to the date of the delivery of the letter, it cannot be assumed that it was delivered at a date later than March 30, 1915, nor could the fact of such delivery at a later date overcome the plain declaration in the letter itself that it was to secure obligations incurred "within one year from date." This, however, does not solve the difficulty, for the reason that there were offered and

received in evidence two letters written by plaintiff Keese, grantee in the deed, in which he declares that the purpose of the deed is to secure the Westinghouse Company for purchases made within one year after May 12, 1915. One of these letters is directed to the defendant Beardsley and the other to the Westinghouse Company. The respondents contend that these letters are in effect a declaration of trust, coming as they do from a grantee in the deed, and that they are therefore binding upon all the parties to the transaction. The answer to this proposition is that the deed was not a deed of trust, but was under our statute merely a mortgage, and that the agreement as to the indebtedness which it was to secure was the agreement between the mortgagor and mortgagee. If these letters dated May 12, 1915, had been received by the parties to whom they were addressed and acquiesced in by them, there is no doubt that such acquiescence would have constituted a binding contract. In dealing with a deed absolute given as security, we are not bound by the rule that writings cannot be contradicted by parol, and it is therefore permissible to establish the agreement of the grantor by his acquiescence in a statement made by or on behalf of the persons for whose security the obligation is given. Civ. Code, §§ 2924, 2925. The difficulty in this case is that there is no evidence whatever that the letter to the grantor Beardsley was received by him. The copies of these letters were produced by the plaintiffs from the files of the Westinghouse Company, and therefore it may be properly inferred they were received by the Westinghouse Company, but there is no inference that they were received by the grantor. It follows, then, that the original agreement for security was one securing the Westinghouse Company for purchases made prior to March 30, 1916. The purchases in question were made on April 10, 1916, while the contract of purchase of the land entered into by the appellants was recorded April 3, 1916. The appellants contend that any agreement made between Beardsley and the Westinghouse Company after they had taken possession of the premises in September, 1915, and particularly after the recordation of their contract, April 3, 1916, is not binding upon them.

In view of the fact that the trial court found that, although the appellants had entered into possession of the premises in September, 1915, and had erected a residence and outbuildings thereon valued at about $6,000, they had left the premises, and did not occupy it at the time of the transactions next hereafter to be considered, we will first consider the question of the relative rights of the parties growing out of the recordation of the contract on April 3, 1916. While the respondents attack the sufficiency of such recordation, we will first assume that the recordation was proper, and gave constructive notice of the rights of the appellants.

[2] The first claim advanced by the respondents is that, inasmuch as the obligations secured thereby were secured by a deed purporting to convey the entire fee, the conveyance of the fee was notice of any subsequent right or lien less than a fee. This position cannot be maintained, for the reason that the transaction under our statute was in legal effect a mere mortgage, and that the terms of the mortgage are to be shown by parol. Subsequent purchasers were required to take notice only of the existence of the deed and the rights thereby secured, and, having ascertained the extent of these rights, we have ascertained the question of priority and the extent thereof. It follows that, if under the original agreement between the mortgagor and mortgagee the indebtedness secured was only that accruing before March 30, 1916, subsequent agreements, enlarging the terms of the security, would not be binding against the appellants whose rights were derived prior thereto, and notice of which was given by the recordation of their contract.

Respondents insist that, inasmuch as the agreement was to secure future advances, those advances could be made at any time prior to actual notice of the intervening rights of the appellants. This rule does not apply to a case where the original agreement definitely restricted further advances to those made before a definite date. Any purchases or advancements made after that date were not made under the original contract, but only under the supplemental and subsequent agreement. Respondents' next contention is that the agreement for the additional advance was made on March 29, 1916, and that, therefore, although the contract of purchase or advance was actually made after the expiration of a year, the extension of the security to cover this purchase was made within the year. With reference to this proposition it is sufficient to say that the evidence does not sustain the contention that there was an agreement of extension entered into between the parties before the 30th of March. Beardsley simply stated that he was willing to enter into a renewal of the security to cover the contemplated contract of purchase. He did not then and there agree that the deed theretofore given should be treated as such security. It follows, then, from what has been said that the agreement that the deed of May 12, 1915, should be considered as security for the contract of purchase made April 10, 1915, cannot be sustained unless by reason of other evidence not yet considered.

[3] Respondents advance the proposition that a contract made in September, 1916, by which Beardsley expressly agreed that the

deed should be considered as security for the contract of April 10, 1916, and in which it was expressly stated that the deed was originally given to secure indebtedness incurred within one year after May 12, 1915, while not binding upon the appellants' interest in the real property, when considered as a new and independent or supplemental contract, was at least a declaration of Beardsley as to the nature and effect of the original agreement, and therefore was evidence of such agreement admissible against his vendees, the appellants. This declaration, it is true, was made by Beardsley during the period that he still owned the fee in the property, and would therefore be binding upon his successor (section 1849, Code Civ. Proc.), but the appellants, who claim under an agreement which had theretofore vested the equitable title in them, were not bound by such declarations, and they cannot be considered as evidence against appellants in determining their rights, being mere hearsay.

Having thus determined that the appellants were protected by the recordation of their contract against the future agreements entered into by their vendor, and that the arrangements made between that vendor and the respondents were of that character, it is necessary to consider the objections of the respondents to the sufficiency of the recordation of the contract. The first objection made is that the contract of purchase was acknowledged by the vendees, and not by the vendors, and hence was not notice to the plaintiffs of the sale of the premises to the appellants.

[4] It is sufficient in answer to this point to say that it is alleged in the appellants' cross-complaint that the agreement of purchase was "recorded in the office of the county recorder of the county of Los Angeles, state of California, book 6187, page 198." This allegation is not denied in plaintiffs' answer to the appellants' cross-complaint, and the court found the fact to be that—

> "On April 3, 1916, said agreement was recorded in the office of the county recorder of the county of Los Angeles, state of California, in Book 6187 of Deeds, at page 198."

The agreement attached to the cross-complaint as an exhibit has annexed thereto the acknowledgment of the purchaser only, but non constat the agreement was not acknowledged by the seller as well. If the acknowlment of the seller is essential to the recordation of the agreement the finding that it was in fact recorded is an implied finding that it was so acknowledged. This finding being in favor of the appellants is, of course, not attacked by them, and cannot be by the respondents.

[5] Inasmuch, however, as a new trial must be had, it should be said for the benefit of the parties on such retrial that the acknowledgment by the vendees alone was an insufficient acknowledgment to give the successors of the vendor the constructive notice which would otherwise have resulted from its recordation after proper acknowledgment by the vendor. In this regard section 1161 of the Civil Code provides that—

> "Before an instrument can be recorded, * * * its execution must be acknowledged by the person executing it. * * *"

It is true in a sense that when acknowledged by any one of several persons executing it, the conveyance is acknowledged by "the person executing it." On the other hand, it is also true that under our Code (Civ. Code, § 14) the singular includes the plural, and hence section 1161, Civil Code, might be construed as requiring all persons executing an instrument to acknowledge it, but the provisions concerning the recording of instruments must be contrued in the light of their purpose, that is, to give notice to subsequent claimants of the acts of prior owners, alienating or incumbering the title. An acknowledged instrument carries with it the proof of its due execution by the person who so acknowledges it. It is therefore necessary that it be acknowledged by the person whose rights in the property are alienated or incumbered thereby, such as the grantor, or mortgagor, or vendor. It was held in Spect v. Gregg, 51 Cal. 198, that the acknowledgment of a power of attorney by one of four persons jointly executing the same entitled the deed from such attorney executed on behalf of the four joining in the power of attorney to be recorded, and that such record was notice to purchasers from the person who acknowledged the power of attorney. In Fresno Canal, etc., Co. v. Rowell, 80 Cal. 114, 117, 22 Pac. 53, 13 Am. St. Rep. 112, it was held a sufficient record to give constructive notice where the owner of property, who executed an agreement which created a lien on his property to pay water rates, acknowledged the instrument, and it was thereupon recorded, although the other party failed to acknowledge it.

The question is discussed and all the authorities carefully reviewed in the recent case of Bell v. Sage, 212 Pac. 404, by the Third District Court of Appeal, in which case a transfer to this court was denied. This fact renders unnecessary an extensive discussion by us. The case of People ex rel. Oaklawn Corp. v. Donegan, 226 N. Y. 84, 123 N. E. 71, a recent New York decision (March 18, 1919) on mandamus, deals with the duty of a registrar where one of four grantors in a deed failed to acknowledge it in a proper manner. The law of that state with reference to recordation is substantially the same as of this state. Section 1161, Civ. Code. The New York statute provides that—

> "A conveyance of real property within the state, on being duly acknowledged by the per-

son executing the same * * * may be recorded in the office of the clerk of the county where such real property is situated." Real Property Law, § 291.

The Court of Appeals of New York held that it was the duty of the registrar to record the instrument, but not to index it in the name of the grantor, who failed to acknowledge it. In short, that it should be treated for the purpose of recordation as the act only of those persons who acknowledged it. This decision is in accord with our own decision (Fresno Canal, etc., Co. v. Rowell, supra), and leads us to the conclusion that the recordation of the agreement of sale in the case at bar would not be constructive notice of its existence against the grantees or mortgagees of Beardsley, the vendor in the contract, unless acknowledged by him.

[6] It is next contended that the contract should have been recorded in the miscellaneous records and not in the book of deeds. The Supreme Court of Washington in Bernard v. Benson, 58 Wash. 191, 108 Pac. 439, 137 Am. St. Rep. 1051, under statutes similar to ours with reference to recordation, held that a contract for the sale of real estate was included within the meaning of the words used in the statute, "deeds, grants and transfers of real property," and therefore that such conveyance could be properly recorded in the Book of Deeds. In Jackson v. Torrence, 83 Cal. 521, 23 Pac. 695, it was held that an executory contract to convey real estate was a "conveyance" of real estate within the meaning of section 1093 of the Civil Code, and as such required to be acknowledged as a grant. Inasmuch as the effect of the contract was to convey or transfer the equitable title to the land, it clearly comes within the meaning of a "conveyance" or "transfer" as used in the statute with reference to the recordation of such instrument. There is nothing in the cases of Kent v. Williams, 146 Cal. 3, 79 Pac. 527, and Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A. (N. S.) 359, inconsistent with this view.

In view of a new trial something should also be said in reference to the effect of possession as notice, in the event that it should appear on the new trial that the record of the contract did not give constructive notice of the rights of the plaintiffs. The cross-complaint alleges that immediately upon the execution of the contract of purchase the appellants entered into the possession of the premises and erected a dwelling house and other improvements thereon, and ever since have been in the open, notorious, and exclusive possession of the real property involved in this action. The plaintiffs denied such possession, and the court in its findings of fact found that on September 27, 1915, the appellants entered into possession of the premises, and built several permanent buildings thereon, and occupied the same until March 1, 1916, and found:

> "That said defendants then ceased to occupy said premises and continued out of such occupancy until subsequent to January 26, 1918."

There is no express finding upon the ultimate fact of which possession is evidence, that is, notice of the claims of the possessor. Fair v. Stevenot, 29 Cal. 486; Hellman v. Levy et al., 55 Cal. 117, 119. If the vendee was temporarily absent from the premises, it was for the trial court to determine whether the possession was of such character as to give notice of the rights of the vendee or put him upon inquiry with reference thereto (Hellman v. Levy, supra) and to determine the ultimate fact of notice (see, also, Randall v. Allen, 180 Cal. 298, 180 Pac. 941; Bessho v. General Petroleum Corpn., 186 Cal. 133, 199 Pac. 22; Gibbons v. Yosemite Lumber Co. [Cal. Sup.] 211 Pac. 4).

We conclude that the original agreement did not secure to the Westinghouse Company the performance of the agreement of April 10, 1916, as found by the trial court, and that the subsequent agreements entered into between Beardsley and the Westinghouse Company by which it was agreed that the deed should be considered security for the performance of the contract of April 10, 1916, were subordinate, under the facts found at the trial, to the rights of the appellants under their contract of purchase entered into September, 1915, and recorded April 3, 1916, before the supplemental agreement between the Westinghouse Company and Beardsley was entered into. The finding to the contrary not being supported by the evidence, the judgment was erroneous.

Judgment reversed.

We concur: LENNON, J.; WASTE, J.; MYERS, J.; KERRIGAN, J.; SEAWELL, J.; LAWLOR, J.

190 Cal. 493

In re TAGGART'S ESTATE.

BOLAND v. TAGGART et al.

(L. A. 7310.)

(Supreme Court of California. Feb. 27, 1923.)

1. Estoppel 🔑95—Failure of person having custody of another's child to inform her that she was not legally adopted held not ground for estoppel in pais.

Where decedent and his wife agreed with the father of an infant daughter to maintain, provide for, and educate such child, and that in case of the death of decedent's wife the father might repossess himself of the child upon reimbursing decedent for expenses, and that in case of the father's death decedent was to legally adopt the child, and decedent and his wife cared for such child until she attained her majority and was married, that decedent had failed to inform her that she had not been legally adopted did not constitute an estoppel in pais in a proceeding by her for a decree distributing decedent's entire property to her, decedent having complied with his agreement, and a legal adoption during petitioner's minority having been impossible without the father's consent.

2. Adoption 🔑1—Unknown to common law.

The adoption of one person by another was unknown to the common law.

3. Adoption 🔑1—Every essential requirement of adoption statute must be complied with.

The right to adopt a child and the right of a person to be adopted as the child of another are wholly statutory, and he who claims that an act of adoption has been accomplished must show that every essential requirement has been complied with.

4. Equity 🔑57—Maxim that what ought to be done will be regarded as done held inapplicable to adoption proceedings.

Where decedent had the custody and care of a minor daughter of a third person, but failed to legally adopt her, and made no provision for her in his will, the equity maxim that that which ought to have been done must be treated as done had no application where a legal adoption would have been impossible without the consent of the father of the minor.

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Petition by Edna Taggart Boland in the matter of the estate of Francis S. Taggart, deceased, to have distributed to her the whole of decedent's estate, contested by Anna Belle Taggart and William H. Taggart, executor. From an order directing distribution adversely to petitioner's claims, she appeals. Affirmed.

James S. Bennett, of Los Angeles, for appellant.

Carnahan & Clark, of Los Angeles, and James W. Hyde, of Chicago, Ill., for respondents.

SEAWELL, J. Petitioner, Edna Taggart Boland, sought to have distributed to her by the probate court of Los Angeles county the whole of decedent's estate, inventoried at the sum of $45,426, under the provisions of section 1307 of the Civil Code, claiming said estate as an adopted daughter and only heir at law of Francis S. Taggart, deceased, who unintentionally omitted her in his will. The court decided adversely to petitioner, and its decision is here for review.

The court's findings are that Francis S. Taggart died on the 3d day of December, 1919, leaving a will, which was duly admitted to probate. Anna Belle Taggart, a sister of decedent, was made the sole legatee and devisee under said will. William Herbert Taggart, a brother of decedent, was named sole executor. At the time he executed said will, and thereafter until his death, decedent was a resident of the county of Los Angeles, state of California.

Petitioner, Edna Taggart Boland, was born on the 19th day of March, 1876, the only issue of the marriage of Benjamin F. Jordan and Harriett Loretta Jordan, residents of the state of Illinois. Said Harriett Loretta Jordan died in the state of her residence in 1880. Thereafter, and on the 11th day of July, 1881, said Benjamin F. Jordan and Francis S. Taggart and Minerva Taggart, his wife, joined in the execution of an agreement by the terms of which Benjamin F. Jordan committed to Francis S. Taggart and his wife, Minerva, the legal custody and care of said child, Edna Lucinda Jordan, who was the only child of said Benjamin F. Jordan, and said Taggart and his wife agreed with the father of said minor that they would nurture, maintain, provide for and educate said child according to their ability, means, standing, and position in life. It was further provided that, in the case of the death of said Taggart's wife, the father, Benjamin F. Jordan, should have the right to "retake and repossess to himself" his said child upon reimbursing said Francis S. Taggart for moneys expended by him for all reasonable costs, charges, and expenses incurred in and for the care, custody, maintenance and education of said child, if he should upon the happening of this contingency retake said mentioned child into his custody and charge. It was also further agreed that, in case of the death of Benjamin F. Jordan, that the said Francis S. Taggart and his wife, or the survivor of either, would forthwith proceed according to the laws of the state of Illinois to adopt said child as their own, or, if one should be dead, as the child of the survivor. It is also a part of the findings that said Francis S. Taggart and Minerva Taggart, his wife, expressed a desire to adopt petitioner, and that petitioner, being then of the age of about four years, went to live with said Taggart and his wife, and was given and assumed their name, became a member of the family, was entered in the public schools and Sunday schools of the family church as their daughter, and was supported, maintained, and educated by them as their daughter from the time of the agreement until the death of Minerva Taggart, which occurred on January 2, 1900. After her death the relation between petitioner and Francis S. Taggart continued as it had existed in the past until petitioner's marriage, which was solemnized December 11, 1901, with the sanction of said Francis S. Taggart. It is also related that after said marriage petitioner and her husband made their home for a time with said Taggart, at the latter's request.

It is an admitted fact that said Francis S. Taggart and his wife treated petitioner in all respects as a parent should treat a natural child, and in turn she rendered unto each of them the affection, society, and services attending that relationship. Some time after her reception into the Taggart family, and during the life of Francis S. Taggart and his wife, petitioner was informed by them and believed that she was their legally adopted daughter, and did not know until after the demise of Francis S. Taggart that she had not been legally adopted as their child. Benjamin F. Jordan, the father of petitioner, died in Chicago, state of Illinois, on May 1, 1903, about two years after his daughter's marriage. The court also found that under the laws of the state of Illinois a female person ceased to be a minor and attained her majority upon attaining the age of 18 years, and that neither said Francis S. Taggart nor his wife, nor the said Francis S. Taggart after his wife's death, proceeded to or attempted to adopt petitioner as their child in accordance with the statutory law of said state or of any state. It further found the last will and testament of said decedent, Francis S. Taggart, failed to provide for said petitioner or to name her therein, and that there was not at any of the times mentioned in the petition any statute or law in the state of Illinois providing that a person omitted from the last will of his or her natural or adopted parent was entitled to that portion of such parent's estate which he or she would have inherited had such parent died intestate, and that the laws of Illinois permitted a testator to disinherit a child of the blood or an adopted child by omitting to mention or provide for such child in his last will or testament. By its findings the court decreed that the testator left surviving neither wife nor issue of his blood, nor any adopted child, nor any descendant of such issue or of any adopted child. As a conclusion of law from the foregoing facts the court found that petitioner, Edna Taggart Boland, is not an heir at law of Francis S. Taggart, deceased, and therefore not entitled to any portion of his said estate as an heir at law or as a pretermitted child of said decedent, and thereupon denied her petition. Judgment was entered accordingly.

The contract upon which the action has its inception was made in the state of Illinois, where the parties then resided, and where they continued to reside until about the year 1901, when the principal actors removed to this state.

[1] It is the admission of petitioner that no formal statutory adoption exists in her favor. Her claim seems to be that an estoppel in pais should be invoked in her favor on the untenable theory that petitioner has been misled by the declarations and conduct of the Taggarts, or that some species of fraud has been committed against her by them jointly or separately. No dispute exists as to the facts of the case, and we feel satisfied that the authorities cited by petitioner have no application to the statement of facts as related in the record. No question arises in the instant case of a promise or agreement broken to execute a will in another's favor or in fact a violated promise to adopt a child, or a promise to convey property for the benefit of another upon condition that the promisee would change his or her situation or station in life for the benefit of the promisor, nor are there any facts present in this case such as undoubtedly controlled the decisions in the cases cited of the character of Rogers v. Schlotterback, 167 Cal. 37, 138 Pac. 728, and others involving questions of fraud, mistake, and kindred questions. The rights of the parties in the instant case are defined and limited by the clear terms of a written contract about which no doubt can exist as to the intent of the parties. Undoubtedly it was the wish and hope of Francis S. Taggart and his wife to have fully adopted the petitioner while she was in her minority. The father Benjamin F. Jordan, however, having recently lost his wife by death, was attempting to restore as far as humanly possible the motherly love, care, and protection that every right-feeling man would wish his infant daughter to enjoy or possess. Clearly, it was no mercenary thought as to future financial benefits or inheritable possibilities that moved the father to place the custody of his daughter with the Taggarts, but rather it was his desire that she might enjoy the advantages of a wholesome home life which he was not in a situation to supply. He seems in this respect to have been guided by a high and commendable purpose, and, true to paternal instinct, he was not willing to surrender absolutely all possible control of his only child so long as he should live. He was not willing that another should in a full sense be substituted in his place. By his contract he reserved the right at any time upon the

death of Minerva Taggart to resume the care, custody, and control of his child by paying to Francis S. Taggart all reasonable charges and expenses incurred by him in the care and maintenance of said child. This provision shows very clearly that he desired for his daughter, without losing the right to regard her as such, the influence and direction of a woman to take the place of a mother, but at no time did he consent to the adoption of his child while he was in life.

[2, 3] Petitioner has invoked the familiar maxim that equity will treat as done that which ought to have been done; but there is nothing presented by the case at bar upon which the well-known and favored rule may operate. There is nothing of fraud, deceit, or mistake in the case. What is there that should have been done or could have been done that was not done? Surely Francis S. Taggart could not have ruled the fates of men. Only upon the death of Jordan during the period of Edna's minority would it have been legally possible for the Taggarts to have adopted her. The adoption of one person by another was unknown to the common law. The right to adopt a child and the right of a person to be adopted as a child of another are wholly statutory. He who claims that an act of adoption has been accomplished must show that every essential requirement has been complied with. Estate of Sharon, 179 Cal. 447, 177 Pac. 283; Estate of McCombs, 174 Cal. 211, 162 Pac. 897; Ex parte Clark, 87 Cal. 641, 25 Pac. 967; Estate of Johnson, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380; In re Stevens, 83 Cal. 331, 23 Pac. 379, 17 Am. St. Rep. 252. The right being entirely a creature of the statute, we must necessarily look to the statute alone for the authority to adopt, and if not expressed it cannot legally exist.

[4] The statute of California provides only for the adoption of a minor child, and no provision is to be found for the adoption of one adult by another. Section 221 et seq. Civ. Code. Neither is there to be found authority in the laws of Illinois permitting the adoption of adults. Bartholow v. Davies, 276 Ill. 505, 114 N. E. 1017. Thus it will be seen that at no time after the execution of the contract giving the custody of petitioner to the Taggarts was it legally possible for Taggart to have adopted petitioner. At the time Minerva Taggart died petitioner had passed the age of 23 years. Petitioner was of the age of 27 years at the time Benjamin F. Jordan, her father, died. Her age at the time of her marriage was 25 years. So it will be seen that there was no time when an adoption was possible. The father at no time gave his consent, and surely it will not be contended that under the terms of the agreement petitioner could have been regarded as an abandoned child under the statute of this state or by the laws of any other state of which we are advised.

The cases relied upon by petitioner, as observed earlier in this opinion, are not in point. Thomas v. Maloney, 142 Mo. App. 193, 126 S. W. 522, presents a question of the enforcement of an oral contract of adoption. Barney v. Hutchinson, 25 N. M. 82, 177 Pac. 890, is an action to enforce a similar promise or agreement. In the latter case the adoptive parent agreed upon receiving the child into his custody to immediately adopt it. This was not done. Rogers v. Schlotterback supra, was an action to specifically enforce an oral contract made by the promisor in favor of the promisee to the effect that the former would make the latter an heir to share in his estate equally with his own issue. Estate of McCombs, supra, reaffirms well-established legal principles governing the law of adoption and inheritance, but offers nothing specially favorable to petitioner's claim. Steinberger v. Young, 175 Cal. 81, 165 Pac. 432, announces the doctrine that a contract to dispose of property upon death in a particular way may under proper conditions be specifically enforced. The legal principles recited in these cases cannot be combated. They have, however, no application to the facts of the present case.

We are unable to understand how petitioner could have been prejudiced by the agreement made by her father with the Taggarts. It has been suggested that she should have been informed by the Taggarts that she was not their adopted child, and it is also stated, as though the fact had some significance, that, had she known she was not the adopted child of the Taggarts, she would have been able to have named her guardian upon arriving at the age of 14 years. Just what advantage may have accrued to her from such knowledge is not made clear. Her father was her natural guardian, and surely no one would have been permitted to adopt her without his consent. It has not been suggested that he was an improper person to have the care, custody, and control of his natural daughter. From aught that appears in the record it must be presumed that he possessed the requisite qualifications. Whether petitioner knew her father and was advised by him is not shown by the record. In this respect we are only told that she had been informed that she was the adopted daughter of the Taggarts, no further reference being made as to her relations with or knowledge of her said father. She was, however, past 27 years of age at the time of his demise.

In a review of the whole situation we are satisfied that Francis S. Taggart discharged every legal and moral obligation that rested upon him and there can be no imputation that he violated any duty or promise made either to the father of petitioner or to petitioner herself. If as a fact he led her to believe that he and his wife were her adopted parents, it was doubtless done that discipline might be more complete and mutual respect and domestic tranquility be better preserved.

Our conclusion being that the petitioner is not the adopted child of Francis S. Taggart and his wife, Minerva, or either, it becomes unnecessary to discuss the question as to whether the testator had petitioner in mind when he omitted to provide for her in his will, and that such omission was intentional.

The decree is affirmed.

We concur: WILBUR, C. J.; LENNON, J.; MYERS, J.; KERRIGAN, J.; LAWLOR, J.; WASTE, J.

60 Cal. App. 641

JACKSON v. CLOVER. (Civ. 3935.)

(District Court of Appeals, Second District, Division 1, California. Jan. 30, 1923.)

1. Appeal and error ⚷1011(1)—Findings on conflicting evidence not disturbed.

Findings on conflicting evidence will not be disturbed on appeal, and only when there is no evidence to support a finding will it be reversed because unsupported by the evidence.

2. Appeal and error ⚷995—Exclusive province of trial judge to weigh testimony of witnesses together with other evidence.

It is exclusively within the province of the trial judge to weigh testimony of witnesses together with other evidence.

3. Appeal and error ⚷989—Evidence supporting findings below can only be examined to determine if it presents substantial conflict.

Evidence in support of findings of the lower court can only be examined on appeal to determine if there is substantial conflict.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by J. C. Jackson against J. B. Clover. From judgment for plaintiff, defendant appeals. Affirmed.

William B. Ogden, of Los Angeles, for appellant.

Donald Barker and Wm. H. Neblett, both of Los Angeles, for respondent.

HOUSER, J. This was an action on four promissory notes aggregating the sum of $964.60. Three of the notes were made payable to plaintiff, and the fourth note, amounting to the sum of $100, was assigned to plaintiff before the action was commenced. The defendant has interposed three defenses: First, that plaintiff was employed by defendant as superintendent of certain construction work; that he was unfaithful in the discharge of his duties as such superintendent and had made false reports in connection with his said duties, and thereby obtained from defendant the sum of $120; also, that at the time of the execution of the notes sued upon, plaintiff was indebted to defendant in the sum of $800, which he falsely concealed, and by reason of said facts there was no consideration for said notes. Secondly, that while plaintiff was so employed as a superintendent, as an inducement to the execution of the notes sued on, plaintiff had promised and agreed to remain upon the work until a certain date and to care for and to preserve the property of defendant, and upon closing the work for the season was to collect and store the property of defendant at a certain place; that thereafter plaintiff reported to defendant that he had so collected and stored said property, when in fact he had not done so, and thereby obtained from defendant an additional sum of $214.55 to defendant's damage in said sum. Thirdly, that plaintiff on a certain date was possessed of certain property of defendant of the value of $500 which plaintiff converted to his own use to the damage of defendant in the sum of $500.

The court found, first, that all the allegations of the complaint were true, and secondly, that all the allegations of the answer were untrue; and entered judgment for plaintiff as prayed in the complaint.

[1, 2] As is stated in appellant's brief, this appeal is based solely on the proposition that the second finding is not supported by the evidence. Various questions of law, all arising out of the several defenses or counterclaims interposed by defendant, have been presented in the briefs on file herein; but while counsel for respondent has answered each point in turn, he has also urged that where substantial conflict exists in the evidence upon which a given finding is based, the appellate court will not disturb such finding. The rule which counsel invokes is one which is sustained by a host of California and other authorities. It is so well and so generally understood to be the law of this state that it is only where there is no evidence in the record in support of the findings that the decision of the trial court will be reversed upon the ground that it is unsupported by the evidence (Syl., Heinlen v. Heilbron, 97 Cal. 101, 31 Pac. 838), that it would seem to be a waste of labor to set forth the various reasons for the existence of the rule. Suffice it to say that of the credibility of the witnesses the court below was the sole judge. To set aside his finding because this court might have disagreed with him would be to substitute the conclusion of this court for the judgment of the learned judge of the trial court upon purely a question of fact. It was exclusive-

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ly the province of the judge of the trial court to weigh the testimony of the witnesses, together with the other evidence in the case. Preponderance does not necessarily mean the testimony of the greater number of witnesses. So much depends upon things that are not open to one reviewing the testimony or the evidence generally from a mere inspection of the cold record—for instance, the manner of the witness, his apparent feeling in the case, his hostility, his willingness, evasiveness, the expression on his face or the flash of an eye, his hesitancy in answering questions, or his promptness and apparent frankness and good intentions, even when mistaken or in the wrong, or the opposite of any of these qualities—in other words, his manner or his bearing or his interest or his general appearance as a witness may have as much or even more to do with his credibility as his oral words or his written expressions.

[3] This court cannot consider the evidence offered relating to the several defenses, except for the purpose of ascertaining whether the evidence presented a substantial conflict. An examination of the reporter's transcript on appeal discloses the fact that as to each of the defenses such conflict exists. It therefore follows that the finding that all the allegations of the answer were untrue cannot be disturbed.

Judgment affirmed.

We concur: CONREY, P. J.; JAMES, J.

(60 Cal. App. 675)

WILLIAMS v. WILLIAMS et al. (Civ. 4074.)

(District Court of Appeal, Second District, Division 1, California. Feb. 3, 1923.)

1. Judgment 🔑17(1) — Personal judgment cannot be rendered on a constructive service where defendant was present only as a witness.

A personal judgment cannot be rendered against a defendant who was served only by constructive service, and who made no appearance as defendant in the case, though she was present at the trial and testified as a witness.

2. Trusts 🔑103(1)—Recipients of loan of funds withdrawn in breach of confidence are liable to owner therefor.

Where one permitted his fiancée before marriage to withdraw money from his bank account for her own purposes, her withdrawal of such money to loan to a son and daughter-in-law was a breach of trust by her, and the son and daughter-in-law are liable for the amount received under those circumstances.

3. Trusts 🔑81(1) — Voluntary grantees of property subject to resulting trust are liable for amount received by sale.

Where plaintiff had permitted his fiancée to draw money from his bank account, and she withdrew a sum to purchase a tract of land which he had instructed her not to purchase, taking title in her own name, a trust as to such land resulted in his favor, and her son and daughter-in-law, who sold the land after she had conveyed it to them without consideration, must account to plaintiff for the proceeds.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Edward Williams against Elizabeth Jane Williams and others. Judgment for plaintiff, and defendants appeal. Judgment modified, and as modified affirmed.

Jarrott & Jarrott, of Los Angeles, for appellants.

Fred E. Peterson, of Los Angeles, for respondent.

CONREY, P. J. By its judgment the court declared null and void two deeds, the first being a deed whereby the defendant Williams (then Elizabeth Jane Cole) conveyed to the defendant Walter M. Cole lot 114 of the Crestmore tract, in the county of Los Angeles, and the second being a deed whereby the defendant Williams conveyed to the defendants Cole the same property. The judgment further provides that the plaintiff shall thereby have and recover from defendant Williams a stated sum of money, of which amount the sum of $675.28 is declared to be a lien on said lot 114. It is further provided that the plaintiff recover from the defendants Cole the sum of $1,375 and costs, and that, if said sum of $1,375 be paid by either of the defendants, the judgment against defendant Williams is to be reduced and satisfied pro tanto. The defendants appeal from the judgment, and the record consists of the judgment roll.

As appears from the findings, the said sum of $675.28 is not a part of the judgment rendered against defendants Cole. It is made a lien upon lot 114, solely because of certain facts which the court deemed to be in equity sufficient to create a lien therefor upon said lot 114 by reason of the circumstances under which said sum of $675.28 was expended for the benefit of that lot by the defendant Williams out of funds belonging to the plaintiff. The decree attempting to establish said lien and declaring void the said deeds is therefore wholly dependent upon the validity of the personal judgment rendered against the defendant Williams.

[1] The judgment against the defendant Williams is a default judgment based upon constructive service of process against the said defendant. Upon affidavits showing that Mrs. Williams was then residing in the state of Washington, the court made an order for publication of summons against her. Upon proof of publication of the summons and of mailing of copy of the summons and com-

plaint, the default of said defendant was duly entered. She has never made any appearance in the action, although the findings state that she was present at the trial and testified therein. The case was being tried upon the complaint and the answer of the defendants Cole. The facts thus found and shown by the record were not sufficient to give the court jurisdiction to render a personal judgment against said defendant.

The plaintiff and the defendant Williams were married on the 23d day of December, 1918, and ever since have been husband and wife. Prior to their marriage, the plaintiff consented and arranged that the defendant Williams, then Elizabeth Jane Cole, might draw checks upon his bank account. The said sum of $675.28 is made up of sums drawn out by the defendant Williams under the authority thus obtained by her. On October 11, 1917 (which, it will be noted, was prior to the marriage), said defendant withdrew $400 and paid it on account of a mortgage on said lot 114, Crestmore tract, which she then claimed to own. The remainder of said $675.28 the court finds was thereafter withdrawn from plaintiff's separate funds and applied in part to pay taxes on said lot and in part to pay interest on said mortgage. The court finds:

> "That defendant Elizabeth Jane Williams advised plaintiff that by reason of their marriage relations plaintiff had an interest in said lot 114, Crestmore tract, and that the said payments were being made for the benefit of plaintiff and defendant Elizabeth Jane Williams."

But the court finds that it is not true, as alleged in the complaint, that Mrs. Williams proposed or agreed to transfer to plaintiff an undivided one-half interest in said lot. It may well be doubted whether, under these circumstances, the loan thus made by the plaintiff to said defendant, unaccompanied as it was by any mortgage, would have been sufficient to impose a lien on the lot. At all events, the decree attempting to give force to such lien is void for the reasons heretofore stated.

[2] Turning now to the judgment against the defendants Cole, $175 thereof consisted of money withdrawn from said bank account by Mrs. Williams and by her loaned to said defendants Cole. In view of the fact that, on account of his confidence and trust in the defendant Mrs. Williams, she had been given the above-stated authority to withdraw funds from plaintiff's account, the court was justified in finding that it was a breach of trust for her to withdraw such funds and lend them to her son and daughter-in-law. The defendants Cole, having received the money of the plaintiff under these circumstances, are properly held liable to him therefor.

[3] This leaves for consideration only the further award to the plaintiff of judgment against the defendants Cole in the sum of $1,200. As found by the court, the facts are that the plaintiff and the defendant Williams, prior to their marriage, negotiated for the purchase of a certain lot 136 of the Miramonte tract in the county of Los Angeles: that the plaintiff however, instructed the defendant not to purchase said property until further advised by him; nevertheless that the defendant, without the knowledge of the plaintiff, withdrew from the funds of plaintiff in the bank the sum of $400 to pay as first payment on said lot and negotiated to purchase the property, taking the title thereto in her own name. Thereafter defendant Williams, with intent to defraud the plaintiff of his rights in said property, transferred the same to the defendant Hattie M. Cole, who sold the property for the sum of $3,200, being a net profit of $1,200 on the purchase price. The conveyance by defendant Williams to Mrs. Cole was without consideration, and the defendants Cole received the money which she obtained by selling said lot. The money so received was part of the purchase price thereof, less a mortgage of $1,500, which was assumed by the purchaser. The circumstances attending the purchase of this property, according to the facts as found by the court, were such as to create a resulting trust in favor of the plaintiff as against the defendant Williams. The defendants Cole having acquired the title without consideration, it was subject to that trust. Having by these transactions acquired the proceeds of the misapplied funds of the plaintiff, they were chargeable with the sum thus obtained.

The judgment is modified by striking therefrom that part thereof which reads as follows:

> "That the deed from Elizabeth Jane Cole to Walter M. Cole, dated August 3, 1916, for the property described as lot 114 of the Crestmore tract, as per map recorded in Book 7, page 72, of Maps, Records of Los Angeles county, Cal., is, and the same is hereby declared to be, null and void and of no effect; that the deed from Elizabeth Jane Williams to Walter M. Cole and Hattie M. Cole, dated January 23, 1920, for the property described as lot 114, Crestmore tract, as per map recorded in Book 7, page 72, of Maps, Records of Los Angeles county, Cal., is, and the same is hereby declared to be, null and void and of no effect; that the plaintiff do have and recover from the defendant Elizabeth Jane Williams the sum of $2,481.79 and costs, $79.90, herein incurred, or which sum the sum of $675.28 is hereby declared to be and made a lien upon the property described as lot 114 of the Crestmore tract, as per map recorded in Book 7, page 72, of Maps, Records of Los Angeles county, Cal."

The judgment is further modified by striking therefrom that part thereof reading as follows:

> "And, if said sum of $1,375 is paid by or made out of either defendants herein, the judgment against defendant Williams is to be decreased and reduced and satisfied pro tanto."

This leaves in effect all other parts of the judgment, including that part of the last paragraph thereof, reading as follows:

"That the plaintiff do have and recover from the defendants Walter M. Cole and Hattie M. Cole the sum of $1,375 and costs, $79.90, herein incurred."

As thus modified, the judgment is affirmed. Appellants are awarded their costs of this appeal.

We concur: JAMES, J.; HOUSER, J.

60 Cal. App. 574

NIELSEN v. GREGORY, Superior Court Judge. (Civ. 2610.)

(District Court of Appeal, Third District, California. Jan. 25, 1923.)

1. Mandamus 🔑77(1)—Quo warranto 🔑11—Quo warranto only proper method to determine which of two competitive appointees is legally constituted superintendent of schools.

The question as to which of two competitive appointees for the office of superintendent of schools is the legally constituted superintendent can be determined only in quo warranto proceedings, and not in mandamus by one of them to compel the judge of the superior court to act upon his bond as superintendent.

2. Schools and school districts 🔑48(2)—Fact that there are two contestants for office held no objection to approval of bond of superintendent.

In proceedings by the judge of the superior court to approve the bond of one appointed as superintendent of schools in the county operating under a special charter conferred by St. 1917, p. 1791, a prima facie showing of title to the office is all that is demanded, and the fact that there are two contestants for the office is no valid objection to the approval of the bond.

3. Schools and school districts 🔑48(2)—Superintendent whose bond was approved held not prejudiced by failure to approve second bond after attempted ratification of appointment.

A superintendent of schools whose bond has been approved is not prejudiced by failure of the judge of the superior court to approve a second bond after an attempted ratification of his prior appointment.

Application by C. H. Nielsen for a writ of mandate directed to H. D. Gregory, Judge of the Superior Court of Butte County. Denied, and proceedings dismissed.

John R. Robinson, of Chico, for petitioner.
W. E. Duncan, Jr., of Oroville, for respondent.

BURNETT, J. An original application was made in this court for a writ of mandate to require respondent to act upon the bond of petitioner, as county superintendent of schools for Butte county, and either approve or disapprove the same. The alternative writ was issued, and upon the return day Irvin Passmore was permitted to become a party to the action, and file an answer and petition, setting up his claim as the legally constituted county superintendent of schools of said county and praying that respondent be directed to approve or disapprove the bond which had been tendered to him by said Passmore as such superintendent. The whole difficulty arises from the question as to the authority of the board of trustees which made the appointment of superintendent of schools. The county of Butte is operating under a special charter ratified at a general election held November 7, 1916, and approved by the Legislature on January 27, 1917 (Stats. of 1917, p. 1791). In article 7, §§ 1, 2, and 3, of said charter, are found all the provisions in reference to the appointment of a superintendent of schools as follows:

"Section 1. There is hereby created a board of county school trustees, which shall consist of one member from each supervisorial district of the county, to be elected at the same time, for the same term and in the same manner as the members of the board of supervisors, except as hereinafter provided, to serve without compensation, but the members thereof shall receive actual and necessary expenses while attending to the duties of their office, including board and lodging.

"Sec. 2. Said board shall meet in the office of the county superintendent of schools on the first Monday after the first day in December succeeding their election, and as often thereafter as may be necessary, on the written call of the chairman of said board or of a majority of the members thereof. The first election of county school trustees shall be held at the general election in November, 1918, and the members of the board elected at that time shall take office on the first Monday after the first day of December, 1918, to serve for two years and thereafter said trustees shall be elected for the same term and be classified as to time of election in the same manner as the member of the board of supervisors from the supervisorial district in which they are elected. They shall elect one of their number chairman, and a majority of their number shall constitute a quorum for the transaction of business, provided no act of the board shall be binding unless three members concur therein. In the event that the chairman shall not be present at any meeting, one of the members shall be chosen to act as chairman pro tempore, and an order to that effect shall be entered in the minutes.

"Sec. 3. It shall be the duty of said board of county school trustees:

"(a) To appoint a county superintendent of schools. This officer must be a certificated teacher, having a regular elementary or high school certificate of the state of California, who has had not less than five years experience as a teacher or educational administrator, or both;

two years of which shall have been in the five years immediately preceding his appointment. He need not be an elector of Butte county, but must reside in the county during his term of office. The term of office of the superintendent of schools shall be two years for the first appointment, unless sooner removed or recalled, and if reappointed the superintendent shall hold office for four years, unless sooner removed or recalled."

Prior to the 4th day of December, 1922, George W. Jones, Fred M. Turner, John Moreland, C. A. Tripp, and P. F. Bullington were the duly elected, qualified and acting members of the board of trustees of said county. At the general election held on November 7, 1922, N. T. Enloe and W. F. Matthews were regularly elected members of the board to succeed said Tripp and Bullington. A serious question arises whether, under the provisions of the charter, their term began on the first Monday of December, which was the 4th day of December, 1922, or on the first Monday after the 1st day of January, 1923; but it is immaterial as far as this proceeding is concerned, and an expression of an opinion thereon would be of no binding force upon the litigants. On November 18, 1922, the board of trustees, as then constituted, appointed Mr. Passmore, who had been superintendent of schools for several years and whose time was about to expire, superintendent for the term of four years. On December 4th the same board ratified the appointment made as before stated, but it is manifest that this ratification could add nothing to the force of the action taken on November 18th. On said 4th day of December the said George W. Jones, Fred M. Turner, John Moreland, N. T. Enloe, and W. F. Matthews, assuming to be and to act as the duly elected and qualified members of the board, met in the office of the county superintendent of schools, and after organizing as such board appointed petitioner, C. H. Nielsen, county superintendent of schools of said Butte county "for the term beginning at noon on the first Monday after the 1st day of January, 1923, and as successor to the said Irvin Passmore, whose term of such county school superintendent would expire at said time." As to Mr. Nielsen, it may be stated that he has abandoned this proceeding for the reason that the "new" board reappointed him on January 8th of this year and thereafter he presented a new bond to the judge of the superior court, which was approved by him and was thereafter filed as provided by law. As to Nielsen, therefore, the refusal of the judge to act upon his first bond is of no further consequence. Passmore, however, insists that the "old" board had authority to appoint him for a period extending nearly four years beyond the end of their term and that he is the legally appointed county superintendent of schools.

[1] It is apparent, though, that we cannot in this proceeding finally determine the title to this office; in other words, which of the two competitive appointees is the legally constituted superintendent of schools of said county. It is conceded that such question can be determined only in quo warranto proceedings. Satterlee v. San Francisco, 23 Cal. 314; Buckner v. Veuve, 63 Cal. 304; 32 Cyc. 1415. We understand that steps have been taken to so determine it, and it would be idle to attempt to forestall the result of such proceeding.

[2] It may be admitted that the existence of contesting claimants of the office is no valid objection to the approval of a bond. In such proceeding a prima facie showing of title is all that is demanded of one who presents the bond for approval. We do not mean to say that the judge would be required to approve the bond if it appeared to him from an examination of the law that the appointment or election of the applicant was entirely illegal, but that it is not his province in such proceeding to determine disputable questions of title as would be proper in quo warranto.

[3] But this consideration is really beside the mark, because Mr. Passmore by the following allegation of his answer has shown that the judge did approve his bond:

> "That after said appointment on November 18, 1922, official notice having been received thereof, the said Irvin Passmore immediately accepted the position, and within the time allowed by law, filed his oath of office and his bond conditioned for the faithful performance of his duty as such county superintendent of schools, and which bond was duly approved by the judge of the superior court of the county of Butte and thereafter duly filed and recorded."

It is of no moment that after said attempted ratification of Mr. Passmore's appointment made on December 4th as aforesaid, he presented another bond which the judge declined to act upon. It is not claimed that the first bond was defective, and no reason appears why the approval of the second bond would have aided Mr. Passmore in any way. The judge may have assigned an erroneous reason for his action, but Mr. Passmore has not been prejudiced by the failure to approve the second bond.

The petition is denied and the proceedings dismissed.

We concur: FINCH, P. J.; HART, J.

60 Cal. App. 629

JOHNSON et al. v. BRIDGE et al.
(Civ. 4408.)

(District Court of Appeal, First District, Division 1, California. Jan. 30, 1923.)

1. Specific performance 🔑119—Plaintiff must show fair and just contract.

In suits for specific performance, it must be affirmatively shown that the contract is fair and just, and that it is not inequitable to enforce it.

2. Vendor and purchaser 🔑134(1)—Encroachment of house on adjoining land held "incumbrance" on title.

Where a land sale contract described a lot by metes and bounds and provided that on full performance vendor would execute a deed conveying it clear from incumbrances, an overlapping of the house two feet on the adjoining lot constituted an incumbrance against which vendor agreed to hold purchaser harmless and was an objection to title, the burden of which was on vendor to remove.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Incumbrance (On Title).]

3. Vendor and purchaser 🔑144(1)—Purchaser as equitable owner not liable for expense in moving house overlapping adjoining lot; "incumbrance."

Where a lot was purchased under land sale contract whereby, on performance by purchaser of her agreement, vendor would execute a deed conveying free and clear of incumbrances, an overlap and encroachment of the house two feet on the adjoining lot was an incumbrance, and the expense of moving the house could not be equitably charged against purchaser.

4. Vendor and purchaser 🔑134(1)—"Incumbrance" may include whatever impairs use or impedes transfer.

As applied to an estate in land, an incumbrance may include whatever charges, burdens, obstructs, or impairs its use or impedes its transfer.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Bertha Johnson and another against Carrie E. Bridge and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Hubbard & Johnson and T. W. Hubbard, all of San Francisco, for appellants.

Frank E. Powers, of San Francisco, for respondents.

TYLER, P. J. This is an action to specifically enforce a contract for the sale of certain real property. Judgment went for plaintiffs, and it directed that defendants execute a deed conveying the property in question upon payment to them of the sum of $79.25, an amount admitted to be due. This is an appeal from such judgment.

It appears from the record that on April 20, 1912, Carrie E. Bridge, as vendor, and Bertha Johnson, as vendee, entered into a written contract for the purchase and sale of a certain house and lot situated in San Francisco. A small deposit was made by the vendee, and the balance of the purchase price was to be paid in monthly installments, the vendor to retain title to the premises until full payment was had.

Plaintiff with regularity made her payments pursuant to the terms of the contract. Following the execution thereof and in the year 1916 the building was partially destroyed by fire, and the vendor collected the insurance, amounting to the sum of $700. At that time both parties to said contract learned for the first time that the house as it had been originally erected overlapped the lot of the contiguous owner. Notwithstanding this fact, the building was reconstructed by the vendor as it originally stood, the sum collected as insurance thereon being used for such purpose. Upon the completion of the building, plaintiff Bertha Johnson entered into the actual possession of the property, and has ever since been and now is in such actual possession. After the defendant vendor had reconstructed the building the adjoining lot owner instituted a suit against her, and judgment was rendered requiring the removal of the structure. In conformity with the terms of the judgment, the building was removed to the proper lines, and it is here sought by the vendor to recover from said plaintiff the various items of expense incident thereto before being required to execute the deed in conformity with her original agreement. There is evidence to show that the vendee, after she discovered the overlapping and before the reconstruction of the house suggested to her vendor that the structure be moved the necessary distance to take it off the adjoining lot. Plaintiff Bertha Johnson also testified that defendant vendor refused to do so, and told said plaintiff not to bother about the matter, as the adjoining owner could do nothing in the premises and that the question was one which did not concern her. The defendant, on the other hand, denied that any such request for removal had ever been made. Under these circumstances it is the claim of appellants that the evidence does not show a case for specific performance as granted, inasmuch as it is inequitable to make such a decree against them without basing it upon the condition that the money expended in removing the house and the costs incurred in the ejectment suit and certain other incidental expenses be returned to them. It is further claimed that said plaintiff, from the time she entered into possession of the property, has been the equitable owner thereof, and all expenses incurred by reason of the fact that the house was built across the line should be borne by her.

[1, 2] It is undoubtedly true that the rule

is well established that in suits for specific performance it must be affirmatively shown that the contract is fair and just, and that it is not inequitable to enforce it. A court of equity will not lend its aid to enforce a contract which is in any respect unfair or which savors of oppression. In the instant case, however, no such condition exists. Plaintiff made her purchase under a contract which specifically described the property by metes and bounds. The contract also provided that upon full performance by her of all the terms of her agreement the vendor would execute and deliver to her a good and sufficient deed conveying the premises free and clear of all incumbrances. It is conceded that plaintiff Bertha Johnson punctually observed and performed all conditions required of her. Here the overlap and encroachment upon the adjoining lot amounted to some two feet, and this certainly constituted an incumbrance against which defendant Carrie E. Bridge by her contract agreed to hold the vendee harmless. The encroachment constituted a substantial objection to the vendor's title, the burden of which it was incumbent upon her to remove. 39 Cyc. p. 1506.

[3, 4] Equally untenable is the claim that as equitable owner of the property the plaintiff must bear the burden of the expense growing out of the overlap. What has been said with reference to appellants' first contention applies with equal force to this one. Plaintiff received no benefit under the contract that she was not entitled to. It called for certain definite property described therein, clear of all incumbrances. The overlapping of the house in the manner indicated upon the adjoining owner was certainly a substantial incumbrance upon the property contracted for and one which the said defendant had agreed by her contract to insure against. The expense of doing the work could not therefore be equitably charged against the vendee. As applied to an estate in land, an incumbrance may include whatever charges, burdens, obstructs, or impairs its use or impedes its transfer. 20 C. J. 1252.

From what we have said it follows that the judgment should be, and it is hereby affirmed.

I concur: RICHARDS, J.

---

60 Cal. App. 459

PEOPLE v. MAGEE. (Cr. 922.)

(District Court of Appeal, Second District, Division 1, California. Jan. 18, 1923. Hearing Denied by Supreme Court March 19, 1923.)

1. Criminal law 🔑144(7)—Consent to continuances presumed in absence of objection.

Though it appears that continuances were allowed after expiration of the time prescribed by statute during which accused had the right to be brought to trial, in the absence of any showing defendant objected to the continuances, his consent will be presumed.

2. Indictment and information 🔑144—Motion to dismiss as to one count too late after plea of not guilty.

A motion to dismiss as to one count of an information made after entry of a plea of not guilty comes too late and is properly denied.

3. Assault and battery 🔑88—Criminal law 🔑1169(12)—Admission of testimony of threats made by accused held error, though not reversible.

In a prosecution for assault, where the prosecuting witness testified that just after he was struck he saw on defendant's hand an instrument called "knuckles," the admission of testimony by another that more than a year before he had seen accused in possession of "brass knuckles," and that accused then stated "he had got one man with them, and would get others," *held* error, though not reversible, in view of all the evidence; the testimony of previous possession of the "knuckles" being admissible, though its probative value would be lessened because of remoteness.

4. Criminal law 🔑1130(5)—Denial of instruction not reviewed in absence of reasons or citations.

Mere suggestions that the court erred in denial of instructions without any statement of the reasons or citations of authorities connected therewith does not present a question for review.

5. Criminal law 🔑1174(5)—Conversation of juror with witness held not alone grounds for reversal.

The fact that a juror held some conversation with the prosecuting witness during a prosecution for assault, though imprudent, *held* insufficient grounds for reversal.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

L. L. Magee was convicted of assault by means likely to produce great bodily injury, and he appeals from judgment and order denying new trial. Affirmed.

Chas. I. Rosin, and Harry J. Keeley, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., for the People.

CONREY, P. J. In this action the information was filed on the 10th day of February, 1922, and the case brought to trial on the following 12th of July. The defendant was convicted of the crime of assault by means likely to produce great bodily injury, a felony, as charged in count 2 of the information. He appeals from the judgment and from an order denying his motion for a new trial.

Section 1382 of the Penal Code provides that—

"The court, unless good cause to the contrary is shown, must order the prosecution to

> be dismissed in the following cases: * * * 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information."

At the beginning of the trial appellant moved that the action be dismissed for the reason that the defendant was not brought to trial within the period prescribed by law, and that all the continuances of the case were made without the consent of the defendant. He now contends that the court erred in denying this motion.

From the clerk's transcript it appears that on February 17, 1922, the defendant entered his plea of not guilty, and the trial of the action was set for April 7, 1922. Thereafter continuances were ordered as follows: On April 7, 1922, to May 2, 1922; on May 2, 1922, to July 12, 1922. The minutes show that each of these continuances was ordered "at the request of the district attorney." The clerk's transcript is silent as to the causes for these continuances. There is no other record of what actually occurred when the continuances were ordered, except that, in the discussion of the motion, as shown by the reporter's transcript, conflicting statements were made by the district attorney and by the defendant's attorney concerning the question whether the defendant did or did not consent to any continuance beyond the 60-day period. Immediately prior to the pronouncing of judgment the defendant presented a motion in arrest of judgment, which was denied, and a motion for a new trial, which was also denied. These motions rested in part upon the ground that the court was without jurisdiction to try the defendant, for the reason that the defendant, not having waived his right to be brought to trial within the time prescribed by law, was not brought to trial within said time, "there being departments of this court, within the time prescribed by law in which the defendant had a right to be brought to trial, that were not engaged in trying criminal matters." During the discussion of the motion in arrest of judgment, as shown by the reporter's transcript, the judge stated:

> "From his own knowledge and experience, that there were no other departments of the superior court engaged in the trial of criminal cases in which this defendant could have been tried," following this with a statement of conditions existing in three other departments of the court. "The court now holds that every time this case was continued, there was a case of greater urgency then being tried by the court because it had equal priority, and in many instances the case actually having been continued from a day or two previous at the time of the case of People against Magee * * * being continued."

[1] From the foregoing statement of facts it is seen that the case was set down to be tried at a date within 60 days after the filing of the information. Thereafter two continuances were ordered to dates beyond the expiration of the said period of 60 days. The record fails to show any objection made by the defendant to either of these continuances. Consent will therefore be presumed. People v. Rongo, 169 Cal. 71, 145 Pac. 1017; People v. Douglass, 100 Cal. 1, at page 4, 34 Pac. 490. On these authorities our conclusion is that the court did not err in refusing to dismiss the action.

[2] Following his motion for dismissal of action on the 12th day of July, as above stated, and the denial thereof, the defendant moved that count 2 of the information be dismissed for the reason that the defendant had not been committed by a magistrate for the offense charged in that count, and for the further reason that count 2 stated the same offense as that stated in count 1, though in different language. He now claims that the court erred in denying that motion. The motion, having been made after entry of the plea of not guilty, came too late, and it was properly denied. People v. Ronsse, 26 Cal. App. 100, 104, 146 Pac. 65; Pen. Code, §§ 990, 996.

[3] The encounter between the defendant and the complaining witness John E. King took place in January of the year 1922. King testified that immediately after the defendant had struck him in the face, the witness saw on defendant's left hand a metal instrument called "knuckles," having the color of babbit, a kind of greyish, greenish color. After this testimony had been given, John Mulligan, sworn as a witness, testified that in November or December, 1920, he saw the defendant have in possession an article which he called "brass knuckles," and that the defendant stated that "he had got one man with them, and he would get others." The defendant objected to this testimony as incompetent, irrelevant, and immaterial, in that the time was approximately a year before the offense charged, and that it was immaterial as to what he was going to do with the brass knuckles. Appellant now contends that the court erred in overruling these objections. Inasmuch as it did not appear that at the time referred to by Mulligan there existed any controversy between the defendant and King, or that the statement referred to King, the objection to the evidence of the statement made by defendant to Mulligan should have been sustained. But in view of all the evidence, which clearly shows the facts of the attack made by the defendant upon King, we think that the erroneous admission of this testimony is not sufficient ground for reversal of the judgment. There was no error in admitting the evidence that defendant had such an instrument in his possession prior to the date of the offense charged. The remoteness in time to which appellant refers

might affect the weight of the evidence, but not its admissibility. The several decisions referred to by counsel for appellant in support of this objection do not in any instance apply to the point stated.

[4] Appellant suggests that the court erred in refusing certain instructions requested by the defendant. Since he has stated no reason for the suggestion, and cited no authorities upon any proposition connected therewith, the point is not so presented that it may now be considered.

[5] The fact that one of the jurors, during the time while the case was on trial, and during the recess of the court, held some conversation with the complaining witness, is not alone sufficient to justify a reversal of the judgment. Unquestionably the conduct of the juror was imprudent. But when the matter was brought to the attention of the court, he testified that said conversation had no relation to this case. Said conversation related only to trivial matters wholly unrelated to this case. There is no evidence to the contrary.

The judgment and order are affirmed.

We concur: JAMES, J.; HOUSER, J.

---

60 Cal. App. 617

CATTERLIN v. PETERSON et al.
(Civ. 3907.)

(District Court of Appeal, Second District, Division 1. California. Jan. 27, 1923.)

1. Vendor and purchaser 🔑335—Defaulting vendee cannot recover payments from vendor.

A vendee cannot, after being in default without legal excuse, recover from the vendor the amount paid by the vendee on a contract, when the vendor was not in default, where there has been no mutual rescission or abandonment of the contract.

2. Vendor and purchaser 🔑101—Vendor held not required to notify defaulting vendee of termination of latter's rights.

Unless the contract specifies otherwise, on a default by a vendee without legal excuse, whether by waiver on the part of the vendor or otherwise, the vendor is under no obligation to give notice to the vendee of his termination of his rights under the contract.

3. Vendor and purchaser 🔑335—Notices sent by vendor to defaulting vendee of termination of latter's interest in property held not abandonment of contract or rescission, entitling defaulting vendee to recover payments.

A vendor's notice to a defaulting vendee under an installment contract stated the vendor would not permit vendee to take possession of premises until satisfactory arrangements were made with vendor, and that in future vendor would insist upon strict compliance with clause making time essence of contract, and a subsequent notice declared that, because of vendee's default, his interest in the property was terminated under the terms of the contract. *Held* not to constitute a rescission or abandonment of the contract by the vendor, so as to entitle vendee to recover payments made notwithstanding vendee's default.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by S. E. Catterlin against Ora A. Peterson and another. Judgment for plaintiff, and defendants appeal. Affirmed.

William R. Barnes, of Los Angeles, for appellants.

Jones & Weller, of Los Angeles, for respondent.

HOUSER, J. The parties entered into a contract on the 5th day of August, 1920, by the terms of which defendant Ora A. Peterson agreed to purchase from the plaintiff a house and lot in the city of Los Angeles for the sum of $4,500, payable $500 in cash on the execution of the agreement and $60 each month thereafter until the balance of the purchase price was paid. The vendee paid on account $676.66, and thereafter, having failed to make payments promptly as provided by the terms of the contract, on January 31, 1921, the vendor served upon the vendee the following notice:

"Ora A. Peterson, 212 Center Street, Venice, California: With reference to our contract dated August 5, 1920, this is to notify you that on account of your failure to comply with the terms thereof, you will not be permitted to take possession of the premises therein described until such time as satisfactory arrangements have been made with me. And you are further notified that in the future I shall insist upon strict compliance with that provision of the contract which makes time of its essence, and that payments shall be made promptly as the same fall due. Dated this 31st day of January, 1921. S. E. Catterlin, by Dana R. Weller, Atty., 500 Union League Bldg., L. A."

On April 6, 1921, the vendor served on the vendee another notice, copy of which is as follows:

"Ora A. Peterson, 212 Center Street, Venice, Calif.: You are hereby notified that on account of your failure to pay installments in accordance with the terms of your contract dated August 5, 1920, for the purchase of lot 210, Chesterfield Square, in the city of Los Angeles, I have elected to and do hereby declare all your interest in said property terminated, in accordance with the terms of said contract. Dated this 6th day of April, 1921. S. E. Catterlin, by Dana R. Weller, His Atty."

Shortly thereafter action was brought by plaintiff against both defendants to quiet title. Defendants answered and, in addition thereto, filed a cross-complaint by which they sought to recover from plaintiff all moneys paid by them to plaintiff on account of the purchase price of the property contracted to be sold to them.

The court finds, among other things:

> "That the defendant did not keep or perform all of the obligations of said agreement on her part to be performed. That the plaintiff did keep and perform the obligations on his part to be performed by the terms of said agreement. That said defendant Ora A. Peterson did not perform each and all of the covenants in said agreement contained, and was not at all times mentioned in her cross-complaint ready and willing to perform each and every covenant therein contained. That the plaintiff has not failed or refused to comply with the conditions of said agreement, and was not required by the terms thereof to permit said defendant to take possession of said premises or to collect the rent thereof. That the plaintiff did not, on the 6th day of April, 1921, or at any other time, rescind or abandon said agreement or retake possession of the premises therein described, and did not notify said defendants that the contract was abandoned or determined, but that plaintiff did notify said defendant O. A. Peterson that her interest in said property was terminated by reason of her failure to comply with the terms of said agreement. That the installments of the purchase price, as required by the terms of said contract, were not paid by the defendant Ora A. Peterson in accordance with the terms thereof."

[1] Counsel for appellant very pointedly states in his brief that the only question for determination is whether the purchase agreement was abandoned by either of the parties. The cases are so numerous as to require no citation to the effect that a vendee cannot, after being in default without legal excuse therefor, recover from the vendor the amount paid by the vendee on the contract when the vendor was in no wise in default on his part of the contract, except where there has been a mutual rescission or an abandonment of the contract by the parties thereto. After the vendee's breach, the vendor may agree to a mutual abandonment and rescission, in which case only there may be a recovery. Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Skookum Oil Co. v. Thomas, 162 Cal. 539. 123 Pac. 363. It is conceded by counsel for respondent that had the contract been rescinded or had it been abandoned, the vendee would be entitled to recover the payments made. So much being settled, at least by agreement of counsel, if not by the decisions of this state, the only question to determine is, Do the two notices served by plaintiff on defendant Ora A. Peterson show an abandonment or a rescission of the contract? In Glock v. Howard & Wilson Colony Co., supra, where a similar contract was involved, the court, in pointing out what are the several rights of a vendor of real estate in such circumstances, said that one of his remedies was to rest upon his contract, remain inactive, yet retain to his own use the moneys paid by the vendee, and as an incidental matter call the "vendee into a court of equity and compel him to show why all his rights under the contract should not be held to be at an end. The vendor, when he prosecutes such an action, does so to cut off the possibility of any future claim by the vendee to equitable relief, which might embarrass or cloud his title." That is what respondent contends he did in this case.

[2] The law appears to be well settled that, in the absence of an express provision in the contract of the parties to the contrary, on a default by the vendee, without legal excuse for such default whether by waiver on the part of the vendor or otherwise, the vendor is under no obligation to give notice to the vendee of his termination of his rights under the contract. Commercial Bank v. Weldon, 148 Cal. 608, 84 Pac. 171; Champion Gold Mining Co. v. Champion Mines, 164 Cal. 205, 128 Pac. 315; Schwerin Estate Realty Co. v. Slye, 173 Cal. 172, 159 Pac. 420; Newhall L. & F. Co. v. Burns, 31 Cal. App. 549, 161 Pac. 14.

> But "if the vendee, in fact, has been in default, a notice that the contract was terminated would have been proper, and the vendors would be no longer bound, either to convey the land or refund the purchase money. Such notice would have been in strict accord with the contract. (Citing cases.) Lemle v. Barry, 181 Cal. 10, 183 Pac. 150.

The case of Oursler v. Thacher, 152 Cal. 739, 93 Pac. 1007, is exactly in point herein. It shows a contract of sale on installments, default by vendees, a notice by vendor to vendees containing, among other things, the following:

> "Wherefore we, the undersigned, A. R. Oursler and Clemente Salazar, parties of the first part in said bond, do hereby declare said bond to be forfeited and all of your interest in the property therein and hereinafter described to be terminated."

The vendor brought an action to quiet title; the vendees answered and filed a cross-complaint for moneys paid by them to vendor under the terms of the contract. In the course of the decision the court said:

> "The stipulated facts here warrant no inference but the one that plaintiffs have done no more than to insist that under the terms of the contract defendants had no further rights under such contract, but had forfeited all such rights. Their notice of forfeiture and demand for possession of the mining property were strictly in line with this claim, and were in no sense a repudiation or abandonment of the contract or a consent to a rescission thereof. * * * The bringing of the action to quiet title was an act of the same character. Practically, it amounted to no more than the calling of the defaulting

vendees into court to show why it should not be decreed that under the terms of the contract all their rights thereunder were at an end. In the absence of some sufficient equitable showing to excuse their failure to comply with the terms of the contract, plaintiffs, while standing on their contract, were entitled to such a decree, so as to cut off the possibility of any future claim by the vendee to equitable relief, which might embarrass or cloud his title."

The case of Champion Gold Mining Co. v. Champion Mines, supra, also involved a principle of law similar to that in this case. There a mining property had been sold on the same plan pursued in this case; that is, on the installment plan. The vendee had breached the contract by not making the payments agreed upon and, after some negotiations, as here, the vendor, a corporation, at a regular meeting of the board of directors thereof, adopted a resolution containing, in part, the following:

> "Now, therefore, it is hereby resolved, that said agreement be, and it is hereby terminated and canceled, and B. W. Shoecraft, secretary of this corporation, be and he is hereby authorized and directed for and on behalf of this corporation, and as its act and deed, to immediately take possession of all the properties of this corporation covered by said contract."

A certified copy of the resolution referred to was delivered to the vendee. Some subsequent attempt to adjust conditions between the parties proved unsuccessful, and the vendee instituted an action to recover possession of the property and damages for the detention thereof. In holding that plaintiff (the vendee) could not recover, the court said, in part:

> "We do not understand that any notice was essential to terminate plaintiff's rights under the contract. Its default, unexcused and not waived, ipso facto terminated those rights, and practically the only effect of the resolution was to express the determination of defendant corporation not to waive such default and that the contract was, by reason of the default, terminated, and to authorize the designated officer for and in its name to retake possession."

[3] It is a general rule that there is no presumption in favor of an abandonment and that clear proof thereof will be required. Appellant has made no argument, either in his brief or orally, to sustain his claim that the language contained in either or both of the notices herein set forth will bear the construction for which he contends. All that the first notice contains is a statement to the effect that, because of failure on the part of the defendant to comply with the terms of the contract, she would not be permitted to take possession of the premises until such time as satisfactory arrangements had been made with plaintiff; also that thereafter plaintiff would insist on strict compliance with that provision of the contract which made time its essence, etc. Surely there can be nothing so far which in any manner could be construed as an abandonment of the contract on the part of plaintiff. On the contrary, it would appear that plaintiff, far from suggesting or even contemplating an abandonment, is insisting or enforcing the provision of the contract so that "payments shall be made promptly as the same fall due." The substance of the second notice is that, by reason of the fact that defendant Ora A. Peterson has failed to pay installments, plaintiff declares that Ora A. Peterson's interest in said property is terminated in accordance with the terms of the contract. It will be noticed that plaintiff did not say that he rescinded or abandoned or canceled the contract or that the contract was at an end. He rather contented himself with notifying defendant that her interest in the property was terminated, just as was done in the case of Oursler v. Thacher, supra, where the vendors, by their notice to vendees, declared "said bond to be forfeited, and all your interest in the property therein and hereinafter described to be terminated." There is nothing which would indicate that the contract was to be canceled, or that it was rescinded; but there is a clear intimation that plaintiff considered defendant's rights in the property itself had been forfeited by reason of her breach of the contract. In the opinion of the court, there was no rescission or abandonment of the contract by plaintiff. He stood squarely and firmly on the terms of his written contract; he was not in default at any time with reference to anything by him to be done or performed. On the other hand, the vendees were in default; they showed no inclination to abide by the terms of their obligation to plaintiff. There was no legal excuse for their conduct because of waiver on the part of plaintiff or otherwise; consequently they are in no position to recover any moneys paid to plaintiff on account of the purchase price.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

60 Cal. App. 503

CALIFORNIA PEAR GROWERS' ASS'N v. HERSPRING. (Civ. 2552.)

(District Court of Appeal, Third District, California. Jan. 22, 1923. Hearing Denied by Supreme Court March 22, 1923.)

1. Sales 🔑181(12)—Evidence held to show windfall pears merchantable when delivered to drier.

Evidence *held* sufficient to establish that windfall pears were delivered to a drier in merchantable condition, and that subsequent loss occurred through inability of the purchaser to care for the fruit quickly enough.

2. Appeal and error 🔑1010(1) — Appellate court bound by findings of fact below supported by evidence.

Appellate court bound by findings of fact below supported by evidence.

3. Sales 🔑365—Finding that pears were merchantable held sufficient regardless of when delivery deemed made.

Findings that windfall pears were in a merchantable condition when delivered to the purchaser *held* broad enough to apply, whether delivery be deemed to have been made at piers or at the purchaser's drier, to which they were subsequently transported.

4. Sales 🔑168(2), 176(4)—Inspection must be within reasonable time; failure to inspect within reasonable time is waiver of right.

Where the purchaser of goods reserves the right to inspect, a reasonable time therefor is allowed, and a failure to inspect within the time allowed by the contract or by law is a waiver of the right.

5. Sales 🔑202(1)—Pear grower's contract with drier held such that payment was unnecessary to pass title to seller.

A contract between a pear growers' association and a purchaser of windfall pears *held* an executory agreement to sell certain goods for a certain price, so that, when they were delivered and accepted or the right to reject waived, the sale was executed and the purchaser liable for the price; it being unnecessary that payment be made in order to pass title.

6. Sales 🔑51—Action for price is ratification of sale.

An action to recover the purchase price is a ratification of a sale.

7. Sales 🔑384(3) — Contract price measure of damages for failure to accept windfall pears pursuant to contract.

In an action to recover damages for a purchaser's failure to accept windfall pears pursuant to contract, where the pears had become valueless, the damages, under Civ. Code, §§ 3311 and 3353, would be measurable by the contract price.

8. Account stated 🔑19(3)—Evidence held insufficient to establish an account stated and accepted.

Evidence *held* insufficient to establish an account stated and accepted between a pear growers' association and a purchaser of windfall pears.

9. Estoppel 🔑52—Essentials stated.

In order to give rise to estoppel, the party to be estopped must be apprised of the true facts, must speak or act with intent to deceive or with careless and culpable negligence, and the party asserting the estoppel must be destitute of knowledge of the facts or means of acquiring it and must rely on the conduct or statement of the other under circumstances such that he will be injured by allowing its truth to be disputed.

10. Appeal and error 🔑1058(1)—Exclusion of evidence as to merchantability of pears at drier held not prejudicial.

In an action for a balance due on pears, exclusion of the county horticultural inspector's report as to the merchantability of the pears at a drier *held* not reversible error, where he himself testified fully as to the condition as he found them.

11. Evidence 🔑244(2)—Report of one acting without the scope of his authority as to condition of fruit held properly rejected in action for purchase price.

A report made by one who was directed by an incorporated growers' association to inspect windfall pears at a wharf from which they were being shipped to a drier, relative to the condition of the fruit at the drier and based on another's report to him, *held* properly rejected in an action for a balance due on the purchase price, since he did not follow instructions and his report was not within the scope of his authority and based on another's report to him as to conditions at the drier which were not in controversy.

12. Evidence 🔑448—Introduction of extrinsic evidence to aid in construction of contract to purchase windfall pears held unwarranted.

Introduction of extrinsic evidence consisting of conversations between a purchaser of windfall pears and directors of a growers' association, under Code Civ. Proc. §§ 1856 and 1860, as circumstances surrounding the execution of a contract to aid in proper construction thereof, *held* unwarranted.

13. Trial 🔑46(1)—Purpose of proposed testimony should be stated when its relevancy does not appear.

Where the materiality of proposed testimony is not apparent, what is sought to be proven should be stated so that the court may be fully advised in ruling thereon.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the California Pear Growers' Association, a corporation, against Joseph Herspring. From a judgment for plaintiff, defendant appeals. Affirmed.

Arthur C. Huston, of Woodland, and Robert H. Schwab, of Sacramento, for appellant.

Aaron Sapiro and Milton D. Sapiro, both of San Francisco, and Downey & Downey, of Sacramento, for respondent.

BURNETT, J. The action was for the balance of the purchase price of pears sold by the plaintiff to the defendant, and plaintiff had judgment, from which defendant has appealed. The contract between the parties was in writing, executed on July 17, 1919, and we may quote the following provisions:

> "1. Subject to delivery by growers under the standard pear crop agreement of the seller, the seller agrees to sell and the buyer agrees to accept and buy from the seller 1,000 tons, more or less, windfall pears, at the price of thirty-five dollars ($35.00) per ton, f. o. b. river bank, Sacramento river, during the season of 1919. 2. Said pears, up to the said quantity of 1,000 tons, more or less, shall be delivered from any of the following grower-members of the seller, namely, as per list attached, all of whom are known to the parties hereto and the location of whose ranches and points of delivery are also known to the parties hereto. 3. Deliveries hereunder shall not begin prior to July 25th unless by mutual agreement or by consent, at the suggestion of the buyer. * * * 5. The pears shall be two inches and up, free from sunburn and immature pears and from pears which have begun to rot. * * * 6. The buyer shall inspect all fruit at the time of delivery and shall accept or reject the pears at the drier. No rejection shall be made except on notice to the grower and for defects herein specified. * * * 8. The fruit shall be weighed at the drier. If there are no facilities there for weighing, the seller will accept the weights at drier on tested scales or at the nearest public weigher and a certificate of weights shall be signed by the buyer and delivered immediately to the seller. * * * 9. The buyer further agrees to pay for all the pears delivered hereunder immediately upon delivery. 10. It is expressly agreed that all of the pears delivered hereunder shall be used by the buyer for drying only and shall not be sold or delivered directly or indirectly to any canner under any circumstances without the written consent of the California Pear Growers' Association, and only upon such terms and conditions as the said association may specify in writing."

The plaintiff is a nonprofit, co-operative marketing association whose members are growers of pears, and the fruit was to be furnished by those whose names appeared on said list attached to the contract. The ranches upon which the pears were produced are located upon the Sacramento river, and defendant's drying plant is just outside the city of Sacramento. After the execution of the contract, defendant made arrangements for the transportation of the pears from the river bank by the Southern Pacific steamers to Sacramento and thence by the Northern Electric Railroad to his said plant. The fruit was of an inferior grade, shaken from the trees by the wind, of an extremely perishable nature, and requiring prompt shipment and speedy attention for drying. Not only by reason of the character of the pears, but also of the excessive heat of the summer and the lack of refrigeration, was there necessity for economy of time in the shipment and the preparation of said fruit for drying. Prompt and expeditious carriage was furnished by said transportation companies, and the fruit arrived in good season at the drier. As to this there seems to be no dispute between the parties, but there is a vital disagreement as to the quality and condition of a large part of the fruit when it was delivered, and this controversy is the cause of the litigation. That much of the fruit was discarded and destroyed because it was unfit for drying or indeed for any use is shown without conflict and is not denied by respondent; but the association's claim is that—

> "Mr. Herspring's plant was entirely inadequate to accommodate the quantity of fruit purchased under this contract. As a consequence, the pears arrived at the drier and were there compelled to stand unloaded for days. Deterioration was inevitable. When the fruit was eventually removed from the cars, a large quantity had become unfit. With each day the congestion became heavier and the period of delay longer. Hence the quantity of spoiled fruit constantly increased."

Appellant's position, stated generally, is that such condition was not due to any fault on his part, but that such fruit was defective when received, and therefore the loss should fall upon the association. The trial court took the view that the pears complied with the terms of the contract and would have continued of such quality if they had been unloaded and dried within a reasonable time; that the delay, which caused their deterioration, was a circumstance for which respondent was not responsible, and hence the loss should be borne by appellant. This characteristic and determinative factor in the case appealed to the learned trial judge as follows:

> "The fruit season does not wait on anybody. You ship your fruit when it falls, when it accumulates; it does not keep. You can't hold it back to meet the necessities of anybody. It has got to be handled during that time, and anybody who buys that sort of fruit buys it with knowledge that it is a touch and go proposition; that it is a work of days and hours to preserve it, or it is lost; and Mr. Herspring undertook the purchase of a short-lived fruit, the picking of which could not be regulated by its owners; it had to be shipped as it fell during the season when it was available; and without the experience that the business required, without an established plant, without a worked out system, without efficient help—one who had had experience in those enterprises could see how such an enterprise would fail that was so loosely associated together, and the inevitable result happened. I have no doubt that Mr. Herspring did the very best he could under the circumstances, but his plant does not seem to have been qualified to handle such a large amount of fruit as came to him under the terms of his contract."

[1] That this theory thus announced clearly implying, if not expressly stating, that the failure in the character of the fruit was chargeable to the fault of appellant and not

to that of respondent, finds support in the evidence, cannot for a moment be doubted.

First, as to the quality of the pears when shipped, we find the growers testifying without contradiction that the fruit answered and fulfilled every requirement of the contract. This testimony showed further that the condition of the pears was such that it would continue unimpaired for from 4 to 10 days after shipment. As an illustration of this testimony, we may quote Albert A. Brown as follows:

> "I am a member of the California Pear Growers' Association and shipped windfall pears to Jos. Herspring & Co. for the association. I personally inspected the pears shipped by me. There were none less than two inches, free from worms, no withered or rotten pears among them. There were no sunburned pears."

He further testified that they would have remained in good condition "about three, four or five days at the ranch easily enough." Since the pears were shipped promptly and were only one or two days in transit, it is a fair inference from the testimony of these witnesses that the fruit was in good condition when received by appellant and would have answered the purpose if it had been promptly attended to. There was much other testimony to strengthen and confirm the inference. Mr. Fred C. Brosius, the county horticultural commissioner, testified as follows:

> "Q. Did you see the pears consigned to Mr. Herspring at the docks at Sacramento? A. I saw them occasionally. Q. What was the condition of the fruit? A. July 29th, because the telegram designated that I should examine them there on arrival, all the pears on that day consigned to Mr. Herspring's drying yards were in my opinion very good quality windfall pears.
>
> "The Court: Did you look on any other occasion? A. Yes, later on. I had occasion to visit the dock every morning to examine all Eastern and cannery goods for the mealy bug, if for no other reason, and thus at various times I examined them, and they were in fair condition; of course, some of it was in better condition than others.
>
> "The Court: They were merchantable? A. Absolutely."

Mr. C. A. Wilkins, county horticultural inspector, testified also that he examined the fruit on the dock, and, while he found some of it was pretty ripe, "I can't say that I found any signs of decay or leakage at that time." The witness, though, discovered a very different condition when he made an inspection in the drying yards. Then "the fruit was in all stages of maturity and possible decay," but he did not know how long it had been since the fruit arrived. He did add, however:

> "I think there were manifests showing some cars leaving Sacramento on the 27th or 28th of July and inspected on the 10th of August; those were the last cars."

He further testified that he found four or five carloads of the fruit stacked in the yards "out in the sun," where it was quite hot, and that there were not enough trays to handle the fruit. Indeed, as to the inability of the appellant to dispose of the fruit promptly, the testimony of Mr. David Franklin Herspring is convincing. He was the manager of the drying plant during the months of June, July, August, and September, 1919, although he had no prior experience in such business, having been a veterinary dentist and before that engaged in the candy business. He testified that they had labor troubles at the plant with the first foreman; that he had trouble with laborers in the field because of the foreman; "that the foreman, on the day he resigned, went out in the field and induced the men to quit work, telling them that he would take them on a fishing excursion and would treat them royally; that a majority of the men left and that evening at 4 o'clock he picked up fourteen of the men and persuaded them to go back; that he put them to work in the sulphur houses; there were some boys working back there where these men left all this fruit piled up under the sheds; * * * that he could not handle the pears as they came in; that if there was a place for the men and capacity to handle the fruit, they could have handled it, but that they lacked capacity for getting a spur and capacity for the men to do the work; they lacked the number of acres to handle the tonnage delivered; that the failure to handle those pears resulted from a lack of capacity and from lack of space; that they could not possibly unload every car the day it was delivered, because at times they would not have four men."

We consider further quotation unnecessary, but deem it sufficient to say that, if it be conceded that a conclusion favorable to appellant might have been reached by the trial court, there can be no doubt that the finding in favor of respondent is abundantly supported.

This result is not affected by the question as to when the title to the pears passed to defendant. There may be ground for a difference of opinion whether under the contract title vested when the pears were delivered at the river bank to defendant's agent, the transportation company, or whether they remained the property of respondent until a reasonable time elapsed after their arrival at Mr. Herspring's drier. Many conflicting decisions are cited involving similar contracts, but we shall not review them, as the judgment must be upheld upon either theory. It is true that the trial judge expressed his opinion that complete delivery was made at the river bank, but he declared also that the failure in the quality of the fruit was imputable to appellant's delay.

[2, 3] However, we are controlled by the

findings, and therein no specific limitation as to the delivery is made. It was found:

> "That under and pursuant to said contract, said plaintiff delivered pears to the value of $10,147.74 of the kind and quality as called for by the said contract, which said sum has been paid to said plaintiff by said defendant.
>
> "That said plaintiff offered for delivery and acceptance and delivered to said defendant certain other pears under and pursuant to said contract, being the same pears alleged in said complaint as not having been paid for."

Then follow specific findings that these pears complied with the terms of the contract, and furthermore:

> "That it is not true that any pears offered for delivery and acceptance by the plaintiff were rejected by the defendant because of the fact that they were not free from sunburn, or were immature, or had begun to rot prior to their being offered for delivery and acceptance by the said plaintiff. * * * That it is true that plaintiff offered for delivery and delivered to said defendant certain pears, some of which were accepted by defendant, and others of which were rejected by the defendant as not meeting the requirements of said contracts, but that all of said pears so rejected by said defendant did meet the requirements of said contract, and that said attempted rejections by said defendant were improper and did not constitute rejection of the pears so delivered."

These findings are broad enough to embrace either of the suggested theories as to delivery, and in view of the evidence the trial court was not required to be more specific.

[4] It is true that the court did not explicitly find that the delay of appellant in the inspection of the pears was unreasonable, but it is clearly implied in the findings which were made and which covered all the material issues of the pleadings. It is not disputed that where time is given for inspection before title passes, a reasonable time is allowed, having regard to all the circumstances in the case, and "a failure to inspect or test within the time permitted by the contract or the law is a waiver of the condition qualifying the buyer's obligation to become owner of the goods or to pay for them, or of a condition subsequent authorizing return of the goods." Williston on Sales, § 476; Potter v. Holmes, 87 Minn. 477, 92 N. W. 411; White v. Harvey, 85 Me. 212, 27 Atl. 106. Of course, an instance like this demands an almost immediate inspection after delivery. A delay of even 24 hours under the conditions to which we have referred might entail a loss of the right, and render the sale absolute, if we regard the vesting of the title as subject to the right of inspection.

[5] We can see no merit in the claim that the payment of the price was a condition precedent to the passing of title. No doubt there are many such cases wherein the vendor is permitted to retain the title until paid, although he may have delivered possession to the vendee. There is nothing in the contract herein, however, to give countenance to such view. We construe the contract as an executory agreement to sell certain goods for a certain price, and when they were delivered and accepted by defendant, or he had waived his right to reject them, the sale was executed and defendant became liable for the price.

[6, 7] Moreover, upon appellant's theory of the contract it was open to plaintiff either to recover the property or sue for the purchase price and an action brought to recover the purchase price is a ratification of the sale. Parke, etc., Co. v. White River L. Co., 101 Cal. 37, 35 Pac. 442. Herein, manifestly, the plaintiff pursued the only course that was feasible since the pears could not be recovered, as they were admittedly destroyed. The only other possible remedy would be an action for damages, but if the complaint had been grounded upon that theory the loss would be measured by the contract price because at the time of defendant's breach the pears were valueless. Sections 3311 and 3353, Civ. Code. It is therefore apparent that defendant would be in no better condition if plaintiff had adopted the suggested form of action.

[8] One of the main contentions of appellant is that there was an "account stated" between the parties. The source of this claim is found in the fact that itemized statements containing reductions for the rejected pears were sent by defendant to plaintiff, together with checks for payment, and it is urged that they were accepted without objection and therefore became binding upon the parties. The requisites of such account are not in dispute and need not be specifically considered. As to this claim the trial court found:

> "That after the delivery of pears to said defendant by said plaintiff, defendant made a written statement of the quantity of the pears accepted and of the quantity of pears claimed to have been rejected, which said statement was delivered to said plaintiff, together with the check of said defendant in payment for the number of pears so accepted; that four such statements were rendered by said defendant to said plaintiff during the months of July and August, 1919; that such statements were not made and delivered by defendant to said plaintiff immediately after the acceptance or rejection of any pears offered for delivery or delivered by said plaintiff, but four of such statements were made during the months of July and August, 1919.
>
> "That it is not true that plaintiff did not advise defendant that any rejections made by said defendant were not proper, or were not in accordance with the terms of said contract until after the last delivery of the statement following the last delivery of pears.
>
> "That plaintiff made objections to statements furnished by said defendant within a reasonable time after obtaining knowledge of the facts concerning the delivery of pears to said defendant, and the attempted rejection of pears by said defendant."

F. E. Borton, of Bakersfield, for petitioner.
J. R. Dorsey, Dist. Atty., and E. F. Brittan, both of Bakersfield, and M. G. Brittan, of Los Angeles, for respondent.

CRAIG, J. This is a petition for writ of habeas corpus. The complaint, in so far as it is material here, reads as follows:

> "Personally appeared before me this 11th day of August, 1922, George Hudson, of Bakersfield, in the county of Kern, state of California, who, being first duly sworn, complains and accuses M. J. Bergen of the crime of misdemeanor, to wit, carrying concealed weapon, committed as follows: That said M. J. Bergen, on or about the 10th day of August, 1922, within the corporate limits of the said city of Bakersfield, county of Kern, state of California, did then and there willfully and unlawfully conceal upon his person one Iver-Johnson .38 pistol, without a license to carry such firearm."

Petitioner contends that this complaint does not state facts sufficient to constitute a public offense. The language of the section of the statute (St. 1917, p. 221) under which the charge is made reads as follows:

> "Sec. 3. *Carrying Firearms Without License, Misdemeanor.* Every person who carries in any city, city and county, town or municipal corporation of this state, any pistol, revolver, or other firearm concealed upon his person without having a license to carry such firearm as hereinafter provided in section six of this act, shall be guilty of a misdemeanor."

Section 1426 of the Penal Code requires that the complaint through which an action for a public offense is begun must set forth "the offense charged, with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint."

It seems apparent that in any accusation the name given the offense by the pleader is separate from the charging part of the instrument. This was held to be the rule in People v. Cuddihi, 54 Cal. 53. In that case the prosecution was by way of indictment, but the same reason is equally applicable to a complaint. A person of ordinary understanding who reads a formal accusation of crime, and finds himself charged with an "assault with intent to commit murder," "committed as follows," would know that he must look to what follows to discover the alleged facts, and, if they were to the effect that he had administered to some one a large quantity of a certain deadly poison with intent to murder such person, he would understand the offense charged to be that named in section 216 of the Penal Code, and he would pay no further attention to the name erroneously applied to the alleged offense by the pleader. Likewise, one reading the complaint in the instant proceeding passes on from the designation of the offense. There is no suggestion that the name is intended to be part of the charge, but, on the contrary, upon its face it purports to be nothing more than a name. When the complaint says, "committed as follows," we look to that which follows to see what it is alleged that Bergen did to commit an act violative of the law. There we find it said that he did "willfully and unlawfully conceal upon his person" a certain pistol "without a license to carry such firearm." Two facts are contained in this charge: First, that he concealed the pistol on his person; and, second, that he had no license to carry the same. But the act under which the prosecution is brought does not make it an offense to conceal a weapon upon one's person without a license to carry it, unless the concealment is joined with the carrying of the same. Without doubt, the purpose of the Legislature in enacting this law was to prevent citizens going armed in such fashion as to constitute a danger to the public; we think it was not designed to prohibit the concealment of a weapon upon one's person on his own premises or in his own home.

The technical meaning of the word "carry" seems not to have been given extended consideration in the cases involving this class of public offense. Webster's dictionary defines it as "to act as bearer; to convey anything; as to fetch and carry. To have or exert propulsive power." At common law the offense of carrying concealed weapons involved riding or going about, and not merely holding or possessing a weapon. State v. Huntly, 25 N. C. 418, 40 Am. Dec. 416.

The use of the word "carry" in an indictment conveys to a defendant the thought of going about armed, as well as the further proposition that he is charged with transporting the weapon with intent to use it as such. State v. Larkin, 24 Mo. App. 410; State v. Murray, 39 Mo. App. 127; State v. Gilbert, 87 N. C. 527, 42 Am. Rep. 518; Mangun v. State, 15 Tex. App. 362. The absence of an allegation of "carrying" leaves the accusation defective, not merely in form, but in substance; the complaint is lacking in an essential allegation, and therefore cannot confer jurisdiction upon any court to require the defendant to submit himself to processes in connection with any proceeding based upon it.

But it is said that, from the fact that the complaint alleges that petitioner was without a license "to carry" such firearm, it might be understood that the pleader intended to charge the defendant with having carried as well as concealed the pistol. This would be overstraining even the "squint" doctrine announced in Re Avdalas, 10 Cal. App. 507, 102 Pac. 674.

The complaint in the Matter of the Application of Winston, 160 Cal. 18, 116 Pac. 390, contained every element of the statute. As the opinion points out, it clearly charged a simple

[12] Claiming that they were a part of the circumstances surrounding the execution of the contract and admissible under sections 1856 et seq. of the Code of Civil Procedure, appellant sought to introduce evidence of various conversations; but respondent's objection thereto was sustained. One of these questions, relating to a change that was made in the written contract providing that the fruit should be weighed "at the drier" instead of "on the river bank," was as follows: "At that time, Mr. Herspring, did you have any conversation with Mr. Edinger about that change?" Upon answering, "I did," he was asked the following question, to which an objection was sustained: "What was that conversation?" He sought also unsuccessfully to introduce evidence of a conversation which he had with one of the directors of plaintiff after the execution of said contract with reference to the quantity of fruit which he could handle. These conversations were not admissible, of course, to vary the terms of the written instrument, and they could be received as evidence of the surrounding circumstances only to aid in the proper construction of the written contract (section 1860, Code Civ. Proc.) if there were any uncertainty therein. We think the situation was not such as to admit of this extrinsic evidence.

[13] Moreover, since the materiality of the proposed evidence was not apparent, appellant should have stated what he proposed to prove in order that the court might be fully advised of his position. We may add that there was and is no contention that any mistake was made in the written contract, that any fraud was practiced in its execution, or that a different contract was afterward substituted for it. To the suggestion that all fruit should have been delivered as appellant was able to take care of it, it is sufficient to answer that, if he so desired, he should have so provided in the contract. No advantage was taken of him in its terms, and, if he suffered loss through his misfortune, plaintiff was not responsible. Besides, it is clear that there could be no appreciable delay in the delivery as the pears demanded immediate attention. It is worthy of observation also that since the transportation from the river bank was under the direction and control of appellant, he could regulate the receipt of the fruit at the drier as far as its condition would permit.

We may not have noticed specifically all the points made in the able and exhaustive brief of appellant, but from a careful examination of the record we are convinced that we are not authorized to interfere with the decision of the trial court.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

---

60 Cal. App. 581

AROCENA v. SAWYER. (Civ. 4026.)

(District Court of Appeal, Second District, Division 2, California. Jan. 25, 1923.)

1. Appeal and error 🔑105, 110—Orders denying nonsuit and new trial not appealable.

Neither an order denying a motion for nonsuit nor one denying a motion for a new trial is appealable.

2. Partnership 🔑258(6, 7) — Surviving partner may be sued on claim against partnership without joining personal representatives of deceased partner.

In actions upon claims against the partnership, the surviving partner may be sued alone, without joining the executors or administrators of the deceased partner or alleging the presentation of any claim against his estate.

3. Payment 🔑57—Complaint for services held not demurrable as failing to allege nonpayment.

In an action against a surviving partner upon claims for services rendered which had been assigned to plaintiff, that the complaint alleged that a certain sum was due, owing, and wholly unpaid "from defendant to the plaintiff herein," *held* not to make it demurrable on the ground that it failed to negative the possibility that the claim might have been paid by the partnership or by the deceased partner; the complaint containing another allegation that no part of the sum "has been paid."

4. Evidence 🔑354(24)—Books of partnership kept by plaintiff as defendant's agent held admissible in action for wages.

In an action on assigned claims for services brought against a surviving partner by the foreman of the partnership, books of account containing statements of amounts due for such services, kept by plaintiff as defendant's agent, were admissible as admissions against interest.

5. Appeal and error 🔑1052(6)—Admission of evidence, if error, harmless where adverse judgment not rendered.

Where, in an action for services brought by a foreman, the books of the employer kept by the foreman as defendant's agent were introduced as admissions of the employer against interest, if error, the error was harmless to defendant appellant, since judgment went against plaintiff on the particular claim.

6. Evidence 🔑354(24)—Account books kept by plaintiff as defendant's agent held admissible in evidence in suit for wages.

Where claims for services against a partnership were assigned to plaintiff, who had been defendant's foreman and who had kept defendant's books, such books were admissible in evidence as documents kept by the partnership, and as admissions against interest.

7. Limitation of actions 🔑183(3)—Statute of limitations held insufficiently pleaded.

Where in an action for wages, the answer failed to allege that the cause of action accrued more than the statutory period of time prior to the filing of the original complaint, plea being couched in language speaking not from the date of the original complaint, but from the time of the filing of the answer, *held* insufficient to set up the bar of the statute of limitations, either as an attempt to plead facts constituting the bar or as an attempt to plead in the manner permitted by Code Civ. Proc. § 458.

8. Limitation of actions 🔑197(1)—Evidence held to disclose existence of "mutual account" not barred by four-year statute.

In a suit on assigned claims for services rendered by ranch hands for a partnership, evidence as to credits for merchandise sold by defendant to plaintiff's assignors and as to cash payments made by the employer to them *held* to disclose the existence of a mutual, open, and current account not barred by Code Civ. Proc. § 337, subd. 2, and section 344, providing that suit must be brought on such an account within four years from the date of the last item; an account being "mutual" if there be a mutual credit founded on a subsisting debt on the other side, or if there be an agreement, express or implied, for a set-off of mutual debts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mutual Accounts.]

9. Appeal and error 🔑1071(6)—Failure to find on issues not necessary for judgment entered held not reversible error.

Where the court has made fact findings upon all the issues necessary to sustain the judgment as entered, that no findings were made upon entirely separate and distinct issues which might have been the basis of another and different judgment, but, which, if found upon, could not have affected the judgment actually rendered, cannot justify a reversal.

10. Appeal and error 🔑1011(1)—Finding on conflicting evidence cannot be disturbed.

A decision of the trial court based upon conflicting evidence will not be disturbed on appeal.

11. Limitation of actions 🔑94—Bar as to one partner held not a bar as to another partner who has been absent from state.

That one of two partners continues to reside in the state until a right of action against him on the partnership debt is barred does not affect the liability of the other partner who has been absent from the state, since the statute of limitations is a defense peculiar to him who pleads it; its effect being not to satisfy the debt, but to bar the remedy.

12. Interest 🔑39(1) — Interest on unpaid wages due monthly properly allowed from termination of employment.

In an action for services rendered as a cook at an agreed wage per month, the account not being a mutual, open, and current one, but the obligation to pay becoming absolute at the end of each month, interest might properly be allowed on the principal found due on the claim at the legal rate from the date of termination of her employment.

13. Interest 🔑39(5)—Interest on open and mutual account for wages runs only from time of striking balance.

Where the amount due for services was due as upon a mutual, open, and current account, interest is payable only from the day on which the balance is ascertained, under the express provisions of Civ. Code, § 1917.

14. Interest 🔑39(5)—Statutory provision as to interest held inapplicable to recovery upon open account.

Civ. Code, § 3287, providing that persons entitled to recover damages certain or capable of being made certain by calculation, the right to recover which is fixed upon a particular day, are entitled to recover interest from such day, *held* to have no application to an action to recover upon an open account.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action by A. Arocena against Edward A. Sawyer. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Frank Birkhauser, of El Centro, for appellant.

B. C. Nichols, of San Diego, for respondent.

FINLAYSON, P. J. [1] This is an action to recover for services which plaintiff and his assignors—certain ranch hands—performed for a partnership of which defendant is the surviving member. Judgment passed for plaintiff on four of the assigned claims. Defendant appeals from that judgment and likewise from an order denying his motion for a nonsuit and from an order denying his motion for a new trial. As neither of these last-mentioned orders is appealable, the attempted appeals therefrom will be dismissed.

[2] Defendant and one Leopold Alexander had been partners. The partnership, which had been engaged in farming a ranch in Imperial county, was dissolved by the death of Alexander on February 12, 1916. Plaintiff brought the action against defendant, the surviving member of the firm, pursuant to the rule that in actions upon claims against a partnership the surviving partner may be sued alone, without joining the executors or administrators of the deceased partner or alleging the presentation of any claim against his estate. Corson v. Berson, 86 Cal. 433, 25 Pac. 7; Friermuth v. Friermuth, 46 Cal. 42; West Coast L. Co. v. Apfield, 86 Cal. 335, 24 Pac. 993; Minifie v. Rowley, 187 Cal. 481, 202 Pac. 673.

Plaintiff did work as foreman of the ranch between November 1, 1911, and August 15, 1916. He was employed in that capacity by Alexander some years prior to the latter's death. The assigned claims upon which plaintiff recovered judgment are those of Mariana Arocena, who cooked for the men employed on the ranch, and Juan Arguedas, Antonio Etchebarren, and Juan Louissena, ranch hands employed to do work on and about the ranch. Another laborer, Frank

Arocena, did work on the ranch for the partnership; but the court found that he did not assign his claim to plaintiff.

The action was tried upon plaintiff's amended complaint and defendant's answer thereto. The amended complaint contains 22 separate counts. In counts 1 and 12 plaintiff alleges that there is a balance due him for his own personal services as ranch foreman and for moneys advanced by him for the partnership. The court found that all of this alleged balance had been paid, and, accordingly, plaintiff did not recover anything therefor. For this reason there may not be a reversal unless there be some error affecting the judgment on the four assigned claims.

In counts 6, 11, 17, and 22 plaintiff alleged facts showing the amount due for services performed by Frank Arocena; but as the court found that this claim was not assigned to plaintiff, and for that reason rendered no judgment thereon, we are not concerned here with the cause of action alleged in each of those counts. In counts 2 to 5, inclusive, it is alleged that plaintiff's four assignors, Mariana Arocena, Juan Arguedas, Antonio Etchebarren, and Juan Louissena, performed certain services at the request of the partnership of a certain "agreed value," no part of which has been paid, and that an open book account of the same was kept. Counts 7 to 10, inclusive, are like counts 2 to 5, except that they make no mention of any open book account. In counts 13 to 16, inclusive, plaintiff sues in quantum meruit to recover the reasonable value of the work alleged to have been done by his four assignors. In counts 18 to 21, inclusive, plaintiff, suing upon his four assigned claims, alleges that a balance of account in favor of each of his assignors was struck and stated.

The court made findings in favor of plaintiff upon counts 2 to 5, inclusive, 7 to 10, inclusive, and 13 to 16, inclusive. That is, as to plaintiff's four assignors the court found that each rendered services for the partnership of a certain "agreed value"; that an "open book account" of the services was kept; and that the services were of a certain "reasonable value"—the amount found to be the "reasonable value" in each instance corresponding with the amount found to be the "agreed value." No findings were made on counts 18 to 22, inclusive.

Appellant claims: (1) That the court erred in overruling his demurrer to the amended complaint; (2) that error was committed in admitting certain of plaintiff's exhibits; (3) that the evidence shows that each cause of action is barred by the statute of limitations; (4) that through the court's failure to make findings on the issues presented by counts 18 to 22, inclusive, appellant has suffered prejudicial error; (5) that certain of the findings are not supported by the evidence; and (6) that it was error to allow interest upon the assigned claims—the only claims upon which plaintiff recovered judgment.

[3] There is no merit in the point that defendant's demurrer was improperly overruled. In each count there is a paragraph wherein it is alleged that—

> "The defendant, as one of the partners of said partnership, has not paid plaintiff the sum of [naming the amount sued for], nor any part thereof, and said sum * * * is now due, owing and wholly unpaid from defendant to the plaintiff herein."

This allegation, says appellant, does not negative the possibility that the claim may have been paid by the partnership, or by Alexander, the deceased partner. Wherefore it is argued that the complaint fails to allege nonpayment, and that therefore it does not state a cause of action. But in another paragraph of each count, after alleging the facts which show the precise amount of the balance due to the particular assignor mentioned in the count, it is expressly alleged that "no part" of that sum "has been paid." It is difficult to conceive of a more complete allegation of nonpayment than this. It is a generic and comprehensive allegation which is in no wise inconsistent with the more particular averment to the effect that the claim has not been paid by defendant to plaintiff. There is therefore no inconsistency between the two allegations, and the demurrer was properly overruled.

Plaintiff was allowed to introduce in evidence, over defendant's objections, a certain account book (Plaintiff's Exhibit 1), three time books (Plaintiff's Exhibits 2, 3, and 4), and a sheet of paper containing a statement of certain credits in favor of the partnership (Plaintiff's Exhibit 7). Plaintiff, the foreman of the ranch, kept these books and made this statement as the employee of Sawyer & Alexander. The entries were made by him personally or under his direct supervision. As foreman of the ranch, he had personal knowledge of the matters represented by each and every entry. The books and the statement contain entries showing the amount of the monthly wage of each of plaintiff's assignors and when and how long each worked for Sawyer & Alexander. According to the testimony on behalf of plaintiff, each of his assignors was employed to work on the ranch at a certain agreed monthly wage.

[4-6] Several reasons are urged against the admissibility of these books and the statement of credits. For example, it is urged that not all of the entries were made at the time of the respective transactions, and that therefore the documents could not be received in evidence under the rule which governs the admissibility of a tradesman's book of original entries. Under the view which we take of the case it will not be necessary to consider in detail each of appel

lant's objections to the introduction of these exhibits. Plaintiff testified that he made the statement and kept the books as a part of his duties in carrying on the business of the ranch as its foreman; and it seems quite evident that it was a part of his business as ranch foreman to do these things. It is a reasonable inference from all the evidence that he made the statement and kept the books, not for himself, but for his employer, the firm of Sawyer & Alexander, and as its agent. The books and the statement were therefore the books and statement of Sawyer & Alexander. Cormac v. Western White Bronze Co., 77 Iowa, 32, 41 N. W. 480; 22 C. J. 892. As such, their contents were the admissions of Sawyer & Alexander and were admissible in evidence against that firm or either member thereof, like any other admission against interest. "A statement contained in a book entry may amount to an admission, in which case it is, like other admissions, competent evidence against the party by whom or under whose direction the entry was made." 22 C. J. pp. 889, 890. "Where a book containing entries against interest is shown to belong to the party, he will not be heard to object to the form of the book or the manner in which it was kept." 22 C. J. p. 891. Although there is very respectable authority for holding that entries made by a clerk in his favor are admissible against his employer (Cormac v. Western White Bronze Co., supra), we shall assume, for the purpose of this decision only, that in so far as the entries relate to plaintiff's own personal services and to moneys advanced by him to or for the partnership, the books would not have been admissible in his favor unless it were shown that they had been kept by him in all respects in conformity with the rules pertaining to the admissibility of a trader's shop books. But if there was any error in admitting the books and statement as evidence of plaintiff's claim for his own services or for moneys advanced by him, such error was harmless, since as to that claim the judgment went against plaintiff. As to the four assigned claims, the books and the statement without question must be regarded as documents kept by the partnership, and, as admissions against the interest of the partnership, they must be held to be admissible in evidence against the partners, or either of them, regardless of their form or the manner in which they were made or kept. At the time when the entries were made, none of these claims had been assigned to plaintiff. The assignments were not made until after the termination of the employment of the assignors. If, instead of assigning their claims to plaintiff, each of these assignors had brought an action in his or her own name against the partnership, or against the defendant here as the surviving partner, the books which plaintiff had kept for the firm as its employee and trusted agent, and the statement of credits which he had made in the course of his duties as ranch foreman, would have been admissible in favor of each of such laborers as admissions made by the partnership against its interests. The fact that these claims were assigned to plaintiff and that he is suing thereon does not make the documents any the less admissible. There is nothing to indicate that when plaintiff, as the agent of Sawyer & Alexander, made the entries in these documents, he contemplated securing an assignment of the claims to himself. And even if he had had such assignments in mind at the time when he made the book entries and prepared the statement, that fact, we think, would have affected the weight of the documents as evidence rather than their admissibility.

For the foregoing reasons our conclusion is that no reversible error was committed in admitting in evidence the account book, the three time books, and the statement.

Appellant also complains of the admission in evidence of certain other exhibits, but as he has not seen fit to advise us of the reasons for his plaint we do not deem it necessary to consider it.

[7] The bar of the statute of limitations cannot be invoked successfully. In the first place, the defense of the statute is not properly pleaded. The answer does not allege that any of the causes of action accrued more than the statutory period of time prior to the filing of the original complaint. No mention is made of that pleading in the answer, nor is there any reference to the date of the commencement of the action. The plea is couched in such language that it must be held to speak, not from the date of the original complaint, but from the time of the filing of the answer. Eno v. Diefendorf, 102 N. Y. 720, 7 N. E. 798; Smith v. Walker, 1 Wash. (Va.) 135. As an attempt to plead the facts constituting the bar, it is fatally insufficient under all the authorities. For an analogous case, see United States Fidelity, etc., Co. v. Parker, 20 Wyo. 29, 121 Pac. 531. As an attempt to plead the statute in the manner permitted by section 458 of the Code of Civil Prodecure, the answer is so analogous to that which was held to be fatally defective in Manning v. Dallas, 73 Cal. 420, 15 Pac. 34, that it must be held to fall withing the rule of that case. However, since the trial appears to have been conducted in the superior court upon the assumption on both sides that the statute was sufficiently pleaded, we shall consider the merits of appellant's contention that the evidence shows each claim to have been barred before the action was commenced.

As we have pointed out, plaintiff recovered upon four assigned claims—those of Mariana Arocena, Juan Arguedas, Antonio Etchebarren, and Juan Louissena. In suing as the assignee of Arguedas, Etchebarran, and Louissena, plaintiff, in each of three counts, sought to recover a balance due upon an open book account. If the evidence shows that the claim of each of these three assignors was for a balance due on a mutual, open, and current account, giving rise to reciprocal demands between Sawyer & Alexander on the one side and each of these three assignors on the other, then the bar of the statute was not available to appellant until the expiration of four years from the date of the last item in the account. Code Civ. Proc. § 337, subd. 2, and section 344. The action was commenced within that four-year period—at least we assume that it was from certain statements made in appellant's brief, although, as we have said, the original complaint nowhere appears in the record before us. It remains now to consider whether the claim of each of these three assignors is for a balance due on a mutual, open, and current account.

[8] Each of the three last-mentioned assignors performed services for the partnership. Each had agreed to work as a ranch hand for a certain agreed monthly wage. The services rendered by these men, the agreed monthly wages therefor, and the times when they worked, were recorded in the books which plaintiff kept for his employers as their ranch foreman. Each of these three ranch hands was supplied by Sawyer & Alexander with certain articles of merchandise from time to time during the term of his employment. The charges for these articles were entered in the books kept for Sawyer & Alexander by plaintiff. The services of each of these three men continued over a long period of time. It is fairly inferable from the evidence that the amount, it any, which might ultimately be payable to each of these farm laborers, was to be determined after the striking of a balance whereby the firm of Sawyer & Alexander would be properly credited for the items of merchandise. There were some cash payment made on account of the men's services; but there also were, on the credit side of the books, entries crediting the partnership with the merchandise which it supplied from time to time to each of these men. The charges for these articles of merchandise constituted credits on which demands could have been made and suits maintained by Sawyer & Alexander if their ranch hands had not rendered a consideration therefor in the form of continuous services performed by them as workmen on the ranch. In short, the accounts consisted of existing debits on the one side which were credits on the other. There was, we think, an implied understanding that these mutual debts should be satisfied or set off pro tanto between the parties. And it is a fair inference from all the evidence that it was the intention that the account with each of these three workmen should be permitted to run with a view to an ultimate adjustment by the payment of such balance as might be found to be due from the employer, Sawyer & Alexander, to each employee, or from the latter to the former, as might prove to be the case. "Where a system of mutual dealing exists it implies that the parties have mutually consented that each item, in whosesoever favor it may be, shall not constitute an independent debt due immediately, to be paid or enforced at once, but that the items occurring from time to time in favor of the respective parties shall operate as mutual set-offs, and that the shifting balance, when either or both shall call for it, shall be the debt." 17 R. C. L. p. 804. Mutual accounts are made up of matters of set-off. The account is mutual if there be a mutual credit founded on a subsisting debt on the other side, or if there be an agreement, express or implied, for a set-off of mutual debts. Here the accounts, kept with these ranch hands by plaintiff for Sawyer & Alexander, possessed all of the elements necessary to constitute them "mutual, open and current" accounts within the meaning of the authorities. Norton v. Larco, 30 Cal. 126, 89 Am. Dec. 70; Millet v. Bradbury, 109 Cal. 170, 174, 41 Pac. 865; Mercantile Trust Co. v. Doe, 26 Cal. App. 246, 253, 146 Pac. 692; Sugar Loaf O. G. Ass'n v. Skewes, 47 Cal. App. 470, 474, 190 Pac. 1076. And since the action was commenced within four years from the date of the last item on each account, it follows that it was not barred as to any of the claims upon which plaintiff sues as the assignee of Juan Arguedas, Antonio Etchebarren, and Juan Louissena.

The claim which was assigned to plaintiff by Mariana Arocena differs from that of each of the other assignors in that no mutual, open, and current account was kept with her. The account which was kept with this woman shows no entries debiting her with merchandise. As to her claim the lower court, in accord with appellant's contention, ruled that subdivision 1 of section 339 of the Code of Civil Procedure governed, and that therefore the monthly wage earned by her under her oral contract to perform services as a cook for the hired hands was barred at the end of two years from and after each month's work. It accordingly was held that the wages earned by Mariana Arocena for seven and one-half months were barred by the statute, thus reducing by $225 the amount of her claim. Appellant has not seen fit to point out wherein, if at all, the amount adjudged to be due on this claim, after making the deduction aforesaid, is greater than it should be, and we therefore are spared the pains of further consideration of the effect of the statute of limitations upon the claim assigned by this woman.

Our conclusion on this branch of the appeal is that the statute of limitations has not tolled any part of the amount for which plaintiff recovered judgment.

[9, 10] Appellant cannot complain of the failure to make findings on the issues presented by counts 18 to 22, inclusive—the counts wherein it is alleged that a balance was struck and an account stated. By making findings upon all of the issues presented by counts 2 to 5, inclusive, 7 to 10, inclusive, and 13 to 16, inclusive, the trial court found upon all of the issues necessary to sustain the judgment as entered. Therefore the fact that no findings were made upon entirely separate and distinct issues which might have been the basis of another and different judgment, but which, if found upon, could not have affected the judgment actually rendered, cannot justify a reversal. Hooker v. Thomas, 86 Cal. 177, 24 Pac. 941.

To avoid the effect of the statute of limitations, plaintiff alleged in his complaint that appellant, the surviving partner of the firm of Sawyer & Alexander, was absent from the state of California at all times between November 1, 1911, and the commencement of the action. The trial court found that appellant was absent from the state at least one-half of the time from May 31, 1914, to May 31, 1918; the latter date being that when, as we understand it, the action was commenced. It now is claimed that the evidence is insufficient to support this finding. There is no merit in the claim. The most that can be said in favor of appellant is that the evidence is in substantial conflict on the subject. But under the oft-repeated rule that conflicts in the evidence are for the determination of the jury or of the trial court sitting without a jury, we cannot disturb the decision of the lower court.

[11] The fact that Alexander continued to be a resident of this state until the right of action against him on the partnership debt was barred does not affect the liability of the other partner—the defendant here—who, according to the findings of the trial court, was absent from the state at least one-half of the four-year period immediately preceding the commencement of the action. The statute of limitations is a defense peculiar to him who pleads it. It is a personal privilege of the debtor, to be asserted or waived at his option. Its effect is not to satisfy the debt, but to bar the remedy. There is therefore no reason why the defense of the statute which permits the personal discharge of a partner who continues to reside in the state should be available to the one whose absence from the state has suspended the operation of the statute as to him. Harrison v. McCormick, 122 Cal. 651, 653, 55 Pac. 592; Caswell v. Engelmann, 31 Wis. 93; Spaulding v. Ludlow Woolen Mill, 36 Vt. 150, 158. See, also, Denny v. Smith, 18 N. Y. 567, and Town v. Washburn, 14 Minn. 268 (Gil. 199) 100 Am. Dec. 219.

[12] The only other point worthy of mention is the question of interest. Appellant cannot complain of the trial court's allowance of interest on the claim assigned to plaintiff by Mariana Arocena who worked on the ranch as a cook at an agreed wage of $30 a month. As we have pointed out, her claim was not based on any balance shown by a mutual, open, and current account. The obligation to pay her the agreed monthly wage became absolute at the end of each month. The amount was certain. The trial court allowed interest on the principal found to be due on her claim at the legal rate from the date of the termination of her employment. This was in appellant's favor, for it was less than Mariana Arocena, or rather plaintiff, as her assignee, was entitled to receive as interest.

[13, 14] As to the question of interest on each of the three other assigned claims, the situation is unlike that presented by Mariana Arocena's claim. While each of these three other ranch hands worked for an agreed monthly wage, the amounts whereof appeared on the debit side of the books kept for the partnership by plaintiff as the ranch foreman, the moneys thus earned as wages were offset by cross-demands for merchandise furnished by Sawyer & Alexander from time to time during the mutual course of dealing between each of these claimants and the partnership. The account kept with each of these workmen appears to have been kept open, in contemplation of further dealings to be evidenced by future cross-entries. And even if we were to assume that the partnership or either member thereof would be concluded from questioning the accuracy of the cross-entries which represented the items of merchandise and their value, the workmen to whom the merchandise was supplied from time to time most certainly would not be concluded by such entries. They did not make them, nor were they made by their agent. Our attention has not been called to any evidence tending to show that the charges for the merchandise, as shown by the book entries, were ever fixed by contract. These three ranch hands were therefore free to question the amount of each and every charge for merchandise—not alone the amount and character of the articles furnished, but also the value thereof as shown by the book entries. We think that in such a case section 1917 of the Civil Code applies, namely, that interest is payable only from the day on which the balance is ascertained. But the accounts were never settled and a balance was never ascertained by agreement of the parties. Indeed, the trial court declined to find that a balance was struck and an account stated, though that issue was directly tendered by four counts in the complaint. Instead of finding that an account

was stated, the trial court found, in substance and effect, that each of these three assigned claims was the balance shown by an open book account. And, indeed, respondent himself, in order to avoid the bar of the statute of limitations, has argued that each of these three assigned claims is the balance shown by a mutual, open and current account. Section 3287 of the Civil Code has no application to an action to recover upon an open account. Heald v. Hendy, 89 Cal. 632, 27 Pac. 67. Under section 1917, which is the section applicable here, the balance must be ascertained by agreement of the parties or by the judgment of the court, in order to bear interest. Easterbrook v. Farquharson, 110 Cal. 311, 316, 42 Pac. 811; Erickson v. Stockton, etc., R. R. Co., 148 Cal. 206, 82 Pac. 961; American-Hawaian, etc., Co. v. Butler, 17 Cal. App. 764, 770, 121 Pac. 709. As no balance was ever ascertained by agreement of the parties, it was error to award interest prior to the date of the entry of judgment on the assigned claims of Arguedas, Etchebarren, and Louissena. The amount thus improperly allowed as interest on these three claims is $630.63.

There are no other points worthy of consideration.

The judgment is modified by deducting therefrom the sum of $630.63. As so modified, the judgment is affirmed. The appeal from the order denying the motion for a nonsuit and the appeal from the order denying a new trial are dismissed.

We concur: WORKS, J.; CRAIG, J.

---

60 Cal. App. 516

LAIBLIN v. SAN JOAQUIN AGRICULTURAL CORPORATION. (Civ. 2517.)

(District Court of Appeal, Third District, California. Jan. 22, 1923. Hearing Denied by Supreme Court March 22, 1923.)

1. Contracts 🔑198(1)—Agreement for monthly payments as work progressed held not to require completion of work as condition to receiving payment therefor.

A contract for leveling certain land, which provided for monthly payments on the tenth of each month "for the work done in the previous calendar month," required the contractor to be paid for work done each month whether the same did or did not involve a completion of the work within the requirements of the contract.

2. Contracts 🔑170(1)—Practical construction of ambiguous writing of great weight in its interpretation.

While a practical construction of a writing by the parties thereto is not conclusive as to the correct construction of the instrument, such construction is entitled to great, if not controlling, weight in determining its proper interpretation, where the language requiring interpretation may be characterized by more or less ambiguity or uncertainty.

3. Work and labor 🔑14(2)—Failure to make monthly payments under contract to level land held to justify refusal to proceed with work and suit for quantum meruit.

Where a contract for leveling certain land provided for monthly payments as the work progressed, failure of defendant to make monthly payments *held* a breach which justified the contractor in refusing to proceed further, and entitled him to proceed against defendant upon a quantum meruit for the reasonable value of the labor and services performed.

4. Evidence 🔑523—Expert evidence as to value of services sued for under quantum meruit held proper.

In an action upon a quantum meruit for work done in leveling certain land, it was proper to prove reasonable value of the labor performed by opinions of qualified experts.

5. Work and labor 🔑29(2)—Plaintiff suing on quantum meruit after breach by defendant held not limited to contract price.

Where plaintiff performed services under a contract for leveling certain land, but defendant breached the contract by failing to make monthly payments stipulated for, whereupon plaintiff rescinded and sued on a quantum meruit, plaintiff was not limited to the contract price as the measure of what he was entitled to recover.

6. Appeal and error 🔑1073(7)—Allowance of recovery in excess of contract price on quantum meruit held harmless.

In an action on quantum meruit to recover for services performed in leveling certain land under a contract which had been breached by defendant, allowing proof of the reasonable value of the work in excess of the contract price, if error, *held* without prejudice where the recovery was less than the contract price.

7. Contracts 🔑198(1)—Method of determining maximum deviation allowable in leveling land under contract stated.

Where a contract for leveling certain land provided that "each check should be graded to a smooth and uniform surface, and all holes shall be filled to the level of the check, and all knolls shall be cut down to the level of the check with a maximum deviation of two-tenths of one foot," the maximum deviation was to be ascertained with reference to a datum line, and not with regard to the distance from the highest to the lowest points in different parts of the land.

8. Appeal and error 🔑1001(1)—Verdict based on findings sustained by evidence will not be disturbed.

In an action on a quantum meruit to recover for services performed in leveling land, where there was evidence justifying a finding that the work had been done in substantial compliance with the contract, a verdict based thereon will not be disturbed on appeal.

9. Work and labor 🔑14(2)—Conditional offer to pay held not an offer of payment within contract.

Where a contract providing for leveling certain land contemplated monthly payments, which defendant neglected to make under the claim that the contract had not been complied with by plaintiff, an offer by defendant to advance the amount of money representing the deferred payments provided plaintiff would sign a written acknowledgment that the work had not been completed in accordance with the contract *held* not to constitute an offer of payment, and its refusal would not bar plaintiff's right to abandon the contract and sue upon a quantum meruit if he elected to do so.

10. Arbitration and award 🔑9—Arbitration agreement held not condition precedent to suit on quantum meruit upon rescission of contract.

Where a contract for leveling certain land provided for a settlement of difficulties by means of arbitration, an offer by defendant to submit to arbitration, and plaintiff's refusal to accept the offer, *held* not to impair plaintiff's right to rescind and abandon the contract, the contract not making the arbitration provision a condition precedent to the right to demand and receive the progress payments provided for, and payment of which had been neglected by defendant.

11. Witnesses 🔑379(2)—Contradictory statements held admissible for purposes of impeachment.

In an action on a quantum meruit for services performed in leveling certain land under a contract which had been rescinded by plaintiff, evidence that defendant's president had stated to a third party that the entire land had been leveled and checked *held* admissible for the purpose of impeachment; defendant claiming that the work had not been completed in accordance with the contract.

12. Appeal and error 🔑854(4)—Admission of evidence upon erroneous theory not prejudicial where admissible on any theory.

Where testimony is admissible on any theory or for any purpose, its admission will not be considered prejudicial merely because it was allowed upon an erroneous theory.

13. Trial 🔑206—Instruction as to effect of admissions held not sustained by evidence.

In an action on quantum meruit to recover for work done in leveling certain land claimed by defendant not to have complied with the specifications of the contract, evidence as to an admission by defendant's president that the land had been leveled and checked, admissible only for the purposes of impeachment, did not warrant an instruction that whatever a party voluntarily admits to be true, though the admission be contrary to his interest, may be reasonably taken for the truth.

14. Appeal and error 🔑1170(9)—Instruction not sustained by evidence held harmless.

An instruction that whatever a party voluntarily admits to be true, though the admission may be contrary to his interest, may be reasonably taken for the truth, erroneous because not sustained by the evidence, *held* harmless in view of Const. art. 6, § 4½, requiring reversal for erroneous admission of evidence only where it would result in a miscarriage of justice.

Appeal from Superior Court, Madera County; E. N. Rector, Judge.

Action by C. H. Laiblin against the San Joaquin Agricultural Corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Everts, Ewing & Wild and T. M. Stuart, all of Fresno, for appellant.

Fee & Ring, of Madera, and Gallaher, Simpson & Hays, of Fresno, for respondent.

HART, J. The plaintiff brought this action to recover from the defendant the sum of $18,991.69, claimed to be due him for work or services performed by him for the defendant in building levees and reservoirs upon and leveling and checking certain lands owned by the latter, and situated in the county of Madera. The services for which the plaintiff here seeks compensation were performed in pursuance of the terms of a written contract entered into by and between the parties to this action on the 17th day of January, 1920. The aid of a jury was invoked, and a verdict returned in favor of the plaintiff for the sum of $10,071.69. Judgment was entered accordingly, and from said judgment the defendant appeals.

The lands upon which the services were to be performed are, for the purposes of the contract, subdivided into three different tracts, and designated in the agreement as tracts 1, 2, and 3. Tract 1 contains 100 acres, more or less, tract 2, 110 acres, more or less, and tract 3, 480 acres, more or less.

The provisions of the contract important to the present inquiry may summarily be stated as follows:

That the work was to be done according to a certain diagram "on the plats * * * of said land, prepared by the first party" (defendant). That the plaintiff was to furnish his own equipment, machinery, etc., and help for doing the work. That the defendant was to pay the plaintiff for the services performed as follows: For leveling and checking said lands, $30 per acre; for the construction of certain of said levees, ditches, and reservoirs, 25 cents per cubic yard; and for the construction of one particular reservoir 30 cents per cubic yard.

It is further provided in the contract:

That "each check shall be proven level by flooding the same with water, and that, if, after said flooding, any check does not comply with the specifications of this contract, it shall be releveled by the second party at his own cost and expense until it does comply with the requirements of the specifications of the contract. The work of flooding shall be done by said first party, but it is further understood and agreed that the work of proving said checks shall not be done so as to delay second party from undertaking other work after he has completed this contract, or delay the second party from moving his outfit, and, if such work does or will cause such delay, then it is understood that the last 50 acres to be tested and proved shall be tested by surveying the same instead of by flooding."

It is further provided:

That there shall be made by the defendant to the plaintiff progress payments which must be made not later than the 10th day of each month for the work done in the previous calendar month; that "the amount of said work during any month to be settled by statement presented by said second party to first party and by said first party checked and approved, but it is further expressly understood and agreed that the said first party shall retain 10 per cent. of the payments due for each month's work until the final completion of the work, and thereafter until satisfactory evidence of the payment of all claims for labor and material has been presented by said second party to first party, and said 10 per cent. shall be paid to second party upon the expiration of the time allowed by law for filing liens or before said time, provided that the second party presents to the first party satisfactory evidence that that all claims for labor and material have been fully paid."

By the contract the first party reserves the right to pay out of the said 10 per cent. any claims for labor and material duly presented to it and not contested by said second party, the same to be deducted out of the amount remaining due to second party. It was agreed that the second party shall proceed within 10 days after the execution of the contract with the performance of all the work set forth and specified in said agreement, "and to constantly employ for this purpose not less than 60 horses or mules and a sufficient and ample supply of drivers for the same, and to use and employ in said work such other equipment as may be usual or proper in the performance of the work specified in this contract, and to keep at least 60 head of stock constantly employed on said work, so far as the weather will permit, until the work called for in this contract is entirely completed." The contract proceeds:

"It is further mutually understood and agreed that any dispute between the parties hereto arising from any matter covered by this contract shall be submitted to a board of arbitration for determination, said board to consist of three (3) members, one to be selected by each of the parties hereto and the said two arbitrators to select the third."

Other provisions of the agreement will be hereafter referred to, if necessary to the discussion of the points presented for decision.

The plaintiff on the 25th day of January, 1920, proceeded to the execution of the terms of said contract, and remained on the lands with his equipment until May 5, 1920, when he ceased further work, abandoned the contract, and removed all his horses, machinery, and other equipment from the premises. All the work done by him in pursuance of the terms of the contract was upon tract 3, no work having been done by him on tracts 1 and 2.

The amended complaint is in two counts, the first cast in the form of a common count, as upon a quantum meruit. In said count it is alleged that the plaintiff within "two years last past, at the special instance and request of defendant corporation, did furnish said defendant with work, labor, and service in the leveling and checking of certain lands belonging to defendant and in the construction of certain levees, ditches, and reservoirs thereupon," etc., which work, labor, and services, it is alleged, were then and there and now are of the reasonable market value of $24,643.05. It is further alleged that the defendant has paid upon said amount the sum of $6,128.31 only, and that there now remains owing, due, and unpaid the difference between the last-mentioned sum and the sum sued for, to wit, $18,514.74, which, it is alleged, the defendant has refused to pay to plaintiff although often requested to do so. The second count is upon the contract, the substance of which and the refusal of the defendant to comply with its terms are pleaded and alleged. It is unnecessary to reproduce herein the facts set forth in the second count, since the plaintiff was required, on the opening of the trial to make an election as between the two counts of his complaint upon which he intended to rely, and thereupon he elected to rely upon the first or the common count. This eliminated from the case the second count of the complaint, and therefore renders said count a matter of no consequence in the consideration of this appeal.

Copy of the written contract between the parties was attached to and made a part of the complaint, and also with the amended complaint the plaintiff served and filed a bill of particulars, specifying the items making up the general sum for which he here sues. This bill of particulars included, of course, the notation of a credit of $6,128.31, paid by the defendant to the plaintiff.

The defendant interposed a demurrer to the amended complaint upon general and special grounds, and the same was overruled by the court. Thereupon defendant filed an answer, and also a cross-complaint. The answer consists of denials and admissions of certain of the allegations of the complaint. The cross-complaint charges that the plaintiff failed in a number of enumerated particulars to comply with the terms of the contract. Among the assignments of the default of the plaintiff in this respect are these:

That the plaintiff at all times during the period that he performed work upon the lands under the contract had less than 60 head of horses or mules working upon the same; that he failed to complete the work of leveling and checking the land and constructing the ditches and reservoirs according to the terms of the contract, and that he did not finish or complete any of the work called for by the agreement; that prior to the execution of said contract between the parties hereto the said lands of cross-complainant required checks, levees, reservoirs, and leveling, so that cross-complainant could use the same to produce alfalfa successfully, "and this defendant fully advised the plaintiff that the purpose for which it desired to have said lands leveled and checked, and the purpose for which it desired to employ the said plaintiff to do all the work set forth in said contract, was to prepare said lands and put the same in a condition so that the defendant could raise alfalfa successfully thereon, and that the said plaintiff signed said contract and commenced said work, knowing full well that such was the purpose of the said work, and also knowing full well that, if the said lands were not leveled and checked, and if the said ditches, levees, and reservoirs were not completed in accordance with the terms of said contract, the said defendant would be unable to use its said lands to produce alfalfa successfully thereon." It is further alleged that, by reason of the failure of the plaintiff to level and check the said lands and to construct the ditches, levees, and reservoirs called for by the contract, "and by reason of his failing to furnish the number of mules and men specified therein, and to comply with the terms and conditions set forth in said contract, defendant herein has been damaged by reason of said lands not being so leveled and checked, ditches constructed and reservoirs built, * * * in that defendant has been unable to raise any crops of alfalfa on any of the land covered by said contract, and the defendant's said lands are not in the condition for planting as they would have been in were said contract complied with, and hence the defendant has lost the rental value thereof, all to its damage in the sum of $30,000." It is alleged that the defendant has been damaged in the sum of $17,000 because of the failure of the plaintiff to comply with the terms and the conditions of said contract, which sum of $17,000, it is alleged "it would cost said defendant, according to the amount provided in said contract, to complete the work which said plaintiff herein has refused and neglected to so complete all in accordance with the said contract." The defendant further alleges that it is willing and able to fully pay to the plaintiff for all work and service completed and rendered by him in accordance with the terms and the conditions of the said contract. It is further alleged that the "defendant did, in writing, prior to the said plaintiff removing his stock and implements from said land, and prior to his ceasing work thereon, and after demands had been made upon the defendant by plaintiff for moneys which defendant claims and alleges herein are not due from defendant to plaintiff, offer to submit, in accordance with the terms and the conditions contained in said contract, the controversy between the plaintiff and the defendant, to arbitration, and in so making said offer in writing this plaintiff refused to submit the same to arbitration."

The plaintiff filed an answer to the cross-complaint, admitting the execution of the contract, and that the work performed by him was undertaken by him by virtue of and in accordance with the terms and the conditions of said contract, and denying that he breached said contract as alleged in the cross-complaint. Paragraph II of the answer states in detail the grounds upon which plaintiff refused to proceed with the work and demanded payment for the labor performed by him under the contract up to the time of the abandonment thereof. It is therein alleged, in substance, that the plaintiff, on the 1st day of March, 1920, presented the defendant a statement in writing setting forth in detail the amount of work done by plaintiff in the months of January and February, 1920, payment therefor being due, under the contract, on the 10th day of March, 1920; that defendant did not pay for said work until after the 19th day of March, 1920, at which time said payment was made; that plaintiff thereafter notified defendant in writing that he did not consider himself required to proceed with the said work, unless defendant furnished plaintiff with security for future payments as required by the contract; that no such security was ever furnished by defendant. The answer proceeds to allege that a statement in writing was presented to defendant on the 1st day of April, 1920, showing the work done in the month of March of that year, but, although the payment for the work so shown to have been done was not paid on the 10th day of April, 1920, at which time it became due, the amount due for said work has not since been paid plaintiff, and that defendant has at all times refused, and "still refuses," to pay for the work so shown to have been done; that plaintiff continued work under the contract until the latter part of April, 1920, when he presented defendant a statement of work done in the month of April, 1920, and also demanded of plaintiff payment for the work done in March, 1920; that defendant refused, "and still refuses," to pay for the work done in either the month of March or the month of April, and failed to furnish plaintiff security as by him demanded; that, in the latter part of April, 1920, plaintiff ceased to perform work under the contract, and made preparations for moving his equipment from the premises; that the offer of defendant to plaintiff to arbitrate their differences was not made until after the former had ceased doing work under the contract, and had made preparations to move, and had actually commenced moving, his equipment from the premises referred to in the contract; that defendant was, during all of said times, familiar with the demand and claim of plaintiff, but never informed the latter "wherein it differed with (from) said plaintiff" as to said demand and claim. It is further alleged that, after discontinuing said work as aforesaid, and before any offer was made to arbitrate by defendant to plaintiff, the latter notified defendant that he rescinded the contract, and demanded of defendant payment in full for all work done for which payment had not been made, as indicated by the written statements of the same presented to the defendant by plaintiff.

There are some 11 or 12 points specifically urged in support of a reversal, but most of these are subsidiary to what is, in fact, the main or principal proposition, to wit, that the verdict is insufficiently supported. The solution of this proposition hinges, to some extent, upon a construction of certain provisions of the contract.

The specific contentions of the defendant may be condensed as follows: That the work for which plaintiff demanded payment, as also was true as to the work for which he had already been paid, was not done in accordance with the specifications of the contract; that the plaintiff, although demanded by the defendant to complete the work thus far done in conformity with the specifications and requirements of the contract, refused to do so; that the defendant offered to pay plaintiff on April 10th for the work done in the month of March, as shown by the statement presented on the first of April, but the latter refused to accept the same; that the plaintiff refused to present proper statements of the work claimed to have been done by him. It is insisted that, for all these reasons, the plaintiff breached the contract and, consequently, without justification or right rescinded and abandoned the same. Upon these propositions it is contended and argued that it was not competent for the plaintiff to declare on a common count or quantum meruit, and that the court, having permitted evidence to be introduced on the theory that the action was properly brought upon a quantum meruit, erroneously allowed evidence as to the reasonable value of the work done by the plaintiff, or without regard to the contract prices, the contention being in this connection that, having himself violated the terms of the agreement, whatever compensation or damages the plaintiff might be entitled to recover were to be determined solely upon the basis of the contract prices.

In addition to the above points it is contended that the court allowed the plaintiff to prove a certain admission made by the defendant's president, J. W. Goodwin, upon the erroneous theory that such admission involved a declaration against interest. There are also some other points made by the defendant to which we will give brief attention.

As hitherto stated, the plaintiff, in the latter part of January, 1920, assembled upon the premises which were to be improved under the contract the necessary equipment for the execution of the terms thereof, and started work thereon; that, owing to the fact that the plaintiff commenced the work in the latter part of January, there was comparatively little work done during that month, and that because of that fact he presented no statement to defendant disclosing the amount of work done until the 2d day of March, 1920, when he presented a statement which covered all the work done during the months of January and February, particularizing therein the character and amount of work done. This statement showed that the total amount of work done in the months of January and February equaled, when measured in money, the sum of $6,811.40. Against this was a debit of $1,108.31 for approximately 44½ tons of hay furnished the plaintiff by defendant, and also deducted therefrom was the 10 per cent. which the contract provides should be retained by the defendant for the protection of itself against liens for labor, material, etc. Said statement was checked and approved by the defendant's engineer, and the sum shown by the same to be due the plaintiff as a progress or a monthly payment was paid on the 19th day of March, 1920. Because of the fact that the defendant failed to make the payment shown to be due by said statement on the 10th day of March, on which day in each month the contract provides progress payments shall be made, the plaintiff demanded of the defendant in writing that it forthwith furnish him with security for such future progress payments as might become due, and that unless it did furnish such security the plaintiff would not consider himself obligated further to proceed with the work called for by the contract. No such security was furnished by the defendant at any time.

On the 1st day of April, 1920, the plaintiff prepared and presented a statement in writing to defendant disclosing the amount and character of work done in the month of March of that year. The defendant, claiming that the work for which such payment was demanded, as well as portions of the work done in the months of January and February for which payment had already been made, was not done in accordance with the specifications of the contract, and also claiming that the amount paid to the plaintiff for the work done in the months of January and February was in excess of that to which the plaintiff was rightfully entitled, refused to pay the plaintiff the amount shown to be due in the statement presented by the latter for work done in the month of March. This led to a controversy between the plaintiff on the one side and the president and superintendent of the defendant on the other with regard to whether the work already done by the plaintiff accorded with the specifications and requirements of the contract, the defendant claiming that it had made a water test and had found that the portion of the premises upon which work had been done had not been properly leveled, and that certain levees and a reservoir had not been constructed in conformity with the specifications of the agreement. The plaintiff, while insisting that he was entitled to progress payments, whether the work was or was not completed according to the requirements of the contract, also maintained that the work thus far done had been in all particulars as the contract specified. However, upon insistence by the defendant's agents, plaintiff did certain releveling of the lands upon which he had bestowed labor, but the defendant still maintained that all the land had not been properly leveled, and insisted that the defendant should complete the leveling of so much of the land as he had already bestowed labor upon in that particular before it would pay the demand contained in the statement of March 1st. The plaintiff, in reply to this proposition, stated that he had leveled the land as the contract specified, and that he did not propose to go over it again. He further claimed that, if the land was not leveled as specified in the contract, it was due to the fact that the flooding of the land had caused it to settle in spots. The plaintiff declared that he could not go on with the work unless he was paid the progress payments as prescribed by the contract; that he was compelled to pay for labor and material, and depended upon these payments for the purpose of enabling him to proceed with the work; that unless he paid the men who were employed to assist him in the execution of the contract they would cease working for him. The defendant then proposed to advance the plaintiff as much money as the March statement called for, provided the plaintiff would sign a statement acknowledging that the work done by him down to that time was not completed in accordance with the requirements of the contract. This proposition the plaintiff refused to accede to. The controversy remained unsettled, and the plaintiff, in the hope (so he testified) of reaching a satisfactory settlement with the defendant of the demand contained in the statement of March 1st, remained on the premises with his equipment until the latter part of April, 1920, when, concluding that no settlement would be effected, he began preparations for moving the equipment from the premises and abandoning the contract. About the same time he notified the defendant in writing that he rescinded and had abandoned the contract, and thereafter delivered to the defendant a statement showing the amount of work done during the month of April, and demanding that the same, together with the money due for work done in the month of March, be paid. Either shortly before or after the notice of rescission was served by the plaintiff upon defendant, and while the plaintiff was in the act of moving his equipment from the premises, the defendant made an offer in writing to the plaintiff that the differences between them be submitted to arbitration, in accordance with the provision of the contract stipulating that any dispute arising between the parties from any matter involved in the contract should be submitted to a board of arbitration for determination.

The facts above set forth stand in the record uncontradicted. Evidence of other facts will later be referred to herein as we consider certain points, the solution of which will necessitate such consideration. The proposition which first will be considered involves a determination of the true meaning of the provision of the contract stipulating that payments shall be made to the plaintiff on the 10th day of each month for the work done during the preceding month.

The contract provides, as we have seen, that the monthly payments "shall be made not later than the 10th day of each month for the work done in the previous calendar month." Nowhere does the contract provide in so many words, or in express language, that, before the plaintiff shall be entitled to a monthly or progress payment so provided for, the work shall have been completed—that is, finished in accordance with the specifications and requirements of the contract. It is the position of the defendant, however, that, notwithstanding the contract does not specifically stipulate that the work shall be done in full conformity with its requirements before the plaintiff shall be entitled to progress payments as specified therein, the agreement, nevertheless, clearly contemplates that, before plaintiff shall be entitled to such payments, the latter shall prepare and present to defendant a written statement, which shall be authenticated or checked and approved by the defendant, showing not only the amount of work done, but also that the work has been done in accordance with the specifications and requirements of the contract. In other words the contention is that the plaintiff is not, within the plain contemplation and spirit, if not the letter, of the contract, entitled to be paid for any work done during any month unless it is made to appear that the work thus far done has been finished or completed in substantial compliance with the specifications of the contract. On the other hand, the plaintiff contends that the intention of the parties was that he should be paid for work done each calendar month whether the same did or did not involve a completion of such work within the requirements of the contract, and that the contract so expressly provides.

[1] We are inclined to accept the plaintiff's construction of the contract in the particular here considered. As above stated, the contract does not expressly provide that, as a condition precedent to the right of plaintiff to receive the progress or monthly payments, the work shall be done in accordance with the specifications and requirements of the contract. It is quite obvious that, had such been the intention, the parties would have taken the pains to have expressed it in the contract in language which would have afforded no ground for any possible misunderstanding as to such intention. It would have been a very easy matter thus to have phrased the contract if such had been the meaning which the parties intended to ascribe to it. Moreover, it can readily be understood how such a provision could work to the great disadvantage of the contractor, particularly where, as here, the undertaking involves a vast amount of work and labor and an extensive equipment for the proper performance of the terms of the contract. For illustration, the contractor might, during a month, bestow in a proper way a large amount of work upon the premises to be improved without completing such work as the contract required, and, unless he was a man of ample ready means which he could use for that purpose (and the plaintiff in this case testified that he was not himself able to finance the enterprise or proceed with it without receiving installment payments), he could not go on with the work in the absence of the monthly payments prescribed by the contract to be used in defraying the necessary expense to which he was required to go in the employment of labor and material for the purposes of the undertaking. Or, let it be supposed that it required him a full month to lay the foundation for a levee in one of the checks. This would not be a completion of that particular work according to the requirements of the agreement. Would it be reasonable to hold in such case that the contractor would not be entitled to payment for the work thus done in such month under the provision of the contract stipulating that monthly or progress payments should be made for work done? If so, and he was himself without the financial means to meet the current expenses arising against him by reason of the work, he would be compelled to surrender or abandon the contract, and be left without remuneration for services already rendered, assuming that in such case legally the owner of the premises were not required or obligated to reimburse him for the work so performed. But, however this all may be, the practical construction placed upon the contract by the parties themselves accords with that given it by the plaintiff. While now claiming that the plaintiff did not do the work in the months of January and February in pursuance of the specifications of the contract, the defendant, nevertheless, paid him the installments shown by his statement to be due for said months after approval of the same by its engineer. It is to be assumed that the defendant, having through its engineer examined, checked, and approved the statement presented to it by the plaintiff for work done in the months of January and February, was fully aware, before payment for such work was made, that the work had not been finished as the contract required, assuming, of course, that such was the fact. Thus, as stated, the defendant must be assumed to have understood the provision in question as bearing the meaning given to it by the plaintiff, and that it would not have made the payment on the statement delivered to it by the plaintiff on the 1st of March if it had not been its understanding that the provision, at the time it was inserted in the contract, was intended to convey that meaning.

[2] While a practical construction of a writing by the parties thereto is not by any means conclusive as to the correct construction of the instrument, such construction is entitled to great, if not controlling, weight in determining its proper interpretation, where the language requiring interpretation may be characterized by more or less ambiguity or uncertainty. See 13 C. J. § 517, p. 546, and California cases named in the note. Of course, this view of the meaning of the provision under present consideration is limited to the matter of progress payments—that is, it refers to the condition upon which the plaintiff is entitled to such payments. Obviously he would be required to complete the entire contract in substantial compliance with the specifications of the instrument.

[3] It is not disputed that the statements presented by the plaintiff correctly show the amount and character of the work done by him in the months of March and April. Therefore, assuming that certain other points made by the defendant hereinafter to be considered are devoid of legal force, the view that we take of the provision of the contract above considered is decisive of this appeal against the plaintiff, since "the failure to make the monthly payments was a substantial breach of the contract by defendant, and justified the plaintiff in refusing to proceed further thereunder." S. F. Bridge Co. v. Dunbarton Land & Imp. Co., 119 Cal. 272, 274, 51 Pac. 335, 336; Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; Porter v. Arrowhead Reservoir Co., 100 Cal. 500, 35 Pac. 146; Williston on Contracts, vol. 2, § 848. These cases further hold that, where, as here, there has been a breach of a substantial provision of the contract by the defendant, the plaintiff is au-

thorized to proceed against the former upon a quantum meruit for the reasonable value of the labor or services performed, and this brings to mind the distinction between the case of Cox. v. McLaughlin, as reported in 54 Cal. 605, and the present case. In the former case the plaintiff contended that the failure of the defendant to make a progress payment at the time prescribed by the contract amounted to an act on the part of the defendant which prevented the plaintiff from proceeding with the fulfillment of the terms of the contract. The court held that a mere failure to pay the consideration for the work as it progresses, according to the terms of the agreement, had never been held such an act of omission on the part of the defendant as to prevent the other party from completing the contract. In the present case there is no claim, either by averment in the complaint or otherwise, that the failure of the defendant to pay the installment due for work done in the month of March constituted an act which prevented the defendant from proceeding with the completion of the contract. Indeed, that is not the theory of the present action. The action here, as stated, is plainly and clearly one upon a quantum meruit. In other words, it is not an action upon the contract to recover the profits the plaintiff would have made if the work had been completed thereunder. The nature of the action by plaintiff necessarily implies a repudiation of the contract.

[4] The action being upon a quantum meruit, it was proper, of course, to allow evidence as to the reasonable value of the labor performed, and it was competent to prove what was the reasonable value of such labor by the opinions of experts fully qualified to give such testimony. In support of the proposition last stated we refer to the following cases: Cowdery v. McChesney, 124 Cal. 363, 57 Pac. 221; Crusoe v. Clark, 127 Cal. 341, 59 Pac. 700; Mosher v. Lack, 41 Cal. App. 23, 181 Pac. 813.

[5] As to the proposition that the plaintiff is not limited to the contract price as the measure of what he is entitled to recover, where he has rescinded and abandoned the contract because of the breach thereof by the defendant, the rule is as stated in 3 Williston on Contracts, § 1485, as follows:

> "Where the plaintiff's failure to fulfill completely his obligations under the contract is due to the defendant's default, there is no reason for imposing any limitation on the amount which he may recover on a quantum meruit or quantum valebat for what he has done, other than that set by the principles of fair value previously stated. Though the amount or rate of compensation stated in the contract is evidence of this it does not set a conclusive limit on the plaintiff's right."

Again, in section 1459, the same learned author declares:

> "More frequently, however, the plaintiff is allowed to recover the real value of the services, though in excess of the contract price. The later rule seems more in accordance with the theory on which the right of action must be based—that the contract is treated as rescinded,"

the plaintiff declaring upon a quantum meruit, and not upon the contract.

In Johnston v. Star Bucket Pump Co., 274 Mo. 414, 202 S. W. 1143, the court in treating a proposition similar to the one involved here said:

> "But in a case where the owner violates or breaches the contract, we universally say the plaintiff can elect to sue in quantum meruit rather than for damages on the contract. If he does so sue, the special contract performs no function in that suit. The defendant cannot undertake to limit the recovery by the terms of the contract, because he has breached the contract. To permit him to use his breached contract to limit a recovery against him, would be to pay him a premium for his own wrong. The law does not contemplate such."

See, also, Philadelphia v. Tripple, 230 Pa. 480, 79 Atl. 703; Adams v. Burbank, 103 Cal. 646, 37 Pac. 640; Cox v. McLaughlin, 76 Cal. 60, 67, 18 Pac. 100, 9 Am. St. Rep. 164.

The foregoing views answer the contention of the defendant that the court erred in admitting evidence of the value of the services of the plaintiff in excess of that fixed by the contract, and in instructing the jury that the contract prices did not constitute the criterion for determining what the plaintiff was entitled to recover.

[6] There is, however, another answer to the proposition last above discussed in the fact that the amount awarded the plaintiff by the jury accords with the prices specified in the contract. We have carefully examined the testimony presented by the plaintiff as to the reasonable value of the services performed, and, without entering into an analysis or an examination in detail herein of said testimony, we may say that it clearly appears therefrom that the amount allowed by the jury is far below what the plaintiff would be entitled to for the work shown to have been done in the months of March and April, even according to the prices specified in the contract. Thus it is clear that, if it were to be conceded that the evidence allowed by the court upon the theory of the reasonable value of the work performed tended to show, or did show, that such reasonable value was in excess of the contract prices, and the admission of such evidence was erroneous, the defendant suffered no injury from the rulings allowing such testimony. The same is true as to the instruction upon that proposition.

But it is contended by the defendant that the notice under date of May 5, 1920, served on it by the plaintiff, shows very clearly that the plaintiff proceeded upon the theory that the work for which he here seeks compensation was completed according to the specifications of the contract. It is to be admitted that said notice does so indicate; but we cannot perceive what difference it would make so far as the result to be arrived at in this case is concerned. Even if the work was completed as the contract specifies, the defendant having breached the contract, the plaintiff would be at liberty either to sue upon the contract and recover according to the contract prices or upon a quantum meruit for the reasonable value of the completed work, it being readily conceivable that a portion of the work finished as the contract specifies might be of greater value than where the contract was considered as a whole. And here we may as well observe that there is some testimony from which, in our opinion, the jury could well have inferred that the work shown by the statements to have been done was completed as the contract specifies. The plaintiff testified that he leveled and checked 400 acres in tract 3. He in no way qualified this statement, and from it it may reasonably be inferred that he leveled and checked the number of acres mentioned in accordance with the specifications of the contract. At any rate, it is quite certain, not only from his testimony, but from that of the defendant, that there were out of the 400 acres referred to between 40 and 50 acres which were, prior to the 1st day of April, 1920, plowed and sown to barley by the defendant, and from this circumstance it is clear that the work on the acreage thus utilized by the defendant had been completed as the contract specifies. There is also the testimony of the witness Rue, a civil engineer, who surveyed the land just prior to the trial for the purpose of determining whether it had been checked and leveled according to the requirements of the contract, and who also made such an examination of the work done on a reservoir which had been constructed and some of the levees, to the effect that he assumed a certain level and found, according to his survey that the leveling and checking were substantially according to the specifications of the contract. The contract provides that—

> "Each check shall be graded to a smooth and uniform surface and all holes shall be filled to the level of the check and all knolls shall be cut down to the level of the check. with a maximum deviation of two-tenths of one foot."

[7] The witness Rue stated that there were 15 acres in the whole tract where the maximum deviation was considerably greater than two-tenths of one foot. He was also made to say upon cross-examination, as to the 400 acres generally, that from the highest point in the land to the lowest there might have been approximately a deviation of four-tenths of a foot, but this measurement was made upon the basis of the distance of the highest point from the lowest, and is obviously not in accordance with the provision of the contract the language of which we have just quoted. That provision evidently means that in determining the maximum deviation such deviation should be ascertained with reference to a datum line—that is, a common level—and not with regard to the distance from the highest to the lowest points in different parts of the land. In other words, the provision means that the deviation should be measured from the highest or the lowest point to the level or datum line, and not from the highest point to the lowest point, which would make the four-tenths of a foot deviation mentioned by the witness on cross-examination. This was the construction put upon the provision by the witness, and, as stated, we think it is the correct view of the provision, and, according to his testimony, while there might in places have been a deviation a trifle above two-tenths of a foot, yet, taking the whole acreage together, with the exception of the 15 acres mentioned, the deviation was substantially as the contract provides. In addition to the foregoing testimony, we may refer to the testimony of the president of the defendant, who was called by the plaintiff under section 2055 of the Code of Civil Procedure (Stats. 1917, p. 58). He testified that he had stated to certain people, prospective buyers of the land, that a considerable portion of the 400 acres referred to above had been leveled and checked. He qualified this, however, by saying that he would not say it had been leveled and checked "within the purview of the contract within two-tenths of a foot." Other witnesses who testified that they were familiar with the character of work specified to be done by the contract, and who had examined the work done by the plaintiff, testified to the reasonable value of such work.

[8] It is unnecessary, however, to proceed further with the examination of the testimony tending to show that the work was completed. It is sufficient to repeat that there is some testimony from which the jury could reasonably conclude that the work, or at least the bulk of it, for which defendant here asks to be paid was done in substantial compliance with the contract, and, of course, if there be any substantial evidence as to that matter, even though contradicted, the verdict, so far as that point is concerned, cannot be disturbed.

The complaint that the plaintiff refused to perform the contract as required by its provisions is without merit. He testified that he did cause the land to be releveled in a number of different places after the flood test, these particular places having been pointed out or indicated by the defendant's superintendent after the water test was made and the water had dried up.

The contention that the statement of work done presented by the plaintiff was not in proper form is without substantial ground for its support. The statements for the March and April work were substantially the same as the one presented to and accepted by the defendant for the work done in January and February. These statements appear to be so clear as to the amount and the character of work done as to have enabled the defendant's engineer without difficulty to check them and so compute and determine whether they were correct. Besides, the contract does not describe any particular form or manner in which the statement of the work should be made. The case here is not exactly the same as that of Sinnott v. Schumaher, 45 Cal. App. 46, 187 Pac. 105, as to the character of statement which a contractor must make and present to the owner as a prerequisite to the making of a progress payment. In that case the contract provided that the contractor shall furnish the architect at each time when payments became due a written report setting forth the exact percentage of the work installed. Here the contract, as we understand it, merely provides that the amount of work done during any month was to be shown by a statement, more or less of a general character, presented by the contractor, and that seems clear enough to have been what the contractor in this case did. Furthermore, the defendant in this case made no objection to the form or character of the statement itself, and did not base its refusal to pay upon that ground. In this connection we may add to what has already been said that the defendant's president testified that the only reason he refused to pay for the work for March, when the statement of the work done for that month was presented, was because plaintiff had been overpaid by defendant for the January and February work.

[9] The declaration of the defendant that it offered to pay the plaintiff for the work done in March and April, but that he refused to accept such payment, is not supported. The defendant did offer to advance to the plaintiff an amount of money equal to the total amount called for by his statements for March and April provided he (plaintiff) would sign a written acknowledgment that the work had not been completed in accordance with the specifications of the contract. This the plaintiff refused to do. But this offer, obviously, did not constitute an offer of payment, and the defendant had the right to refuse it, and his act in doing so did not, as counsel for the defendant contend, constitute a bar to his right to abandon the contract and sue upon a quantum meruit or upon the contract itself if he had so elected.

[10] The offer by the defendant to the plaintiff to submit their controversy to arbitration, and the refusal of the plaintiff to accept the offer, in no way affected or impaired the right of the plaintiff to rescind and abandon the contract. The provision in the contract for the submission to arbitration of any controversies arising between the parties with respect to the contract does not either expressly or by necessary implication say that in such instances arbitration shall be a condition precedent to the right of plaintiff to demand and receive the progress payments provided for in said contract.

> "An arbitration clause of a contract will not be construed as ousting the courts of jurisdiction unless such construction is inevitable, so that, unless the clause is made a condition precedent by express words or necessary implication, it will be construed as merely collateral to the liability clause and is no bar to an action without an award." 2 R. C. L. p. 363; Oakdale Irrigation District v. Beard, 47 Cal. App. 66, 72, 190 Pac. 224; Hamilton v. Home Ins. Co., 137 U. S. 711, 11 Sup. Ct. 133, 34 L. Ed. 708.

See, also, Rose's U. S. Notes.

The point that the court erred in allowing a certain declaration made by J. W. Goodwin, president of the defendant, involving what counsel for the plaintiff seem to believe was a declaration against interest or an admission tending to show that the 400 acres of land were leveled and checked in accordance with the specifications of the contract, even if well taken, is of little consequence in its bearing upon the decision of this appeal. The declaration referred to was made by said Goodwin to one Carroll, in the course of negotiations between the two for the leasing of a portion of the 400 acres by the defendant to said Carroll, and it was to the effect that the entire acreage had been leveled and checked. There is grave doubt as to the admissibility of testimony of the declaration referred to upon the theory that it was a declaration against interest. Indeed, in our present view of the matter, we should say it is not admissible for that purpose.

[11-13] But we think that, in view of the fact that Goodwin's general testimony tended to show that none of the work for which the plaintiff claimed the right to be paid was done, as the contract specifies, the declaration would be admissible for the purposes of impeachment—that is, for the purpose of impeaching the testimony of Goodwin tending to show that the work had not been done as required by the contract. Obviously, if the testimony was admissible upon any theory or for any purpose, it cannot be said that its admission was prejudicial merely because it was allowed upon an erroneous theory. The court also instructed

the jury with regard to the testimony of the declaration in part as follows:

> "Evidence has been offered of certain admissions of J. W. Goodwin, President of San Joaquin Agricultural Corporation. Whatever a party voluntarily admits to be true, though the admission be contrary to his interest, may be reasonably taken for the truth."

[14] The court should not have given this instruction, for, as above pointed out, the theory upon which testimony of the declaration of Goodwin was admissible, if admissible at all, is that its tendency was to impeach other parts of his testimony. Indeed, such an instruction should not be given in any case. But, considering the entire record, including, of course, the evidence, and particularly in view of the construction which we have been led to give to that provision of the contract stipulating for monthly payments for work done, the conclusion that no prejudice or miscarriage of justice resulted from the giving of said instruction is justified. Const. art. 6, § 4½.

There are no other points which we conceive it is necessary to be considered.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

---

60 Cal. App. 635

PEOPLE v. MAHACH et al. (Cr. 666.)

(District Court of Appeal, Third District, California. Jan. 30, 1923.)

1. Criminal law ⚷1104(6)—Reading and delivering application for transcript of evidence to judge in open court held equivalent to filing.

Where an application for a transcript of the evidence in a criminal prosecution is presented in open court within the time prescribed by Pen. Code, § 1247, in the presence of the clerk or his deputy, the district attorney or his deputy, and read in part to the court, and thereafter delivered to him for inspection, with the understanding that it would be given to the clerk for filing, together with an order for the transcript, *held*, though it was never delivered to the clerk, that what had been done was nevertheless equivalent to an actual filing; the absence of indorsement by the clerk being only evidence of filing.

2. Criminal law ⚷1104(6)—Relief from default in failure to file application for transcript of evidence held warranted.

Where an application for a transcript of the evidence in a criminal prosecution, which is regular in all respects, has been presented within the time prescribed by Pen. Code, § 1247, and, after being partly read, handed through courtesy to the court for inspection, rather than to the clerk for filing, with the understanding that he would hand it to the clerk, with the order for the transcript, but which he failed to do, so that no filing was in fact made within the prescribed time, *held*, that the default was one which, under Code Civ. Proc. § 473, the court under his discretionary power should have relieved against.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Lawrence Mahach and Marion Rube were convicted of robbery. From an order denying their application for a transcript of the evidence, they appeal. Reversed, with directions.

T. H. Selvage and E. S. Selvage, both of Eureka, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. [1] Defendants were convicted in the superior court of the county of Humboldt on September 1, 1922, of the crime of robbery. On September 5 judgment was pronounced sentencing them to the state prison. When arraigned for judgment they moved for a new trial, which motion was denied. Within two days thereafter they filed a "notice of appeal" with the clerk of said superior court. Within five days after said notice was filed T. H. Selvage, one of the attorneys for said defendants, presented in open court a written application for a transcript of the testimony in said cause; said application stating in general terms the grounds of the appeal and the points upon which the appellants relied, and designating the portions of the phonographic reporter's notes necessary to have transcribed to fairly present the points relied upon. At the time this application was made there were present in court in the discharge of their duties in connection with said cause the judge, the county clerk or his deputy, the district attorney or his deputy, and the said attorney for defendants. Thereupon Mr. Selvage read aloud portions of said application, and then inquired of the judge of the court whether it would be necessary to read all of it. Being advised that it was not necessary to do so, he then handed the same to the judge on the bench, in the presence of the other officers mentioned, for the purpose of having said judge inspect it, so as to make said order requiring the transcription of said notes, and for the further purpose of filing the same with the clerk. Said judge examined the document and retained it, as appellant's counsel believed, for the purpose of making said order, and then handing both to said clerk. Subsequently, on September 13, Mr. Selvage learned through the public press that no such order was made, and that the judge did not hand the application to the clerk, who was sitting at his desk just in front of the judge, but that the latter

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

retained it in his possession until more than five days had elapsed after said notice of appeal was filed. Thereupon Mr. Selvage presented a verified petition to the court, praying that such order be made, supporting it by his affidavit, setting forth the facts which we have related above, and also:

> "That because of the foregoing matters affiant was taken by surprise, and that, upon learning that the said application had not been handed to the clerk by said judge, he at once took steps to have the order transcribing testimony properly made. That affiant believed and had reason to believe that the judge of said court did, at the time said application was handed to him by affiant, hand the same to the clerk of the said court, and that it was through affiant's mistake, inadvertence, and excusable neglect that the said document was not placed in the hands of the clerk of said court. Affiant refers to the application and points placed in the hands of the judge of said court and now in his possession, and makes it a part of this affidavit. That affiant believes that the defendants have a good cause for appeal, and that errors detrimental to defendants occurred at the trial of said cause in the ruling of the trial judge and upon the introduction of testimony, which said errors were sufficient to reverse said cause by the appellate court and remand the same for a new trial on the ground that they were prejudicial to the rights of defendants."

The matter came on regularly for hearing in open court, and it was ordered "that said motion be and the same is hereby denied," from which order the appeal has been taken.

The particular statute governing such applications for the transcription of the reporter's notes is found in section 1247 of the Penal Code as follows:

> "Upon an appeal being taken from any judgment or order of the superior court, to the Supreme Court or to a District Court of Appeal, in any criminal action or proceeding where such appeal is allowed by law, the defendant * * * must, within five days, *file with the clerk and present an application to the trial court*, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal is wholly ineffectual and shall be deemed dismissed and the judgment or order may be enforced as if no appeal had been taken.
>
> "The court shall, within two days after the filing of such application, make an order directing the phonographic reporter who reported the case to transcribe such portion of his notes as in the opinion of the court may be necessary to fairly and fully present the points relied upon by the appellant. If the court fails to make the order within two days after the application is filed, the notes requested in the application shall be transcribed without such order."

It is not disputed that appellants complied with the requirements of said section in every particular except they made the mistake of handing the application to the judge on the bench instead of to the clerk who sat in front of him. We think, however, that a just and reasonable interpretation and application of the statute lead to the conclusion that what was done should be deemed equivalent to an actual filing of said application. That appellants desired and intended it to be filed must have been known to the district attorney, the clerk and the judge of the court, and the fact that it was presented in open court with all these officers present subserved the same purpose as though it had been formally filed with the clerk and then presented to the judge. The circumstance that it was not indorsed by the clerk is of no consequence, since the facts as to what occurred are not in dispute. O'Connor v. Board of Comrs., 17 Idaho, 346, 105 Pac. 560; Burkleo v. Town Board, 108 Minn. 224, 120 N. W. 526, 121 N. W. 874. The indorsement of the fact of filing is, indeed, only evidence that such filing has been made. Oats v. State, 153 Ind. 436, 55 N. E. 226.

We consider the situation quite different from that involved in the Estate of Sbarboro, 63 Cal. 5. Therein the petition in question was presented to the judge of the court at his private residence, instead of being filed, as the statute required, with the clerk of the court. It was in view of such fact the Supreme Court said:

> "Presenting an unfiled petition to the judge of a court, for the purpose of obtaining from him an order for a citation upon it, is not filing it in court, nor the equivalent of filing it. It is no part of the duty of a judge to receive a petition in a cause for filing, or to file it, or to make an order for its filing, or for issuing a citation upon it, unless some law expressly requires of him the performance of such a duty. There was no law which required of the judge of the court in this case performance of any one of those acts. The duty of filing the petition, and issuing citation upon it, when filed, was cast by law upon the clerk of the court. Section 1328, Code Civ. Proc."

In Rhodes v. Sargent, 17 Cal. App. 54, 118 Pac. 727, the application utterly failed to comply with the requirements of said section 1247 of the Penal Code specifying what the application should contain, and the District Court of Appeal of the First District very properly held that said section was mandatory, and that one of the important purposes of said section as amended in 1911 (Stats. of 1911, p. 692) was to avoid the "great and needless waste of public funds which had occurred under the former practice." As we have stated, no objection has been or could be made to the form of the application herein.

In People v. Measor, 20 Cal. App. 406, 129 Pac. 469, it appears that no notice whatever was given as contemplated by said section. The cause, however, appeared upon the calendar of the appellate court, and it was stated that the court had examined the record in order "that injustice might not be done the defendant by reason of the neglect of her counsel * * * and we find no prejudicial error therein." The judgment was therefore affirmed.

In People v. Ali, 38 Cal. App. 544, 176 Pac. 883, the last case cited by respondent, we find, also, that no application was made as required in said section 1247, and for that reason the appeals were dismissed.

[2] But, if it should be deemed that there was a failure to comply technically with the requirement of the statute as to filing, we think the trial court should have relieved appellants from their default. In this connection it may be stated that no controversy is raised as to the availability of section 473 of the Code of Civil Procedure in cases like this. It is likewise admitted that such applications for relief are addressed to the sound discretion of the trial court. The consideration is thus stated in Jergins v. Schenck, 162 Cal. 747, 124 Pac. 426:

> "The law governing this class of cases is so well settled, and has been so often declared in the decisions of this court, that we may dispense with the citation of authority. An application to be relieved from a default under section 473 of the Code of Civil Procedure is addressed to the sound discretion of the trial court, and the action of that court will not be set aside on appeal unless an abuse of discretion clearly appears. Any doubt that may exist should be resolved in favor of the application, to the end of securing a trial upon the merits. The appellate court will, therefore, be less inclined to reverse an order granting, than one refusing, an application to open a default. Indeed, the cases in which this court has held that such such relief was improperly granted are very rare, while in a number of instances an order refusing to open the default has been reversed."

The great liberality which should be shown toward such applications when made in good faith is also enunciated and emphasized in Paramore v. Colby, 37 Cal. App. 648, 174 Pac. 677, Borgmeyer v. Solomon, 39 Cal. App. 106, 178 Pac. 544, Banta v. Siller, 121 Cal. 414, 53 Pac. 935, Estate of Keating, 158 Cal. 109, 110 Pac. 109, and many other decisions.

Under the circumstances enumerated herein we feel satisfied that appellants' "surprise" was justifiable and their neglect—if any—was excusable. Out of courtesy, no doubt, to the presiding officer of the court, they presented the application to him, that he might entirely satisfy himself that it was in proper form. They had a right to expect and believe that the judge, after reading it, would transmit it for filing to the clerk, who is the custodian of the record of the court. We must assume that the judge knew that the application should be so filed, and that it was presented to him for the twofold purpose already stated. With that situation confronting him, the judge would naturally be expected to pursue the course that appellants anticipated. It may be that there was no express legal obligation resting upon him to do so, but it was the obvious and right thing to do under the circumstances in furtherance of justice and to promote the rights of the parties. It cannot be supposed, of course, that the learned trial judge had any desire to take an advantage of the defendants, or to lull them into fancied security and thereby deprive them of the benefit of an appeal. His retention of the document was probably the result of inadvertence, and not of any purpose to disappoint the expectation of counsel for appellants, or to interpose a merely technical obstacle to the prosecution of the appeal. While the strict letter of the law might justify the affirmance of the order, we think it just to hold that the defendants should be permitted to have an appellate court review the record in the case.

The order is reversed, with direction to the trial court to order the transcription of the reporter's notes as prayed for by appellants.

We concur: FINCH, P. J.; HART, J.

60 Cal. App. 608

BIAGGI v. MAINERO et al. (Civ. 4400.)

(District Court of Appeal, First District, Division 1, California. Jan. 26, 1923. Hearing Denied by Supreme Court March 26, 1923.)

1. Quieting title 🔑10(2)—Recovery on strength of title.

Plaintiff must recover on strength of his own title rather than any weakness of defendants.

2. Appeal and error 🔑907(3)—Conclusively presumed no evidence supported unsuccessful plaintiff's title where appeal on judgment roll alone.

Where the judgment in action to quiet title decreed that plaintiff was not the owner, on appeal on the judgment roll alone it will be conclusively presumed that there was no evidence offered to establish plaintiff's claim of title.

3. Quieting title 🔑50—On decree that plaintiff was not owner, finding that his claim was based on tax sale not necessary.

In a suit to quiet title a finding that plaintiff's claim of title was based on an alleged sale of said property for delinquent taxes and on alleged conveyances to plaintiff's predecessor in interest pursuant to such sale for delinquency was unnecessary to the judgment wherein the court decreed only that plaintiff was not the owner or entitled to possession of the property, and did not quiet title in the defendants, as Pol. Code, § 3898, subd. 5, providing that no decree of forfeiture shall be given until the former owner shall have repaid the purchaser the taxes, penalties, and costs paid by him had no application.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by George Biaggi against G. Mainero and others. Judgment for defendants, and plaintiff appeals. Affirmed.

William R. Biaggi and Ralph McComish, both of San Jose, for appellant.

John P. Fitzgerald, of San Jose, Walter Fitzgerald, of Gilroy, and C. C. Coolidge, Thomas J. Riordan and Maurice J. Rankin, all of San Jose, for respondents.

ST. SURE, J. This is an action to quiet title to a tract of land containing 28.77 acres in Santa Clara county. Judgment was for defendants, and plaintiff appeals on the judgment roll.

The complaint is in the usual form. Defendants G. Mainero, Margherita Mainero, and Peter Piumarta answered, denying ownership in plaintiff of any of the property, and setting up their own ownership of a part of it, subject to a certain pipe line right. They disclaimed ownership in a portion of the property lying "west of Llagas creek." Emelia Piumarta answered separately, denying all of the allegations of the complaint. All of the defendants joined in an amendment to their answers, alleging, on information and belief, that plaintiff's claim of ownership was based upon an alleged sale of the land for delinquent taxes of 1914–15, and alleged conveyances to plaintiff's predecessor in interest pursuant to such alleged delinquency and sale, and tender to plaintiff of taxes, penalties, and costs chargeable upon the land which plaintiff or his predecessor paid at such alleged sale or afterward on the faith of it, with legal interest from the time of payment.

The action was dismissed as to all defendants save the Maineros and Piumartas, and trial was had upon the complaint and answer and amendment to the answer. The court decreed merely that plaintiff was not the owner, in possession or entitled to possession of the property described, and that defendants have judgment for costs.

[1, 2] Plaintiff contends, first, that, inasmuch as there was a disclaimer as to a portion of the land, plaintiff was entitled to a decree quieting his title as to that portion as against the parties making the disclaimer; second, that the judgment should have been conditioned upon restoration to the plaintiff of the money spent in pursuit of the tax title. The first point is disposed of by the cases of Rockey et al. v. Vieux et al., 179 Cal. 681, 178 Pac. 712, Sears v. Willard, 165 Cal. 12, 130 Pac. 869, and Williams v. San Pedro, 153 Cal. 44, at page 49, 94 Pac. 234, which hold that the plaintiff must recover on the strength of his own title rather than any weakness of the defendants' title. Whether or not defendants had any title to the property, or any part of it, is immaterial. The defendant Emelia Piumarta did not disclaim as to any part of the property, but denied all of the allegations of the complaint. This put in issue all of those allegations and made it incumbent upon the plaintiff to prove every allegation of his complaint. The appeal comes before this court upon the judgment roll alone, and it will therefore be conclusively presumed that there was no evidence offered to establish plaintiff's claim of title. Mohr v. North Rawhide Co., 177 Cal. 264, 170 Pac. 600. The second point is also without merit. The appeal, as we have stated, comes before us upon the judgment roll alone, and in our determination we are limited to the questions presented thereby. Norton v. Newerf, 45 Cal. App. 10, 187 Pac. 57.

[3] In its decision the trial court, among other things, found that plaintiff's claim of title was based upon "an alleged sale of said property for alleged delinquent taxes for the fiscal years 1914–15, and upon alleged conveyances executed to plaintiff's predecessor in interest, R. G. Biaggi, pursuant to said alleged delinquency and pursuant to said alleged sale." In this connection respondent calls our attention to subdivision 5 of section 3898 of the Political Code, which provides that in an action of this kind no decree of forfeiture shall be given "until the former owner, or other party in interest, shall have repaid to the purchaser, the full amount of taxes, penalties and costs paid out and expended by him." The finding was unnecessary to the judgment. Furthermore, we note that the court did not find that there was in fact a delinquency on the property in question, or that there was in fact a sale of the property for such delinquency. Neither did it find that plaintiff or his predecessors in interest ever paid any sum whatever for taxes, penalties, or costs. In the absence of any evidence showing such payment it must be assumed that there was no evidence in that respect. Had the court made a decree quieting title in defendants, it may be that such decree should have been conditioned on payment of the moneys paid by plaintiff in pursuit of the tax title, but this question does not arise in this case for the reason that the title was not decreed in anyone. If plaintiff is not aggrieved by a judgment declaring some one else to be the owner when he has shown no title in the land in himself, this plaintiff cannot be heard to complain of this judgment.

The judgment is affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

60 Cal. App. 667

SWAIN v. LOS ANGELES MORRIS PLAN CO. et al. (Civ. 4076.)

(District Court of Appeal, Second District, Division 1, California. Feb. 2, 1923.)

1. Pleading ⚷64(2)—Causes of action on attachment undertaking and for malicious attachment held improperly commingled in one count.

A complaint, in an action against the sureties in an attachment bond for damages for the wrongful issuance of a writ and levy thereunder, which, after charging the improper issuance of the writ and levy thereunder, naming the sureties, charged injury to his name and reputation to the extent of $5,000, and then setting for particular items of actual damages, improperly commingled in one count two causes of action, based on the undertaking given upon the attachment and a cause for malicious procuring and levying an attachment.

2. Pleading ⚷201—Language of demurrer held not objectionable.

A demurrer to a complaint under Code Civ. Proc. § 430, subd. 5, on the grounds that it "purported" to set forth causes of action improperly joined, is not objectionable because of the use of the word purported.

3. Attachment ⚷349—Complaint, stating cause of action on undertaking in attachment, must allege refusal or nonpayment of damages.

A complaint, alleging a cause of action on an attachment undertaking, is insufficient if it fails to allege a demand for and refusal of payment of damages, or that such damages remain unpaid.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Charles Swain against the Los Angeles Morris Plan Company and others.

From judgment for defendants, plaintiff appeals. Affirmed.

Wm. Crawford, of Los Angeles, for appellant.

O'Melveny, Millikin & Tuller, Paul Fussell, and Walter H. Sprague, all of Los Angeles, for respondents.

JAMES, J. Plaintiff brought this action to recover a large sum of money as damages which he alleged he had been made to suffer through the acts of the defendants. The demurrer of the defendants to the third amended complaint of the plaintiff was sustained. Plaintiff declined to amend, whereupon judgment was rendered against him. Plaintiff appealed.

[1] All of the damages alleged to have been sustained by the plaintiff were attributed to the alleged wrongful issuance of a writ of attachment in a civil action brought by the first-named defendant against the plaintiff. Defendants Workman and Cottle were sureties on the undertaking given to secure issuance of the attachment writ. The demurrer of the defendants assigned: First, the general ground that sufficient facts were not stated in the complaint to constitute a cause of action; second, "that several causes of action are purported to be set forth and are not separately stated, in that said complaint attempts to state in one and the same count a cause of action for malicious attachment and a cause of action upon an undertaking in attachment"; third, that there was a misjoinder of parties defendant. The complaint was so clearly vulnerable to the attack that different causes of action were attempted to be stated in the same count that but brief attention need be given to the other grounds assigned. In the complaint it was first alleged that an action was brought in August, 1921, against the plaintiff by the corporation defendant for the principal sum of $495, and that in the complaint it was alleged that the corporation held a certificate of deposit as collateral security for payment of the debt; it was next alleged that defendant Workman made an affidavit in which he falsely alleged that the payment of the debt mentioned had not been secured by any lien upon personal property, and that said affidavit was filed in the office of the clerk of Los Angeles county; that an attachment bond or undertaking was given with defendants Workman and Cottle as sureties, guaranteeing that, if the attachment should be discharged on the ground that plaintiff "was not entitled thereto under section 537" plaintiff would pay all damages which the defendant in that suit might sustain by reason of the attachment; that the attachment was, upon motion of the defendant, made upon the ground that the writ "was improperly issued," discharged on the 31st of August, 1921. The complaint further showed that after the issuance of the attachment, certain property of the plaintiff here had been taken in charge by the sheriff under the writ, and certain credits had been levied upon. Plaintiff then alleged that in the making and filing of the affidavit and undertaking, and the causing of the attachment to be issued and levied, "the defendant corporation and said Workman and Cottle did so with the intent and design to injure the plaintiff in his good name for honesty and in his good business reputation among his friends and business associates," etc., and that he was so injured and damaged to the amount of $5,000. Particular items of damage were further set forth, as to the value of the use of the attached property ($135) and expenditure for attorney's fees of the sum of $75. The allegations of the complaint show that the plaintiff was attempting to recover both upon the contract undertaking given upon the attachment as well as for the malicious procuring and levying of a writ of attachment. He not only particularly alleged the falsity of the statement in the affidavit that the alleged attachment debt was not secured by a lien upon property, but the amount of his damages were many times in excess of any possible penalty under the bond, considering the sum sought to be recovered in the attachment suit. And yet we find in appellant's reply brief the statement that he is not claiming that a cause of action for malicious attachment was stated, for he says:

> "We could not maintain such an action, as the action of the respondent corporation against the appellant has not been tried nor has it abated. Vesper v. Crane, 165 Cal. 36, 130 Pac. 876, L. R. A. 1915A, 541."

[2] Appellant's objection that the ground of demurrer referred to was not stated in the exact language of subdivision 5 of section 430 of the Code of Civil Procedure, in that the demurrants refer to the causes of action as being "purported," is highly technical and not entitled to serious consideration. Assuming that the different causes of action were such as might be joined in the same suit, respondents were entitled to have them separately stated instead of being commingled and confused as they were in the pleading demurred to.

[3] The cause of action on the attachment undertaking, separately considered, was insufficient, as it was not alleged that there had been demand made on plaintiff in the attachment suit for payment of the damages, or that such damages were unpaid. Morgan v. Menzies, 60 Cal. 341; Curtiss v. Bachman et al., 84 Cal. 216, 24 Pac. 379.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

60 Cal. App. 658

WILLIAMS v. THOMPSON et al.

(Civ. 4086.)

(District Court of Appeal, Second District, Division 1, California. Feb. 1, 1923.)

1. Appeal and error 🔑935(2)—Counsel's reliance on motion to quash service of summons when permitting default to be taken assumed error after denial of motion.

Where counsel, under the belief that copies of the summons served on them were insufficient, allowed a default to be taken against them, and relied on a motion to quash the service of summons which motion is thereafter denied, it is assumed, on appeal from grant of motion to open default, that they were in error in relying on such motion.

2. Appearance 🔑9(5)—Application for additional time not general appearance.

An application for additional time within which to plead does not constitute a general appearance.

3. Judgment 🔑161—Setting aside default held not abuse of discretion, though proposed answer was not verified.

Where the affidavits in support of a motion to set aside a default judgment, under Code Civ. Proc. § 473, state that counsel permitted the default to be taken under the good-faith opinion that the service of summons was insufficient and would be quashed, and that counsel told defendant he had a good and meritorious defense, *held*, that the setting aside of the default was not an abuse of discretion, notwithstanding the copy of the answer, to be made if the motion was allowed, which accompanied the motion was not verified.

4. Judgment 🔑143(3)—Relief may be had against mistake of the law resulting in default.

In a proper case, the court will grant relief against a mistake of the law which has resulted in a default of a defendant.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Action by George F. Williams against O. M. Thompson and others. From an order granting a motion to set aside a default judgment in favor of plaintiff, plaintiff appeals. Order affirmed.

Goodwin & Morgrage, of Los Angeles, for appellant.

Allen & Lyon, of Fullerton, and Jones & Weller, of Los Angeles, for respondents.

CONREY, P. J. Judgment by default having been entered against the defendants, they moved the court to set aside the default and vacate the judgment, on the ground that said default was taken as a result of mistake of law and surprise of the attorneys for the defense. This appeal is from an order granting that motion.

The action is one commenced in the county of Los Angeles to recover money alleged to be due under a contract for personal services. The summons was served on the defendants in the county of Orange on October 24, 1921. Summons was returned on November 25th, and the default and judgment by default were entered December 5, 1921.

On the 7th day of December, 1921, pursuant to notice duly given on the 25th day of November and their special appearance for that purpose, the defendants moved to quash the service of summons because of certain alleged defects in the copies of summons and complaint which had been delivered to them. That motion having been denied, they then made the motion whereby they sought relief under the provisions of section 473, Code of Civil Procedure. From the affidavits on this motion, it appears that Mr. Lyon, one of the attorneys of the defendants, had charge of the motion to quash service of summons; that he in good faith was of the opinion that the copies of summons delivered to the defendants were insufficient because they were not dated, were without seal and were not signed by a deputy clerk of the court, and because the purported copy of the complaint was not signed by the plaintiff or his attorney. Relying upon their special appearance and motion to quash summons, defendants entered no general appearance and thereby suffered default.

[1, 2] The motion to quash service of summons having been denied, it is now assumed as the law of the case that counsel for defendants were in error when, relying upon that motion, they permitted default to be taken against them. They claim that they did this because they were also of the opinion that an application for additional time in which to appear and plead would have constituted a general appearance. If so, we think that this also was a mistake of law. Davenport v. Superior Court, 183 Cal. 506, 191 Pac. 911.

That part of section 473, Code of Civil Procedure, which is applicable to this case, reads as follows:

> "And may, also, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; provided, that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken; and provided, further, that said application must be accompanied with a copy of the answer, or other pleading proposed to be filed therein, otherwise said application shall not be granted."

[3] Appellant contends that the court abused its discretion in granting the order from which this appeal is taken, because there was no sufficient affidavit of merits,

and because, although the complaint in the action was verified, the proposed answer which accompanied the motion of defendants was not verified. One of the defendants in his affidavit stated that he had stated all the facts in the case to his attorney and was thereupon advised that he and his codefendants had a good and meritorious defense to the action. We think that this affidavit, together with the proposed joint answer of the defendants, was a sufficient compliance with the requirements of the motion then before the court with respect to a showing of merits of the defense. It may fairly be presumed that when the court granted the motion, the answer filed would have been verified. If the answer, which pursuant to that order has been filed, is not verified, it would have been easy to establish the fact in preparing the record on this appeal.

[4] It is a recognized rule that the court will, in a proper case, grant relief against a mistake of law which has resulted in the default of a defendant. Mitchell v. Cal., etc., S. S. Co., 156 Cal. 576, 580, 105 Pac. 590. The court did not abuse its discretionary power, in treating this as a proper case for such relief.

The order is affirmed.

We concur: JAMES, J.; HOUSER, J.

---

60 Cal. App. 633

DIENER v. SHAUL et al. (Civ. 4472.)

(District Court of Appeal, First District, Division 2, California. Jan. 30, 1923.)

1. Sheriffs and constables 🔑113(1)—One consenting to destruction of wine in order to save son from serving jail sentence held not entitled to recover for such destruction.

Where plaintiff's son was convicted of selling wine and sentenced to 60 days in jail and to pay a fine, but the jail sentence was suspended upon condition that the liquor upon his mother's premises and owned by her should be destroyed, and plaintiff consented thereto in order to save her son from serving a jail sentence, and the wine was destroyed, she could not recover damages from the sheriff for such destruction, regardless of her property rights in the liquor.

2. Appeal and error 🔑1052(5)—Error as to admission of evidence of immaterial matters held harmless.

Where, in a suit to recover for the destruction of wine claimed to be owned by plaintiff and destroyed by defendant as sheriff, where the jury found that the wine was destroyed by plaintiff's consent, errors as to admission of evidence of various sales of wine made by plaintiff *held* immaterial.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by Marie Diener against B. F. Shaul and others to recover value of wine destroyed. Judgment for defendants, and plaintiff appeals. Affirmed.

Roy L. Daily and W. C. Burgess, both of San Francisco, and Benj. C. Jones, of Lakeport, for appellant.

C. M. Crawford, of Lakeport (J. E. Pemberton, of San Francisco, of counsel), for respondents.

LANGDON, P. J. This is an action to recover the value of certain wine alleged to have been the property of the plaintiff and to have been destroyed by the defendant Shaul, the sheriff of the county of Lake. The other defendant is the surety upon the sheriff's official bond.

The action was tried before a jury, which brought in a verdict for the defendants. From a judgment rendered upon this verdict the plaintiff has appealed.

[1] It is admitted that the wine was destroyed by the sheriff upon the written consent of the plaintiff. It is claimed, however, by the plaintiff that this consent was obtained by duress. The plaintiff had 600 gallons of wine in the cellar of her home held in a bonded warehouse and 180 gallons upstairs. Her son, who lived with her, sold some of this wine and was arrested. He pleaded guilty and was sentenced to 60 days in jail and to pay a fine. The jail sentence was suspended, however, upon condition that he should refrain from further violations of the law and that the liquor upon the premises should be destroyed. The son consented to this, but stated that the liquor belonged to his mother and he had no right to consent to its destruction. The sheriff was then instructed to obtain the mother's consent before detroying the wine. The son returned to his home late in the evening and explained the entire matter to his mother, and on the following day the sheriff arrived at the home of plaintiff and her son and presented a written consent to the destruction of the wine for the mother to sign. She did so, and the jury has found, under instructions which fully and fairly presented the plaintiff's contention of duress, that she signed this consent voluntarily and that the same was not procured by duress. This is determinative of the case. Plaintiff had power to consent to the destruction of her property to save her son from serving a jail sentence, and she cannot recover damages from one who acted upon that consent.

It is unnecessary for us to determine whether or not plaintiff had forfeited her right to the liquor or whether or not a judgment of a court declaring such forfeiture was essential to a destruction of her property rights, or many of the other interesting questions argued in the briefs; for, as we have stated, if the plaintiff consented to the destruction of the wine, she cannot recover against the defendants, regardless of whether or not she had a property right in the same. The matter of her free and voluntary consent was presented to the jury by the instructions given at the request of the plaintiff. After full and fair instructions regarding duress, menace, fraud, constructive fraud, etc., the jury was instructed:

> "If you find from the evidence that the defendant seized and destroyed the wine owned by Marie Diener, plaintiff herein, without a valid process or order of court, he was a trespasser from the beginning and personally liable for his acts, unless the plaintiff, Marie Diener, voluntarily consented to the seizure and destruction of said wine."

It was not disputed that the sheriff did not act nor purport to act under an order of court for the destruction of the wine, but relied upon plaintiff's consent, and did not proceed until he had secured the same.

[2] In the face of the instruction just quoted the jury brought in a verdict for the defendants, and we assume they followed the instructions of the court. It being settled, therefore, by the finding of the jury that the plaintiff voluntarily consented to the destruction of the wine, the case is concluded, and plaintiff could not have been prejudiced by rulings of the court in relation to the admission of evidence of various sales of wine made by her or other matters which had no bearing upon the question of her free and voluntary consent to the destruction of this wine.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

60 Cal. App. 680

BROWNING et al. v. DOW et al. (Civ. 2471.)

(District Court of Appeal, Third District, California. Feb. 3, 1923.)

1. Mandamus 🔑72—Writ will issue to compel exercise of discretion or correct "abuse of discretion."

A writ of mandate will issue in a proper case to compel the exercise of discretion, but it will never issue to control discretion, either before or after the exercise thereof, and in a proper case, however, the writ will issue to correct an abuse of discretion, which is not the exercise of discretion, but action beyond the limits thereof, and the writ will only issue where the act to be commanded is certain, definite, and fixed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Abuse of Discretion.]

2. Mandamus 🔑78—Writ to compel trustees of reclamation district to establish office near district improper, where trustees had already exercised discretion.

In an action for a writ of mandate to compel the trustees of a reclamation district to maintain an office in or near the district, as required by Pol. Code, § 3454, as amended by St. 1917, p. 1193, § 6, where it appeared that the trustees in good faith had established an office at a point removed from the district, and had therefore exercised their discretion, which was not limited by the statute, a writ would not issue to compel the trustees to act again nor to set a limit within which they were to act.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by J. W. Browning and others against E. L. Dow and others, for a writ of mandate to compel defendants as trustees of a reclamation district to maintain an office in or near the district. Judgment for plaintiffs, and defendants appeal. Reversed with directions.

Devlin & Devlin, of Sacramento, and Thomas Rutledge, of Colusa, for appellants.

Seth Millington, Jr., of Colusa, for respondents.

PER CURIAM. The complaint alleges that the defendants are the trustees of reclamation district No. 108, located in Colusa and Yolo counties; that as such trustees they ceased, on the 16th day of July, 1915, to keep an office in or near the district and established the office of such district in San Francisco, where it is now maintained; that the town of Grimes is in or near the district, is a business center thereof, convenient to the residents of the district, and provided with suitable offices and accommodations for the transaction of the business of such district; and that San Francisco is neither near the district nor convenient to the residents thereof as a place for the transaction of its business. The prayer is for a writ of mandate compelling defendants to keep an office in or near the district for the transaction of the business thereof.

The answer alleges that San Francisco is nearer to the "landowners owning a majority of the acreage of lands in said district than the town of Grimes"; that district No. 108, Sacramento River West Side levee district, and Knight's Landing Ridge drainage district are engaged in the same kind of work; that defendants "constitute a majority of the board of commissioners in each" of the two last-named districts, as well as being the trustees of district 108; that the three districts "have a common office, the same secretary, the same engineer, and the same attorney or counsel, and also the same manager," thereby reducing the expenses of all of said districts. Various other reasons are alleged for maintaining such office in San Francisco.

The court found that San Francisco is neither in nor near the district, but about 130 miles therefrom; that for the residents of the district to go to San Francisco "involves expense, inconvenience, and loss of time, * * * consuming several days in travel and attendance"; that San Francisco is not the most convenient place to keep said office, "but that there is in or near the said district the Town of Grimes, and other towns, adequate and suitable for the keeping of the office of said district"; that the "owners of a majority of land of the said district do not * * * reside within the said district, but that the majority of individual landowners of said district do reside within the boundaries of said district"; that the defendants constitute a majority of the commissioners of the Knight's Landing Ridge drainage district and of the Sacramento River West Side levee district and "that it would be cheaper and more convenient to operate the three offices together and employ office force jointly, but that the three of said offices could be more conveniently located in or near the lands involved, and there is no restriction on removing the offices of the said last-named districts." Judgment was entered commanding the defendants "to keep an office of said reclamation district No. 108 in or near the said district for the transaction of the business of said district and to keep the books, maps, papers, records, contracts, and other documents of said district in said office."

Section 3452 of the Political Code, as amended in 1874, required the trustees of a reclamation district to "keep their office in the district, or as near as practicable for the transaction of all business pertaining to the reclamation of the district." Stats. 1873–74, p. 46. In 1887 this provision was dropped from section 3452 and section 3453 was amended to provide: "The board of trustees must keep an office in or near the district for the transaction of the business thereof." Stats. 1887, p. 238. In 1917 this provision was omitted from section 3453 and section 3454 was amended to include the following: "Said board of trustees shall have powers and duties as follows, to wit: (1) To keep an office in or near the district for the transaction of the business thereof." Stats. 1917, p. 1193. For the purposes of this opinion the foregoing provisions will be treated as mandatory and identical in meaning and as requiring the trustees to keep an office in the district or as near as practicable thereto.

[1] Had the question of location of the office been committed originally to the decision of the trial court, there could be no doubt as to the sufficiency of the evidence to support the findings, and there are persuasive reasons in support of the contention that the trustees abused the discretion vested in them when they located the office in San Francisco, but it does not follow, even if such abuse of discretion be conceded, that the judgment can be upheld. Among the rules by which courts are guided in the issuance of writs of mandate are the following: (1) The writ will issue, in a proper case, to compel the exercise of discretion. (2) It will never issue to control discretion, either before or after the exercise thereof. (3) In a proper case, the writ will issue to correct an abuse of discretion. An abuse of discretion, however, is not the exercise of discretion but action beyond the limits of discretion. (4) It will issue only where the act to be commanded is certain, definite, and fixed. Where discretion has not been exercised, the definite thing commanded is to act. Where the limits of discretion have been exceeded, the definite command is to act within such limits.

[2] The command of the statute to keep an office in or near the district undoubtedly vests a discretion in the trustees as to its location. Their selection of a place anywhere within the district or on one side or the other thereof or a mile or several miles therefrom, depending upon circumstances, would be a reasonable exercise of their discretion. The court cannot be more specific in its commands than is the statute, a limitation which the judgment recognizes. Had the court commanded the defendants to keep an office at a particular place or within a given distance from the district, it would have been a judicial usurpation of the discretionary power vested in the trustees. If the trustees attempt to comply with the mandate of the court and establish an office at a place which, in the opinion of the court in a subsequent suit, is not near the district, another writ may issue and another and another, until a place is finally selected which the court shall conclude is near the district. This piecemeal control of the discretion of the trustees would constitute judicial usurpation as fully as if exercised in the first instance. Since the trustees are not charged with bad faith or fraudulent conduct, it must be assumed that they exercised an honest judgment in locating the office in San Francisco. Having exercised their discretion, and the statute not having set any definite limits to that discretion, the courts can neither require the trustees to act again, nor set a limit within which they must act. The following authorities sustain the rules herein applied, and no decision to the contrary has been discovered:

> "When the discretion has been exercised the writ cannot be used to compel a party to abandon his own judgment, and to make it conform to the judgment either of the court or of some other person. Every case where a party has been commanded by mandamus to do an act has been a case where the act was definite,

certain, and fixed, and where its character and scope, and the result to flow from it, were as well known before the doing of the act as afterwards." Jacobs v. Board of Supervisors, 100 Cal. 121, 129, 34 Pac. 630, 632.

"Whenever such officers or bodies are vested with discretionary power as to the performance of any duty required at their hands, or when in reaching a given result of official action they are necessarily obliged to use some degree of judgment and discretion, while mandamus will lie to set them in motion and to compel action upon the matters in controversy, it will in no manner interfere with the exercise of such discretion, or control or dictate the judgment or decision which shall be reached." High's Extraordinary Legal Remedies (3d Ed.) § 24.

"It [mandate] does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion." Ex parte Virginia, 100 U. S. 313, 323, 25 L. Ed. 667, 671.

See, also, Inglin v. Hoppin, 156 Cal. 483, 105 Pac. 582.

A writ of mandate was sought to compel the board of supervisors to erect a suitable jail. The court said:

"It is obvious * * * that the jail provided by the board of supervisors of La Salle county is far inferior to the wants and public necessities of the people of the county, and we are compelled to express our astonishment, when the wealth and resources of the county are considered, that the board should persist in requiring the officers of the county to confine those who are so unfortunate as to be charged or convicted of crime, in a prison which is dangerous to the life and health of the prisoners. * * * Section 26, c. 34, Rev. Stat. of 1874, p. 307, declares, 'It shall be the duty of the county board of each county to erect or otherwise provide, when necessary, and the finances of the county will justify it, and keep in repair, a suitable courthouse, jail.' * * * Had the county board failed and refused to provide any kind of a jail in which to confine prisoners, and it clearly appeared that the finances of the county were such as to justify the construction of a jail, we are inclined to the opinion that the duty enjoined by the statute might be enforced by mandamus; but such is not this case. While the provision of the statute requiring the county board to furnish a jail may be regarded as mandatory, * * * yet, the kind of a jail to be provided must necessarily be left to the discretion of the board. * * * If the court had power to interfere in this case because the jail was not properly ventilated, and was damp, and the room was too small and endangered the lives and health of the prisoners, upon the same principle, if a county should construct a jail at a cost of $30,000, and some taxpayer of the county was able to show that the cells were too small, or the building insecure, or that money enough had not been expended to make the building as elegant as the wealth of the county demanded, in such a case the court would also have to interfere." People v. Board of Supervisors, 84 Ill. 303, 25 Am. Rep. 461.

In affirming a judgment denying a writ of mandate requiring the board of supervisors to erect a fireproof clerk's office, it is said:

"The provisions of the Code which require the board of supervisors to provide a fireproof clerk's office are mandatory. * * * One of the marked characteristics of a proceeding by mandamus is that, if the functionary whose conduct is complained of is by law to exercise any discretion, that discretion will not be controlled by a writ of mandamus; for that would be to transfer the discretion which the law commits to the functionary to the court which undertakes to award the writ. * * * It cannot be said that the erection of a fireproof clerk's office is an act so clear and specific that no element of discretion is left in its performance. * * * If this court was of the opinion that the clerk's office in question was not fireproof, and awarded the writ commanding the board of supervisors to provide a fireproof clerk's office, how are they to determine whether they should erect a new building or repair or remodel the old? If the court goes into details and directs them what to do, it usurps the discretion vested in them. If the court does not do this, how are they to know what will satisfy the requirement of the statute in the opinion of the court? The county authorities having exercised their discretion, and provided a clerk's office intended to be fireproof, the circuit court did not err in refusing the writ." Broaddus v. Board of Supervisors, 99 Va. 370, 38 S. E. 177.

See, also, Ward v. Commissioners, 146 N. C. 534, 60 S. E. 418, 125 Am. St. Rep. 489.

"An act was passed to divide the county of Surry. * * * By the same act the defendants were appointed commissioners 'to select and determine upon a site for a permanent seat of justice for Surry county, who shall locate the same as near the center of said county as a suitable location can be obtained, taking into consideration both the extent of territory and population.' The commissioners, in their return, state that they have performed their duty with a strict and conscientious regard to the requirements of the act. These commissioners are the servants of the General Assembly to perform the acts required of them; and to their discretion the business was intrusted. With the exercise of that discretion we cannot interfere, as they in their return state their compliance substantially with the act. If the court were to issue its mandamus, what would it command? That the commissioners should proceed to select a site for the county town, observing the requirements of the act. We could not tell them whether the proper site is to the east or west of the center line designated in the petition; or whether, if on the one side or the other, it would be the proper place, regard being had to the population of the county. To do so, would be assuming an authority not given to us, but to the defendants, the commissioners. We could make no other fiat than the one already set forth. What other return then could the defendants make than the one they have made, if it be the truth? Another mandamus might be issued, to which the same return might be made; and in this way the matter might be bandied about from term to term." State v. Bonner, 44 N. C. 257.

Had the statute fixed limits to the discretion of the trustees, as that they should keep an office in the county in which the district or some part thereof is located, mandate would lie to compel them to keep the office within those limits, but the writ will not issue to direct and control the indefinite discretion vested in the board by the law. Since the question considered is decisive of the case, it is unnecessary to consider other grounds urged for a reversal.

The judgment is reversed, with directions to the trial court to enter judgment on the findings in favor of defendants.

---

60 Cal. App. 568

TONNINGSEN v. ODD FELLOWS' CEMETERY ASS'N. (Civ. 4358.)

(District Court of Appeal, First District, Division 2, California. Jan. 25, 1923. Hearing Denied by Supreme Court March 26, 1923.)

1. **Mortgages 🔑591(1)—Foreclosure sale may only be made subject to redemption.**

In view of Code Civ. Proc. §§ 700a, 701, 702, a sale of real property under foreclosure of a mortgage can only be made subject to redemption.

2. **Judgment 🔑505—Foreclosure of judgment failing to allow redemption held void and subject to collateral attack in ejectment by holder of equity of redemption.**

Where real estate was sold in the foreclosure of a mortgage, the judgment allowing no right of redemption, but providing that a deed issue to the purchaser immediately upon sale, such judgment was void and subject to collateral attack in an ejectment suit by the holder of the equity of redemption against the purchaser.

3. **Mortgages 🔑605—Delivery of amount sufficient for redemption held to divest any title which foreclosure purchaser had.**

Where a sale in foreclosure has been made without allowing redemption, a tender by the holder of the equity of redemption of an amount sufficient for redemption divested any title which the purchaser had.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Ejectment by John Tonningsen against the Odd Fellows' Cemetery Association. Judgment for plaintiff, and defendant appeals. Affirmed.

Lent & Humphrey and Robert Mack Light, all of San Francisco, for appellant.

Stoney, Rouleau, Stoney & Palmer and R. M. J. Armstrong, all of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment for plaintiff in an action in ejectment. Exception is taken to certain of the findings of fact, and it is contended that they do not support the conclusions of law and the judgment.

Since 1904, defendant has been in possession of certain land in San Mateo county, which it used for a cemetery. Its possession was held under certain contracts to purchase, made with the predecessors in interest of the plaintiff, as vendors. These vendors transferred the said property to the Union Trust Company of San Francisco, subject to the rights of defendant, as security for the payment of certain bonds of the vendors. On January 23, 1917, default having been made in the payment of the bonds, the Union Trust Company commenced an action in the superior court in and for the county of San Mateo to foreclose the equity in said property, under the terms of the deed conveying the property to it as security.

There is considerable discussion in the briefs as to whether this conveyance for security should be regarded as a deed of trust or a mortgage. The instrument itself recites that it is a deed of trust or mortgage, and provides that, in case of default in payment of the bonds, the Union Trust Company, at the request of the bondholders, may sell the property at public auction or may proceed to foreclose the mortgage or deed of trust and sell all of said property under a decree of foreclosure by the court having competent jurisdiction. The trust company pursued the latter method. For the purposes of this case the instrument was treated as a mortgage and foreclosed as such, and therefore the question of whether this instrument was, technically, a deed of trust or a mortgage is not controlling here

On September 13, 1917, a judgment and decree of foreclosure and sale was made and entered in the foreclosure action. This judgment contained a provision that, immediately, upon the execution of the commissioner's certificate of sale, he should deliver his deed to the purchaser for the property sold, and that from and after the delivery of the deed the defendants in the foreclosure action and all persons claiming under them should be barred and foreclosed of all right, title, and interest, lien, or claim, or equity of redemption in and to the property. No appeal was taken from this judgment. The commissioner appointed by the court sold the property, and it was purchased by the defendant and appellant herein for $9,960. As directed by said decree, the commissioner executed a certificate of sale, and immediately thereafter executed and delivered to the defendant and appellant herein his deed as commissioner, which deed constitutes defendant's claim to title.

Plaintiff's claim to the property arises by reason of the fact that through successive transfers he acquired the rights in the property, if any, which existed in favor of the mortgagor under the deed of trust or mortgage given to the Union Trust Company. On October 2, 1918, one Tuchsen, plaintiff's predecessor in interest in said rights, if any, tendered to the defendant and appellant herein (the purchaser at the foreclosure sale) a sufficient sum to redeem the property if the sale was one subject to redemption, which tender was refused. On the following day Tuchsen conveyed any interest which he had in the property to the present plaintiff, who relied on said tender to divest the defendant and appellant herein of title, and brought the present action in ejectment, thus collaterally attacking the judgment in the foreclosure action which had cut off the right of redemption.

The trial court gave judgment for the plaintiff upon the theory that the decree of strict foreclosure, without allowing the right of redemption, rendered in the former action, was void because it was violative of sections 700a, 701, and 702, Code of Civil Procedure. The defendant has appealed from this judgment, and advances numerous ingenious arguments to sustain its first contention, which is that the portion of the judgment in the foreclosure action barring the right of redemption was proper.

The second contention of appellant is that, even if the decree in the foreclosure action was erroneous in barring the right of redemption, the error was one that could only be taken advantage of upon appeal, and did not render the judgment void so as to subject it to collateral attack.

[1] It is not necessary to discuss the arguments advanced by appellant in support of its first contention; it is sufficient for us to say that sections 700a, 701, and 702 of the Code of Civil Procedure are applicable to the situation presented in the foreclosure proceedings. The sale was of real property, and could only be made subject to redemption. Anthony v. Janssen, 183 Cal. 329, 334, 191 Pac. 538.

The second contention of appellant offers a more serious problem. Some authorities from other jurisdictions would seem to sustain the appellant's position, and it is elementary, of course, that judgments of courts of competent jurisdiction may not be collaterally attacked for mere errors or irregularities. However, in the present case, the judgment barring the right of redemption presents more than a mere irregularity; it was beyond the power of the court. It was said in the case of Anthony v. Janssen, supra:

"The direction in the decree that the deed should be made immediately after the sale was contrary to the Code and beyond the power of the court. It was, therefore, void."

In the case of Sache v. Gillette, 101 Minn. 169, 112 N. W. 386, 11 L. R. A. (N. S.) 803, 118 Am. St. Rep. 612, 11 Ann. Cas. 348, it was stated that, while the courts were not in full harmony as to what constitutes a mere irregularity in judgments, nevertheless—

"proceedings outside the authority of the court, or in violation or contravention of statutory prohibitions, are, whether the court have jurisdiction of the parties and subject-matter of the action or proceedings, or not, utterly void. In re Simmons, 62 Ala. 417; In re Gibson, 31 Cal. 619, 91 Am. Dec. 546; Barton v. Saunders, 16 Or. 51, 16 Pac. 921, 8 Am. St. Rep. 261. The mere fact that the court has jurisdiction of the subject-matter of an action * * * does not justify an exercise of a power not authorized by law, or a grant of relief to one of the parties the law declares shall not be granted. * * * Although every exercise of power not possessed by a court will not necessarily render its action nullity, it is clear that every final act, in the form of a judgment or decree, granting relief the law declares shall not be granted, is void, even when collaterally called in question. * * * The case of Ritchie v. Sayers (C. C.) 100 Fed. 520, involved a collateral attack on a judgment, and the court after referring to the rule as generally stated in the books, namely, that the judgment of a court having jurisdiction of the parties and the subject-matter of the action is conclusive and cannot be collaterally called into question, said: 'That may be conceded. But the question is, Did it have jurisdiction to enter the particular decree and judgment that it did enter? As we have before seen, we reach the conclusion that the particular judgment could not be entered; and it is a well-settled principle that, although a court may have jurisdiction of a case, yet, if it appears from the record that it did not have jurisdiction to enter the particular decree and judgment, it may be collaterally attacked."—citing U. S. v. Walker, 109 U. S. 258, 3 Sup. Ct. 277, 27 L. Ed. 927; Ex parte Nielsen, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118; Ex parte Cuddy, 131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154; Folger v. Insurance Co., 99 Mass. 267, 96 Am. Dec. 747; Seamster v. Blackstock, 83 Va. 232, 2 S. E. 36, 5 Am. St. Rep. 562. * * *"

In said case of Sache v. Gillette, supra, the court considered carefully the authorities which hold that a judgment giving relief in excess of that warranted by the statute is merely irregular and not void, but concluded that—

"The weight of authority sustains the proposition that at common law the judgment is void for want of jurisdiction. In fact, it may be said our statute created no new rule on the subject, but merely adopted that existing at common law. It is laid down in Black on Judgments, 242, as a general principle, that, in addition to jurisdiction of the parties and subject-matter of the action, it is necessary to the validity of a judgment that the court should have had jurisdiction of the precise question which the judgment assumes to decide, or the particular remedy or relief which it assumes to grant. Support for this doctrine is found in numerous well-considered cases. * * * The tendency of the courts to enlarge the definition of 'jurisdiction,' by many text-writers and judges seemingly limited to authority over the subject-matter and parties, is referred to in Newman v. Bullock, 23 Colo. 217, 47 Pac. 379, with the statement that it should, properly defined, include, not only power to hear and determine, 'but power to render the particular judgment in the particular case.'"

"A judgment may be collaterally attacked where the court had jurisdiction of the parties and subject-matter of the action, but did not have jurisdiction of the question which the judgment assumes to determine or power to grant the particular relief which it assumes to afford to the litigants." 15 R. C. L. § 327.

[2] We conclude that the judgment in the foreclosure proceeding, in so far as it barred the right of redemption, was void and subject to collateral attack. The only evidence relied upon by defendant in support of its claim was the deed of the sheriff executed and delivered to the defendant on the day of the sale, one year before the period of redemption had expired. Its admission in evidence was objected to by plaintiff at the time of the trial on the ground that it was void.

[3] It is admitted that plaintiff's predecessor in interest made a valid and sufficient tender for redemption if the property was subject to redemption. This was sufficient to divest any title which the defendant had. Leet v. Armbruster, 143 Cal. 663, 77 Pac. 653. The plaintiff was entitled to recover in an action in ejectment. Lett v. Armbruster, supra.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

---

60 Cal. App. 484

GRANGE v. JUDAH BOAS CO. (Civ. 4365.)

(District Court of Appeal, First District, Division 2, California. Jan. 20, 1923. Hearing Denied by Supreme Court March 20, 1923.)

1. Corporations 🔑404(2)—President has no authority by virtue of office to pledge property.

The president of a corporation has no authority merely by virtue of his office to pledge the property of a corporation.

Opinion of Supreme Court Denying Hearing.

2. Bonds 🔑93—Person receiving bonds in good faith in ordinary course of business as security for pre-existing debt is "holder for value."

One who received bonds in good faith in the ordinary course of business as security for a pre-existing debt became a "holder for value," even though the pledge was not in fact valid, the bonds were not negotiable, and the pledgee did not forbear or agree to forbear in consideration of the pledge.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Holder for Value.]

3. Estoppel 🔑75—Expressly authorized pledge by agent held not to be defeated by owner.

Where plaintiff had given his agent a power of attorney to mortgage, hypothecate, and in every manner deal with choses in action and other property in possession or in action, he thereby expressly authorized him to pledge corporate bonds, so as to be within the rule of Civ. Code, § 2991, that one who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it cannot set up his own title to defeat a pledge of the property made by the other to a pledgee who received it in good faith in the ordinary course of business and for value.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Clarence Grange against the Judah Boas Company. Judgment for plaintiff, and defendant appeals. Reversed in District Court of Appeal, and hearing denied in Supreme Court.

A. L. Weil and Harris F. Shaw, both of San Francisco, for appellant.

Walter H. Linforth, of San Francisco, for respondent.

STURTEVANT, J. The trial court awarded a money judgment against the defendant, and the defendant has appealed and has brought up a bill of exceptions.

An understanding of the points made requires that we go back to the year 1912 to commence. In that year R. B. Hanford, W. S. Tevis and the Hanford Investment Company were each engaged in the business of dealing in securities. The Hanford Investment Company had three directors, the two individuals just named, and Miss O'Connell. At that time, and during the years following, Mr. Tevis was president and Mr. Hanford was vice president, or Mr. Hanford was president and Mr. Tevis was vice president; but during the same period of time Miss O'Connell was secretary. During the same period of time Miss O'Connell was the private secretary to Mr. Hanford and was the private secretary to Mr. Tevis. She had the combination to the safe in which were the valuable and confidential papers of Mr. Hanford and Mr. Tevis and of the corporation. During all the times mentioned the corporation and both of those men had numerous interests and each and all were heavily indebted. Their debts were evidenced by promissory notes held by numerous banks and by certain private individuals. Many of the notes were secured by corporate securities pledged to secure the same. When their affairs stood in this condition, they employed the plaintiff to take care of their outstanding obligations and to pay pressing creditors by negotiating loans from other persons, and also by making such arrangements with the creditors as from time to time became necessary to prevent suits and attachments. In transacting this business the plaintiff was to advance out of his own funds certain moneys and repay himself from time to time when the financial affairs of said persons would permit the repayment. In transacting the business the plaintiff took up certain obligations and detached the securities pledged to secure the same, and from time to time pledged those securities with the same or other creditors on other obligations. The plaintiff testified that R. G. Hanford, W. S. Tevis, and the Hanford Investment Company jointly and severally authorized the plaintiff to hold the securities so taken up to secure the plaintiff for advances made by him. The plaintiff testified in this connection that he never saw a resolution of the Hanford Investment Company authorizing any one to make a pledge of its securities, and the plaintiff did not testify, and there is no evidence in the record to the effect that any officer of the Hanford Investment Company was ever authorized to pledge any of its securities.

On July 2, 1912, Albert Hanford delivered to the Hanford Investment Company, among other debentures, five bonds, Nos. 1671–1675, of the United Light & Power Company, which delivery was evidenced by a writing as follows:

> "San Francisco, Cal., July 2, 1912.
>
> "Received from Albert Hanford thirty-five six per cent. first mortgage United Light & Power bonds, par $1,000 each, numbered 1671 to 1675 inclusive; six Natomas Consolidated of California, seconds, numbered 479 to 484 inclusive; six Natomas Consolidated of California, seconds, numbered 463 to 468 inclusive. These bonds are a temporary loan to the Hanford Investment Company to be returned within a short time and not later than thirty days from date. In case of the death of Albert Hanford they are to be returned immediately to his estate.
>
> "Hanford Investment Company,
> "By William S. Tevis."

The above letter was never exhibited to Mr. Grange until he saw the same in the courtroom during the trial of this case.

In taking up one of Mr. Tevis' outstanding debts, the plaintiff came into possession of the five bonds just mentioned and the equity in which is the subject of this suit. At no time did Mr. Tevis, Mr. Hanford, or the Hanford Investment Company make any indorsement on the bonds, or execute or deliver to the plaintiff any writing in the nature of a blank indorsement, a blank assignment, a bill of sale, or other paper evidencing or indicating a transfer of the bonds.

While the bonds were so in the possession of the plaintiff, he received a summons to the bedside of his wife, who was sick in Europe. When that summons was received, and for some weeks prior thereto, the employers of Mr. Grange had been negotiating with Mr. Moore for the financing of the United Light & Power Company. That arrangement contemplated that all of the bonds of the United Light & Power Company would be called in, and other securities issued in lieu thereof. He prepared a letter dated April 11, 1914, and delivered it to Miss O'Connell. That letter was as follows:

> "San Francisco, April 11, 1914.
>
> "Hanford Investment Company, San Francisco, Cal. Attention of Miss O'Connell. Gentlemen: Herewith I am handing you securities, bonds and stocks, received by me as collateral security for the joint indebtedness of yourselves, R. G. Hanford and William S. Tevis. These securities are to be held by you in trust for me subject to the disposition, however, by your company for the following purposes.
>
> "Bonds of your subsidiary companies are to be used, if necessary, for exchange under the Moore agreement. Any of the securities may be redeemed at market from my lien. Any moneys received by you you will please deposit to my credit in bank. Any securities received in exchange kindly hold until my return.
>
> "The object of this deposit with you is to prevent any embarrassment should these securities be needed before my return from Europe.
>
> "Yours very truly."

At the time that the letter was delivered, there was a locked tin box in the safe which had contained the securities which had been in the possession of Mr. Grange, and that box was marked "C. Grange." In that safe was also a drawer which had been used by Mr. Grange and which also had written thereon "C. Grange."

At the same time that the letter was handed to Miss O'Connell, Mr. Grange handed to her a bunch of securities, including the bonds above mentioned. He testified:

> "I gave them to her as the Hanford Investment Company. I deposited them with the Hanford Investment Company."

The witness also testified that he asked her to take care of them. He did not testify that she consented to do so, or that she made any promise to him, or entered into any agreement with him of or concerning the custody of the papers. About that same time, whether as part of the same transaction or a few hours afterwards, the witness testified:

> "When I went to Europe I gave the key to the drawer to Miss O'Connell. I don't know who got the key to the box. I gave it to somebody. It was not Mr. Tevis."

Whether preceding or following the conversation between Mr. Grange and Miss O'Connell does not appear; but, nevertheless, shortly before Mr. Grange left for Europe he executed a general power of attorney appointing Mr. W. S. Tevis his attorney in fact. The instrument is altogether broad and contains no restrictions or limitations. He also prepared a letter of even date therewith, which is as follows:

> "Mr. William S. Tevis, San Francisco, Calif. —Dear Sir: Inclosed herewith I am handing you my power of attorney which is absolute in form and detail. Should you have occasion to make use of the authority contained therein, I would ask that you act for me as you know I would were I here.
>
> "Any cash arising out of the sale of real estate deposit in a special account in some bank or banks in San Francisco, subject to my order and your own under the authority of the power of attorney.
>
> "Should the Union Land Company, that Hanford Investment Company, or any other of your subsidiary institutions desire to repurchase from me any of the lands I obtained from the Union Land Company, see that an adequate price is paid for lands so conveyed, either in cash or securities convertible at an early date; bearing in mind that I have still unliquidated paper outstanding in a very large amount for money borrowed for the benefit of yourself and Mr. Hanford.
>
> "Yours very truly, C. Grange."

Thereafter he delivered the power of attorney and the letter just quoted to Mr. W. S. Tevis.

Some time prior to his departure for Europe, among other financial transactions which the plaintiff conducted, was one with the defendant, the Judah Boas Company. The plaintiff called on that company and negotiated a loan for Mr. Tevis. He delivered to that company the promissory notes of Mr. Tevis and certain securities in pledge. During all of the times that we have mentioned the plaintiff had in his employ, as an accounting and financial agent, a Mr. Crook. Although Mr. Crook was the personal agent of Mr. Grange in Mr. Grange's office in the Merchants' National Bank building, he also attended him in the offices of the Hanford Investment Company, and whether Mr. Grange was in San Francisco or elsewhere, Mr. Crook acted as the personal representative of Mr. Grange.

After Mr. Grange had left San Francisco, the Judah Boas Company notified Mr. W. S. Tevis that additional securities should be deposited with it to protect that company from loss on the loan made to Mr. Tevis. Thereafter Mr. Tevis directed Mr. Crook to take out of the package of securities which Mr. Grange had handed to Miss O'Connell, the bonds in question, and also directed him to deliver the bonds to the Judah Boas Company. Mr. Crook did as he was directed, and in doing so he did not exhibit or mention to the appellant the existence of the power of attorney, or any one of the letters above set forth, or an instrument in writing evidencing a transfer. This suit was commenced to recover the amount of the alleged equity of the plaintiff in and to these bonds.

In his complaint the plaintiff alleged "that prior to the 11th day of April, 1914, there was delivered and pledged to plaintiff by the owner thereof, for the purpose of securing the payment to him of an indebtedness," etc., the bonds above mentioned. The second finding made by the trial court, and which is the only finding in response to the plaintiff's allegation, is as follows:

> "That prior to the 11th day of April, 1914, there was delivered and pledged to plaintiff by the Hanford Investment Company, for the purpose of securing the payment to plaintiff of a joint indebtedness of the said Hanford Investment Company, W. S. Tevis and R. G. Hanford, the above-mentioned bonds."

[1] From what we have quoted from the record it is patent that the Hanford Investment Company never made any pledge to the plaintiff. The most that can be said is that the record purports to show a pledge by the president of that corporation, but that officer merely by virtue of his office has no power to pledge the property of the corporation. Black v. Harrison Home Co., 155 Cal. 121, 99 Pac. 494; 14a C. J. p. 464, §§ 2321, 2322.

It is clear that the plaintiff entertained the opinion that Miss O'Connell became his confidential fiduciary agent to take and hold the bonds as against Mr. W. S. Tevis and the Hanford Investment Company. We think he is mistaken as to any rights flowing to him out of this feature of the case. In the first place, he does not state in his testimony that she agreed to so act; in the second place, she states most positively that she never entered into any such agreement; and, in the third place, she was the confidential agent of the Hanford Investment Company and of Mr. Hanford and of Mr. Tevis. The record is all one way to the effect that whatever conversation was held between Mr. Grange and Miss O'Connell, the same was not in the presence or hearing of Mr. Tevis or of Mr. Hanford, and was never brought to their attention. Under those circumstances, conceding that Mr. Grange had attempted to impose on Miss O'Connell a trust in his favor, adverse to the trust already imposed on her in behalf of her beneficiary, the Hanford Investment Company, such an attempted arrangement would be wholly illegal. Civ. Code, §§ 1992, 2230–2234. Mr. Grange never claimed to be the owner of the bonds. The most he ever claimed was a special property right based solely on the theory of a valid pledge by the Hanford Investment Company. There was no such pledge, and the second finding, therefore, is wholly unsustained by the evidence.

Mr. Grange returned from Europe about the 9th day of July, 1914. Almost immediately thereafter he was fully informed regarding the pledge of the bonds to the appellant. He testified that he made a demand on Judah Boas (now deceased), for the return of the bonds. He testified that he demurred to Mr. W. S. Tevis regarding the pledge of the bonds, and that he would proceed to recover possession of the bonds, and that Mr. Tevis stated that within a short time the United Light & Power Company would be financed, and that thereupon $75,000 would be paid to Mr. Grange. Both for the months of July and August of 1914 Mr. Grange paid to the appellant the interest on the obligation for which the bonds had been pledged. Furthermore, there was evidence to the effect that a short time after the plaintiff returned from Europe another demand for further security was made by the appellant. In response to that demand Mr. Grange attended at the office of the appellant, and appellant's officer showed him that there was a great depreciation in the securities which it held. Mr. Ben Boas testified:

> "At that time we went over the list of the securities that we had in our possession. He didn't claim any of the securities that we had belonged to him at that time."

The five bonds were deposited with the appellant in consideration of forbearance on appellant's part. The appellant did forbear. The plaintiff and the plaintiff's principal accepted and retained the consideration with full notice of all of the facts. Moreover, when with notice that his securities had been pledged for the debt of Mr. W. S. Texis, Mr. Grange thereafter attended at the office of the appellant and paid interest accruing subsequent to the date of the alleged unauthorized pledge, such acts on his part constituted evidence proving, or tending to prove, a ratification of the alleged unauthorized act. The appellant pleaded ratification as a defense. True it is that the defense, as pleaded, might have been subject to a demurrer as not being properly pleaded; but no demurrer was interposed. A reading of the record shows that the case was tried on the theory that the defense had been sufficiently pleaded. The trial court should have made a finding on the issue. However, there is no finding that purports to cover the subject.

The appellant makes many other contentions, but in view of what we have said we do not find it necessary to take up and consider other points made in the briefs.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court Denying Hearing.

PER CURIAM. Upon petition to have the above-entitled cause heard and determined by this court after judgment in the District Court of Appeal of the First Appellate District, Division 2.

[2, 3] For the purposes hereof the validity of the following contentions urged by respondent in support of this application may be conceded: That there was a valid pledge of the bonds in question from the Hanford Investment Company to plaintiff; that the bonds were not negotiable instruments under the law in effect at the time of their issuance; that the defendant did not forbear or agree to forbear, in consideration of the pledge of the bonds to it; that there was no ratification by plaintiff of the act of Tevis in pledging the bonds to defendant. Nevertheless the defendant, having received the bonds in good faith in the ordinary course of business, as security for a pre-existing debt, became thereby a holder for value. Smitton v. McCullough, 182 Cal. 530, 537, 538, 189 Pac. 686, and cases there cited. The plaintiff by his power of attorney to Tevis expressly authorized the latter "* * * to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with * * * choses in action and other property in possession or in action." Therefore Tevis, in hypothecating the bonds to defendant for his benefit, is not to be regarded in law as a thief who stole them, but as an agent who, while violating his obligation to his principal, was nevertheless acting in the course and within the scope of his agency. The case is thus brought within the rule that—

> "One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it, cannot set up his own title, to defeat a pledge of the property, made by the other, to a pledgee who received the property in good faith, in the ordinary course of business, and for value." C. C. § 2991.

This rule is but an application of the equitable doctrine of estoppel, one of the expressions of which is found in the maxim that—

> "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." C. C. § 3543; National Bank of San Mateo v. Whitney, 181 Cal. 202, 205, 183 Pac. 789, 8 A. L. R. 298; Brittan v. Oakland Bank of Savings, 124 Cal. 282, 289, 57 Pac. 84, 71 Am. St. Rep. 58.

For these reasons, the judgment of the trial court in favor of the plaintiff was properly reversed, and the petition is therefore denied.

WILBUR, C. J., and LAWLOR, LENNON, WASTE, SEAWELL, KERRIGAN, and MYERS, JJ., concur.

60 Cal. App. 670

FLYNN et al. v. FINK et al. (Civ. 4073.)

(District Court of Appeal, Second District, Division 1, California. Feb. 2, 1923.)

1. Trial 🔑5—Duty of court to insist upon cases being heard as promptly as possible.

It is the duty of the trial judge, in the absence of some weighty reason to the contrary, to vigorously insist upon cases being heard and determined with as great promptness as the exigencies of the case will permit.

2. Attorney and client 🔑75(1)—Litigants have not absolute right to change of counsel if it necessitates a continuance.

Litigants have not an absolute right to insist upon a change of counsel where such a change requires a continuance in order that the case may be properly prepared for trial.

3. Continuance 🔑7—Largely, if not entirely, at discretion of judge.

The granting or denial of a motion for continuance rests largely, if not entirely, within the discretion of the judge.

4. Continuance 🔑20(3)—Denial of held not abuse of discretion.

Where it appeared that counsel, of whom there were two in the firm at the time of accepting defendants' case, being substituted for the attorney of record five days before the case was set for trial, knew that another trial in which they were engaged would not end in time to allow them to appear for defendants, *held*, that a denial of a continuance by the court was not an abuse of discretion.

5. Appeal and error 🔑966(1)—Continuance 🔑7—Duty of trial judge to work out justice; his action within sound discretion final.

On a motion for continuance, it is the duty of the trial judge, which the law presumes he will faithfully perform, to work out justice, and his action in the exercise of a sound discretion is final, and cannot be disturbed.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Action by William A. Flynn and another, copartners doing business under the firm name of the Venice Sanitary Plumbing & Sheet Metal Works, against D. Fink and others, copartners doing business under the firm name of the Venice Barbecue Meat Company. From judgment for plaintiffs, defendants appeal. Affirmed.

Smith & Breslin, of Los Angeles, for appellants.

Dennison & Towner, of Los Angeles, for respondents.

HOUSER, J. The matter before the court on this appeal from the judgment arises out of the refusal by the judge of the lower court to postpone the date of trial. The facts are as follows: On July 7, 1921, the action was set for trial on the 1st day of December of the same year. On November 26, 1921, which would be five days before the date for the trial of this case, the firm of Smith & Breslin was substituted as attorneys for defendants, but the notice of substitution was not served on the attorneys for plaintiffs until the 30th day of November. On the day when the case was set for trial, to wit, December 1st, the attorneys representing defendants moved for a continuance without first having given the attorneys for plaintiffs any notice of their intention so to do. When the case was called for trial at 10 o'clock a. m., the reason given to the court for the continuance was that the attorneys representing defendants were then engaged in the trial of an action in another department of the superior court; that the case in which they were then engaged had been on trial for a considerable time and would in all probability last a period of a week or ten days longer. On being interrogated by the court, Mr. Smith, of the firm of Smith & Breslin, stated that his firm was engaged in the case on trial in the other department at the time they were substituted as attorneys for defendants, and that they knew at the time of the substitution that they would not be able to conclude the case that was then on trial in the other department by the date set for the case in which a continuance was sought. The court temporarily denied the motion, but continued the case until 2 o'clock p. m. on the same day, at which time attorneys for defendants again appeared in court and filed a formal motion and affidavit for continuance, which motion was denied by the court, and defendants and their counsel thereupon left the courtroom. Evidence was then introduced on behalf of plaintiffs, and judgment was ordered in their favor and against defendants in the sum prayed for in the complaint.

[1] It cannot be said that one party to an action has any greater right than the other party thereto with reference to the time within which the cause is to be determined. The plaintiff, if he be entitled to a judgment as a matter of justice, is usually very anxious that a speedy trial be had; while in the same circumstances the defendant, knowing, or at least believing, that his case is desperate, and that he is fighting in a matter that cannot but end disastrously as to himself, is just as desirous of postponing the inevitable. On the other hand, where the facts are in dispute or the law uncertain, and consequently an even chance of success exists as to either party, the defendant may wish for the end of the controversy equally with the plaintiff. But the plaintiff and the defendant are not the only interested parties. The court itself, representing as it does an arm of the government in its service of the public, has a right to demand that there be orderly, prompt, and effective disposition of litigation. If cases

or proceedings of any sort be permitted to drag by reason of successive continuances, the calendars of the courts will become crowded and congested. Lawyers, litigants, and witnesses will be inconvenienced by reason of the inability of the courts to hear cases on the day on which they may be set for trial with the result that in meritorious instances cases actually ready for trial will not proceed, and the various interested parties will be obliged to return to court on another or perhaps a third or fourth continuance before the action may be determined—all of which often means great loss and hardship to the parties to the action, as well as to witnesses therein. Another consequence which may frequently appear is that, with knowledge of the fact that successive continuances may be had, the lawyers on either side may fail to properly prepare for trial either in matters of law or as to the production of witnesses by whom the facts are to be established, in which event the administration of justice may be greatly embarrassed or hindered, if not altogether thwarted. It therefore becomes and is a part of the bounden duty of the trial judge, in the absence of some weighty reason to the contrary, to vigorously insist upon cases being heard and determined with as great promptness as the exigencies of the case will permit.

[2] Parties litigant have no absolute right to insist upon a change of counsel at the last moment before the time set for the commencement of the trial, where such change of counsel requires a continuance in order that the case may be properly prepared for trial. Such a course, if permitted and if persisted in, might and probably would in many cases work the destruction of private rights of the opposing litigant and would be subversive of the "prompt administration and execution of the laws, upon which depends largely their effectiveness." There are many California cases dealing with the question presented on this appeal.

[3] It has been almost universally held that the granting or denial of a motion for continuance rests largely, if not entirely, within the discretion of the judge before whom the motion may be made. In Baumberger v. Arff, 96 Cal. 262, 31 Pac. 53, a motion for continuance was made on the ground of the absence of the attorney who was then engaged in the trial of a case in another court. In the course of the opinion the court said:

> "The plaintiff did not have an absolute right to a continuance because of the absence of his attorney, but the motion was one which was to be disposed of in the sound discretion of the court, and in view of all the circumstances then made to appear."

In Haight v. Green, 19 Cal. 113, it was held that, where an attorney who was engaged to conduct the defense, but who for two or three days previous to the date fixed for the trial had been engaged as counsel in another case, and consequently was not present when the appealed case was called for trial, "the discretion of the court below cannot be reviewed in its refusal to set aside the judgment for the cause assigned—the absence of the attorney at the time of trial." In the criminal case of People v. Collins, 75 Cal. 411, 17 Pac. 430, it was held that—

> "The defendant's motion for a continuance on the ground that his counsel had been unable, in consequence of another and prior engagement, to make due preparation for the trial of defendant's case, was one which addressed itself to the sound discretion of the court below, and ought not to be interfered with unless we could see clearly that there had been an abuse of discretion."

And in another criminal case, where one of defendant's counsel was engaged in a civil case in another department of the superior court, it was said:

> "To hold that a defendant charged with crime has an absolute right to counsel of his own selection, with unlimited right to insist upon continuances of his trial, and that the court, jury, and witnesses must await the convenience of his counsel in fulfilling other engagements, would be subversive of the prompt administration and execution of the laws—upon which depends largely their effectiveness—and subject the time and service of citizens serving the state gratuitously, as jurors and witnesses, to the wishes and interest of the attorney engaged in the defense." People v. Goldenson, 76 Cal. 341, 19 Pac. 167.

And see, also, the following cases: Musgrove v. Perkins, 9 Cal. 212; People v. De Lacey, 28 Cal. 590; Kern Valley Bank v. Chester, 55 Cal. 49; People v. Warren, 130 Cal. 678, 63 Pac. 87; Peachy v. Witter, 131 Cal. 319, 63 Pac. 468; Estate of Kasson, 141 Cal. 33, 74 Pac. 436; Sheldon v. Landwehr, 159 Cal. 780, 116 Pac. 44; Abrook v. Ellis, 6 Cal. App. 451, 92 Pac. 396; Boehm v. Gibson, 4 Cal. Unrep. 483, 35 Pac. 1014.

[4] In this case plaintiffs sought compensation on account of labor performed and materials furnished. The affidavit submitted on the motion shows that at the time they were retained counsel for defendants fully understood the situation with reference to the nature of the action, as well as to the time the case was set for trial, and of course were familiar with their own engagements. There were two members of the firm of attorneys for defendants, and it is not beyond the realm of reason to infer that one of them might well have been spared from the case in which they were engaged in trial long enough to properly present the defense in the instant case.

[5] On a motion for a continuance of the trial of a case it is the duty of the trial judge, which the law presumes he will faithfully perform, to work out the justice of the situation; his action in the exercise of a

sound discretion is final and cannot be disturbed. Nothing appears in this case to indicate that the judge before whom the action was tried was not earnestly endeavoring to do his full duty in the premises. There was no abuse of discretion.

The judgment is affirmed.

I concur: CONREY, P. J.
I concur in the judgment: JAMES, J.

60 Cal. App. 644

MARBLEHEAD LAND CO. et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 4143.)

(District Court of Appeal, Second District, Division 2, California. Jan. 31, 1923.)

1. Eminent domain 🔑264—Service of writ unnecessary where officers acting under suspended orders giving possession knew thereof.

Where state officers constructing a highway under orders giving possession of land to be condemned before the final decree was entered knew of the issuance of a writ of review which contained the provision authorized by Code Civ. Proc. § 1071, requiring the parties to desist from further proceedings in the matter under review, it was immaterial that they had not been formally served with a duly authenticated copy of the writ.

2. Eminent domain 🔑264—Highway officers in possession under order pending condemnation are "persons acting under the orders."

State officers who have entered upon premises sought to be condemned for highway purposes and are constructing the highway thereon after an order had been entered giving the right to such possession on deposit of security before the decree ascertaining the damages are "persons acting under the orders" giving possession so as to be subject to the provision in a writ of review prohibiting such persons from so acting until the final determination of the writ.

3. Eminent domain 🔑187—Court has jurisdiction and control over property in possession of condemnor before decree.

Where possession of premises sought to be condemned for a highway is granted in accordance with Const. art. 1, § 14, as amended in 1918, upon the deposit of proper securities for the payment of compensation which may be awarded by the final decree, the property is in the possession and control of the court to the same extent as personal property impounded by it to await the outcome of a suit, and the court has power to regulate such control.

4. Eminent domain 🔑187—Possession not ordered unless security deposited is sufficient.

Under Const. art. 1, § 14, as amended in 1918, requiring the plaintiffs in a condemnation suit to give such security as the court may direct in such amounts as it may determine to be reasonably adequate to secure to the owner the immediate payment of just compensation, defendant cannot be deprived of the possession and use of his property unless the deposit of money be made and maintained under the orders of the court at such an amount as will adequately secure to him the payment of the compensation found by the decree of condemnation to be just.

5. Eminent domain 🔑187—Acts in constructing highway under order for possession before decree are "proceedings" under that order.

Acts by the state highway officers in constructing a highway upon property sought to be condemned under orders giving possession of the property before final decree are proceedings under the orders giving possession, since a proceeding in court is an act done by the authority or direction of the court, express or implied.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proceeding.]

6. Certiorari 🔑47—Persons not parties to proceedings for review may be punished for violating supersedeas.

Under Code Civ. Proc. § 1070, authorizing writ of review to be directed to the inferior tribunal, board, or officer whose proceedings are sought to be reviewed, so that persons acting under the orders which are sought to be reviewed are not parties thereto, it would be impossible to enforce the order superseding the proceedings under the orders sought to be reviewed inserted in the writ as authorized by sections 1071 and 1072 if proceedings for contempt were limited to the parties to the writ of review, and therefore any persons violating the supersedeas order may be punished for contempt, though not parties to the writ of review.

7. Contempt 🔑72 — Officers acting in good faith under advice of counsel not substantially punished.

Where the officers of the state highway department acted in good faith under advice of counsel in proceeding with the construction of a highway under orders giving possession in condemnation proceedings, notwithstanding a writ to review such orders, only a nominal punishment need be imposed upon them.

Petition by the Marblehead Land Company and others against the Superior Court in and for the County of Los Angeles and Frank R. Willis, a Judge thereof, for writ of supersedeas and for an order punishing A. B. Fletcher and others for contempt of court in violating a writ of review. Motion for supersedeas denied, and Fletcher and others adjudged guilty of contempt.

Grant Jackson, Nathan Newby, and Newby & Palmer, all of Los Angeles, for petitioners.

Lorrin Andrews, of Los Angeles, for A. B. Fletcher, N. D. Darlington, C. A. Whitmore, and G. C. Mansfield, persons sought to be punished as for a contempt of court.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Lorrin Andrews, of Los Angeles, for respondents.

WORKS, J. The two matters now awaiting our disposition arise out of an application for a writ of review, and the title above set forth is the title of the proceeding for review. In order that our ruling upon the two specific matters which now engage our attention may be thoroughly understood, it will be necessary for us to state with some particularity the questions of fact and law which are involved in the original proceeding for the writ of review.

The present Constitution of California has always contained a provision to the effect that—

> "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation, other than municipal until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law." Const. art. 1, sec. 14.

In fact, this language was the entire text of the section as originally adopted. In 1911 the section was amended in a respect which is not of moment in the present litigation. In 1918 a second amendment was adopted. This amendment opens with the original text as above set forth, the time-honored language being followed immediately by these provisions:

> "Provided, that in an action in eminent domain brought by the state, or a county, or a municipal corporation, or a drainage, irrigation, levee, or reclamation district, the aforesaid state or political subdivision thereof or district may take immediate possession and use of any right of way required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposits as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings."

The section now stands as it was amended in 1918.

On December 13, 1922, the people of the state of California, by the department of public works of the state of California, as plaintiff, filed complaint in eminent domain with respondent superior court. All the petitioners before us for the writ of review were defendants in that action, as were also county of Los Angeles, Reider-Haag Company, a corporation, and eight fictitiously named persons. By the complaint the plaintiff in the action sought to condemn a right of way 19 miles in length for a state highway across that extensive tract of land familiarly known as the Rancho Malibu. After the filing of the complaint, and upon motion to that end, respondent superior court made its two certain orders in the action, each dated December 13, 1922. The first of these, after reciting the fact that the complaint had been filed, and various other matters, including a description of the right of way sought to be condemned, ordered "that the plaintiff * * * deposit in" a certain named bank "the sum of $32,180 in a savings account on interest, which sum is to be placed in a special deposit to be paid out only upon the order of the court herein, and to be held as security for payment to the owner or owners of the property sought to be taken as just compensation for the taking of the parcel of land, and any damage incident thereto, including damages sustained by reason of any adjudication that there is no necessity for taking the property as soon as the same can be ascertained according to law," and also "that upon satisfying the court that such deposit has been made in accordance with this order the said plaintiff shall be given an order by the court authorizing it to take immediate possession and use of the right of way hereinabove referred to, and described." The second order, after reciting that it satisfactorily appeared to the court that the deposit required by the first order had been made, was to the effect "that the said plaintiff, the state of California, may take immediate possession and use of the right of way described in the complaint and in said order, and which said right of way is described, as follows: [Here followed a description of the right of way.]" It is these two orders which are the subject of the application for the writ of review, and, as we have already remarked, the writ issued.

Section 1071, Code of Civil Procedure, is in part as follows:

> "The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, * * * a transcript of the record and proceedings * * * that the same may be reviewed by the court; and requiring the party, in the meantime, to desist from further proceedings in the matter to be reviewed."

Section 1072 of the same enactment provides:

> "If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ; these words may be inserted or omitted, in the sound discretion of the court, but if omitted, the power of the inferior court or officer is not suspended or the proceedings stayed."

Following the mandate of these sections the writ of review which issued in the present instance was in the usual form prescribed by section 1071, containing at its close the clause:

> "And in the meantime we command and require the said respondents, and all persons acting under said orders, to desist from further proceedings in the matter so to be reviewed."

[1] We come now to a more direct consideration of the two matters which are the subject of our present inquiry. Soon after the filing of the complaint in the condemnation action and the making by the superior court of the two orders above mentioned, and pursuant to the terms of the second of those orders, certain officers of the state acting either directly or through employees of the state or of some of its departments, entered into possession of the real property covered by the right of way described in the complaint and in the orders. That possession they have maintained ever since. These officers are A. B. Fletcher, chief of the division of highways of the state of California, and N. D. Darlington, C. A. Whitmore, and G. C. Mansfield, members of the California highway commission. While the writ of review was not technically served upon these four officers, they were each made acquainted with its contents, and such admissions of service and such stipulations have been made between the various parties that it is to be deemed by us that a service of the writ was in due form made upon each of them. In other words, they are before us exactly as if formal delivery of a duly authenticated copy of the writ had been made to each of them. We shall hereafter, for convenience, therefore speak as if service had actually been made upon them. What the effect of that service was, it becomes our duty to determine.

Immediately after taking possession of the right of way the four officers began the construction of the proposed highway across the Rancho Malibu and along the proposed right of way, and they continued with the work after service upon them of the writ of review. In the prosecution of the labors incident to the construction, probably before and certainly after the service of the writ, they removed parts of the soil from place to place and effected a substantial disturbance of the surface of the country. In short, they proceeded with the work of grading necessary to an installation of the highway, making the cuts and fills incident to the prosecution of a work of that nature. Thereupon petitioners presented to this court an affidavit showing the character of the operations being conducted upon the property and asked the issuance of an order to show cause why the four officers should not be punished as for a contempt of court in violating the order for a stay of proceedings which was incorporated in the writ of review. The order to show cause was issued. To it the officers make return that they are advised by their counsel that they have the right to proceed with the construction of the highway in question, and, in effect, that it is their duty to do so, notwithstanding the clause for a stay of proceedings. Whether they are guilty of a contempt of this court is the first of the two questions to which we have referred as awaiting our disposition.

[2] As the writ of review required, in part, that "all persons acting under" the orders made by respondent court "desist from further proceedings in the matter" sought to be reviewed, it is at once apparent that a great part of our labor will be to determine whether, in carrying on the work of grading for the highway, the four state officers are acting under respondents in the matter to be reviewed. We are of the opinion that this question must be answered unfavorably to the position of the officers. It appears to us that the possession of the right of way is in respondent court, and that it will be so until the rendition of decree by that tribunal in the condemnation suit. It may not be strictly correct to say that respondent court has impounded the real property over which the proposed right of way is to pass, or has impounded the right of way itself, for the use of the word "impound," as related to judicial procedure, is usually, if not invariably, descriptive of the act or process by which a court takes possession, pending the conclusion of a litigation, of money or other personal property in controversy. Nevertheless it appears to us that under the provisions of the Constitution to which we have referred respondent court, since the making of the two orders which petitioners seek to review, in effect occupies the same position as to this real property, or as to the right of way, as does an impounding court toward the personal property which it has seized. If these views be correct, it at once follows that the state officers are acting, before decree in the condemnation suit, under respondent court as to everything they do in and about the "impounded" real property or right of way. If our views are correct, it at once also follows that the officers are acting, at least before such decree, in the matter sought by petitioners to be reviewed.

[3] We shall now state the arguments which

have led us to the views above expressed. It will be observed, from a general survey of the language of the Constitution providing for the exercise of the right of eminent domain, that there was by the amendment of 1918 no attempt to authorize a taking for public use prior to condemnation decree. The order provided for by the section can neither advance nor retard the ultimate taking. The organic law merely allows to a would-be condemnor the "possession" and "use" of the land or right of way sought to be taken finally by the decree of condemnation. The nature and extent of this possession and use and the manner in which they may be controlled are ascertainable upon a more specific consideration of the language of the Constitution. The "use" allowed under the section plainly contemplates, in a given case, the prosecution of a public improvement even to completion, if sufficient time for that outcome shall elapse between the date of the order allowing possession and use and the date of decree of condemnation. Can it be possible that under such circumstances the "use" of property of which possession is taken under an order of court can be exercised by the possessor in an unbridled manner and without interference or control by the court making the order? Suppose in the present instance that those who represent the state in the construction of the highway should by mistake depart from the lines of the right of way described in the proceedings for condemnation and should prosecute the construction of the road over parts of petitioners' property not covered by the right of way really intended to be taken. Suppose that by mistake, or through bad engineering, they should construct a culvert over some waterway with an aperture so small that it could not carry the waters of the stream in time of storm, thus entailing a certainty of the flooding of property of petitioners outside the right of way, with the damage naturally consequent upon such an event. Suppose that, during the work of construction, by mistake or otherwise, they should occupy and commit waste upon property of petitioners outside the lines of the right of way. Can it be possible that in case of any of these eventualities it would not be within the jurisdiction of respondent court, upon the motion of defendants in the condemnation suit, and at any time before condemnation decree, to require the officers of the state to administer properly the "use" allowed by the court's order granting possession and use? It is well settled, of course, that after final decree in the ordinary condemnation suit a defendant may protect his property from or collect damages for such invasions or harmful acts as we have supposed may be committed in the present instance. We cite authorities to various principles of law which bear more or less directly upon this assertion. A voluminous array of cases is appended in an encyclopedic work to the statement that—

> "As a general rule, except where an exclusive remedy has been provided by statute, the owner of property appropriated or injured for a public use without just compensation having been made may maintain an action at law for the damages sustained thereby." 20 C. J. 1162.

Where one owns land abutting upon a public improvement, he may recover for such damages caused to his property by the making of the improvement as are over and above those suffered by him in common with the general public. Eachus v. Los Angeles Ry. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; Smith v. Southern Pac. R. Co., 146 Cal. 164, 79 Pac. 868, 106 Am. St. Rep. 17; Sievers v. Root, 10 Cal. App. 337, 101 Pac. 925; Hunt v. Manning, 24 Cal. App. 44, 140 Pac. 39; Fairchild v. Oakland & Bay Shore Ry. Co., 176 Cal. 629, 169 Pac. 388. If a railroad company enters upon land and constructs its road before commencing condemnation proceedings, the owner of the land may recover damages for the trespass. Robinson v. Southern California Ry. Co., 129 Cal. 8, 61 Pac. 947. If one who is engaged in the construction of a line which is to be employed in the administration of a public use appropriates or commits waste upon lands outside the right of way which has been granted to or which has been condemned by him, the owner of the invaded lands may recover damages for the injury resulting. Phillips v. American Tel. & Tel. Co., 71 S. C. 571, 51 S. E. 247; 20 C. J. 1164. Where the public authorities engage in the construction of a public improvement and by mistake place the structure upon private lands, the owner may recover compensation for the taking of his property, or for the damages to it, in an appropriate action. Tyler v. Tehama County, 109 Cal. 618, 42 Pac. 240. When one exercising the right of eminent domain appropriates a right of way wider than that allowed by law, the owner of the excess may recover it in an action of ejectment. McKennon v. St. Louis, etc., Ry. Co., 69 Ark. 104, 61 S. W. 383; Pfaender v. Chicago & N. W. Ry. Co., 86 Minn. 218, 90 N. W. 393; 20 C. J. 1156. Where a concern enters upon land not covered by the grant or condemnation of a right of way, for the purpose of constructing a line or plant to be used in the administration of a public use, the owner of the unlawfully occupied property may maintain trespass. 20 C. J. 1166. If a public improvement is constructed in a negligent manner, and the land of an abutting property owner is thereby damaged, he may recover for the damage done. De Baker v. Southern California Ry. Co., 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237; 20 C. J. 1165. Where one seeking to exercise the right of eminent domain attempts to enter upon the land sought to be condemned before the amount of compensation to be made is ascertained and paid, the entry may be prevented by injunction. Grigsby v. Burtnett, 31 Cal. 406. "An owner may by injunction restrain the taking or injury of property not covered by the condemnation proceedings." 20 C. J. 1171. The rights of one whose property is taken or damaged after condemnation decree, or without such decree, being thus plainly stated, what are his rights before condemnation decree in such a situation as the present? Respondent court necessarily will have full jurisdiction of the condemnation suit now before it until decree rendered. It will then make disposition of the right of way sought to be acquired by the plaintiffs. Can it be that, in the meanwhile, by a mere interlocutory order for possession and use of the land covered by the right of way, it has placed the plaintiffs in such a position that they may deal with the land itself as they please and without the control or interference of the court? We think not. It is plain to us that the continuing jurisdiction of respondent court over the condemnation suit, existent until condemnation decree, includes a jurisdiction to control the possession and use of the land by plaintiffs under the orders made pursuant to the provisions of the Constitution. In a further analysis of those provisions we shall present additional reason for this view.

[4] It is to be observed that, as a prerequisite to the making of an order for possession and use, the Constitution provides that the plaintiffs in a condemnation suit shall give "such security in the way of money deposits as the court * * * may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner * * * immediate payment of just compensation * * * as soon as the same can be ascertained according to law." It is certain that, when such money deposits are made and the consequent order for possession and use follows, the court making the order has exclusive control of the money deposited. The cash is to be deposited merely as security for the immediate payment of compensation when the amount of compensation is ascertained. For the time being neither the plaintiff nor the defendant has any right to the possession of it, and neither may exercise any control over it. If the compensation is not paid by the plaintiff to the defendant immediately, or perhaps within a reasonable time, after the amount to be paid is finally ascertained, then the court must make some order transmuting the money deposited from security into payment; that is, the cash must by appropriate order be turned over to the defendant. If the compensation be promptly paid by the plaintiff, then the court, perforce, must order the cash to be returned to the plaintiff. The money is undoubtedly in the possession and control of the court until condemnation decree, and perhaps until a reasonable time thereafter. Does it not legitimately follow that during a like period the court holds and may exercise a reciprocal control over the land included in the order for possession and use and embraced within the limits of the right of way sought to be taken? We think it does.

The language of the Constitution immediately following that just quoted is most significant:

> "The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings."

Suppose that in a given action in which an order for possession and use had been made the defendant should become convinced that the amount of security was inadequate and should move for an increase under this provision. Suppose that after due consideration the court should order the increase, and the plaintiff should refuse to make deposit of the added amount. It is too plain for words that in such an event it would become the immediate duty of the court to order that the possession of plaintiff should cease, that his use of the land should terminate, and that the defendant should resume the interrupted possession and control of his property. A court cannot in the first instance make its order for possession and use until an amount of money fixed by it as adequate security has been placed under the court's control. Under the sentence of the Constitution now under examination a court surely could not permit the possession and use to continue if the security became and, after order for its increase, were allowed to remain inadequate. Taking the entire provision of the Constitution on the subject, it is obvious that a defendant cannot be deprived of the possession and use of his property unless the deposit of money be maintained, under the orders of the court, at such an amount as will adequately secure to him the payment of the compensation found by the decree of condemnation to be just.

Let us take another view of the sentence quoted from the Constitution in the paragraph immediately preceding the present one. Suppose again that a defendant, the possession and use of whose property had been ordered to the plaintiff, should ask the court for an order to show cause why the amount of deposited security should not be increased. Suppose the showing made by the defendant in support of his application were so strong that it appeared to the court that it might be necessary to order the security increased in a large amount. Can it be possible under such circumstances that the court, upon an application to that end, could not direct that the "use" of the plaintiff under the order for possession and use should cease pending the hearing on the order to show cause? It appears to us to be plain that such a jurisdiction would necessarily exist under the broad principles of equity and under the constitutional guaranties incident to the taking of private property under the right of eminent domain.

[5] For the foregoing reasons it seems to us that respondent court has in effect "impounded" the real property covered by the proposed right of way, and that the four officers of the state, in exercising the "use" authorized by respondent court, are acting under the court, and that their acts are proceedings under the orders desired by petitioners to be reviewed by this court under their petition for the writ of review. In other words, we conclude from what has been said above that the four officers are guilty of a contempt of this court. We do, in addition, however, cite some general authority upon the question as to what matters constitute or are a part of proceedings in an action or under an order or a judgment of a court. In doing so, however, we shall notice but a few of the many cases on the subject which are pointed out to us by petitioners. In applying a provision of the Revised Statutes of the United States inhibiting injunctions by federal courts against "proceedings in any court of the state," it was determined that a sale of land by a sheriff under an execution issued by a state court was a proceeding in the court. The tribunal which passed upon the question, laying aside for a moment the words of the federal statute, said that—

> "The act, however tortious, of an executive officer of a court, done under color of its process, is to be regarded as a 'proceeding' of that court, which comity and public policy require courts of concurrent jurisdiction not to interfere with by injunctive or dispossessory process."

The court then held that this rule of comity and public policy was conclusive in construing the federal statute. American Association v. Hurst, 59 Fed. 1, 7 C. C. A. 598. In another case a federal court approved the language of an earlier decision to the effect that—

> "This term 'proceedings' may properly, and, I think, must necessarily, include all steps taken by the court or by its officers, under its process, from the institution of the suit until the close of the final process of execution which may issue therein." Marblehead Land Co. v. Los Angeles County (D. C.) 276 Fed. 305.

The Supreme Court of this state, in Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332, approved the following quotations from other cases:

> "The word [proceeding] is generally applicable to any step taken by a suitor to obtain the interposition or action of a court. * * * The term 'proceeding' is generally applicable to any step taken by a party in the progress of a civil action. Anything done from the commencement to the termination is a proceeding."

It was said in Burns v. Superior Court, 140 Cal. 1, 73 Pac. 597:

> "The word 'proceeding' necessarily has different meanings, according to the context and the subject to which it relates. * * * In section 473 of the Code of Civil Procedure, and in similar statutory provisions of other states, it has a broader signification [the court, under circumstances stated earlier in the opinion, having attributed a narrow meaning to it], and includes any step taken in a case, whether by the court or by one of the parties thereto. [Citing cases.] 'In its more general sense, in law, it means all the steps or measures adopted in the prosecution or defense of an action.' [Citing cases.] In Anderson's Law Dictionary, p. 816, it is defined thus: 'A proceeding in court is an act done by the authority or direction of the court, express or implied.'"

A consideration of these authorities affords an added justification for the views which we have already expressed, for it is plain from them that the four officers, in administering the "uses" allowed under the order of respondent court, are conducting "proceedings" under that order. They come within the two decisions of the federal courts for the reason that under the provisions of the Constitution, as we have analyzed them, the officers are in effect but the agents of respondent court in the administration of the use. They are to our minds as well within the broad lines of the quotations approved by the Supreme Court, and especially within the definition taken from Anderson's Dictionary of Law.

[6] The four officers make some points which are in effect covered by what we may have said already, but one of them seems, in addition, to merit some specific attention. After the extended discussion which we have bestowed upon the really controlling question in the case, however, we shall be brief in our treatment of the particular point now in question. It is contended that the officers may not be punished for a contempt because they are not parties to the proceeding for review. If that were so, no one could ever be punished for a violation of the terms of the supersedeas which may incontrovertibly be made part of a writ of review under sections 1071 and 1072, Code of Civil Procedure, with the single exception of cases in which the proceedings to be reviewed were those of an "officer." It is provided that—

> "The writ may be directed to the inferior tribunal, board, or officer [whose proceedings are sought to be reviewed], or to any other person having the custody of the record or proceedings sought to be certified." Code Civ. Proc. § 1070.

Where the respondent is a court or a board, the writ should not be directed to the judge of the court nor to the members of the board.

4 Cal. Jur. tit. Certiorari, § 60, and notes. Individuals who are not named in writs of injunction are frequently punished for a violation of their terms. It is necessary only that they should have acted as the agents of persons named in a writ of injunction and should have had knowledge of its existence and terms. Such, we apprehend, is the situation of the four state officers here.

The officers cite many authorities in opposition to the views which we have expressed. It will be found, however, that the cases cited by them fall into two classes: First, those in which the writ of review contained no supersedeas clause and in which the only point involved was whether the writ, without such a clause, had any effect as a supersedeas; and, second, those in which an attempt was made by writ of review, either with or without supersedeas clause, to annul or vacate some act which had been completed under the order desired to be reviewed. This case falls in neither of those classes.

[7] Although we have reached the conclusion that the four officers of the state are guilty of a contempt, we are of the opinion that their punishment should be but nominal. In exercising the "use" of the property covered by the proposed right of way, they have acted in good faith under the advice of their counsel, and in the belief that they were not within the inhibition of the supersedeas clause of the writ of review. Under all the circumstances of the case it is more important that the four officers be furnished, through this expression of our views, with a guide for their future conduct, than that they be subjected to any substantial punishment for contempt.

We now mention the second of the two questions to which we referred early in this opinion. Petitioners ask that we now issue a supersedeas to prevent the agents of the state from acting further, and until the termination of the proceeding for review, under the "use" allowed by the order of respondent court authorizing the possession and use of the land covered by the proposed right of way. This motion was made out of an abundance of caution and in view of the possibility that we might determine that the four officers were not within the supersedeas clause of the writ of review. The motion falls to the ground because of the conclusion we have reached as to the effect of the supersedeas clause.

It is ordered that A. B. Fletcher, N. D. Darlington, C. A. Whitmore, and G. C. Mansfield be, and each of them hereby is, adjudged guilty of a contempt of this court, and each of them hereby is ordered to pay a fine of $10 because thereof. The motion for an injunction or supersedeas is denied.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

60 Cal. App. 594

FAURE v. DROLLINGER et al. (Civ. 3827.)

(District Court of Appeal, Second District, Division 1, California. Jan. 25, 1923. Hearing Denied by Supreme Court March 26, 1923.)

1. Judgment 🔑252(2)—Where answer is filed, general relief may be granted as to either or all the defendants within issues, regardless of the prayer for relief.

In view of Code Civ. Proc. § 580, where an answer is filed in a case even where there are many defendants, the plaintiff's relief is not limited as to any given defendant, either to what he has asked for in his prayer for relief as against such defendant, or as to either or all the other defendants; but such relief may be granted to any party to the action as may be justified by the facts in a case provided such facts are embraced within the issues.

2. Judgment 🔑358—Form of pleading in claim and delivery held not to mislead defendant to his prejudice.

In claim and delivery, the fact that the complaint merely consisted of a statement of the facts constituting the cause of action in ordinary and concise language, together with a demand for relief, and did not formally set up the cause of action in claim and delivery, did not mislead defendant to his prejudice, within Const. art. 6, § 4½, providing that no judgment shall be set aside for errors in pleadings unless resulting in a miscarriage of justice.

3. Replevin 🔑93—Findings held to conclude defendant's contention that plaintiff was without equity.

In an action of claim and delivery for a motor truck purchased by plaintiff but delivered by defendant to another, a finding that representations had been made by another defendant to defendant that the person to whom the truck was delivered had no interest therein, and that plaintiff, when he paid his money, had no knowledge of any claim of such person to the truck or of any interest therein, when considered in connection with the pleadings, *held* to show that defendant was concluded in regard to his contention that plaintiff was without equity.

4. Replevin 🔑69(3)—Finding as to payments to defendant held embraced within issues.

In an action of claim and delivery for a truck purchased and partly paid for by plaintiff, but delivered by defendant to another, a finding that plaintiff had paid to a third person for defendant's benefit a certain amount was merely evidentiary of payment to defendant himself, and would be included within a general allegation of so much money paid by plaintiff to defendant, and therefore was embraced within the issues.

5. Appeal and error 🔑1071(5)—Erroneous findings on immaterial facts not sufficient to disturb judgment.

Findings on immaterial facts, although erroneous, are not sufficient to disturb a judgment.

6. Appeal and error 🔑1071(1)—Trial 🔑404 (1)—That findings of fact state conclusions of law or are not clearly conflicting will not reverse.

Findings are to be read and considered together, and, if possible, are to be reconciled so as to prevent any conflict on material points, and, unless the conflict is clear and the findings incapable of being erroneously construed, the judgment will not be reversed on the ground of a conflict in the findings, and the same is true of findings which, instead of being strictly confined to matters of fact, stated conclusions of law.

7. Trial 🔑394(1)—Statutory requirement that facts and conclusions of law must be separately stated held directory merely.

The statutory provision that the facts found and the conclusions of law must be separately stated is merely directory.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Action by Andre Faure against S. C. Drollinger and others. Judgment for plaintiff, and defendant named appeals. Affirmed.

Clark & Law, of Los Angeles (J. D. Taggart, of Los Angeles, of counsel), for appellant.

J. L. Murphey, of Los Angeles, for respondent.

HOUSER, J. Appellant, Drollinger, complains of many things in connection with the judgment of the lower court; his first contention being that his general demurrer to plaintiff's complaint was overruled when it should have been sustained. He bases that conclusion on the premise that plaintiff intended to set up an alleged cause of action in claim and delivery, and he points out that in such an action possession in the defendant of the subject-matter is both a proper as well as a necessary allegation in the complaint—which allegation, it is conceded by plaintiff, is altogether lacking. But plaintiff states in effect that he had no intention of setting up a claim and delivery action; that all he attempted to do, and in fact all he did, was to conform to the Code rule of making "a statement of the facts constituting the cause of action in ordinary and concise language," together with a demand for the relief which he claimed.

[1] The only question then for this court to consider in that connection is whether the complaint states facts sufficient to constitute a cause of action as against appellant, Drollinger. So far as defendant Drollinger is concerned (outside of certain admitted facts to be hereinafter noticed), the facts appearing in the complaint which affect him in the action, although stated in a somewhat involved manner, cover substantially the following allegations: Defendant Dawson made certain representations to plaintiff by which plaintiff was induced to and did enter into a contract with defendant Drollinger by which plaintiff was to purchase from Drollinger and Drollinger was to sell to plaintiff a certain auto truck on installments; that in pursuance of the terms of this agreement, plaintiff paid to Drollinger personally or for his use and benefit a certain sum of money; that without the previous knowledge or consent of plaintiff, and before the last payment was to be made under said agreement, defendant Drollinger received from one Nora Dawson the sum of $188.25, which was the amount that would shortly thereafter become due to defendant Drollinger from plaintiff on account of the purchase of said truck under the terms of said agreement, and thereupon, instead of delivering the truck to plaintiff, defendant Drollinger delivered the truck to said Nora Dawson, who immediately sold it to defendant Bedford; that plaintiff thereafter made tender to defendant Drollinger of all moneys to be paid by him to Drollinger under the terms of said agreement and demanded possession of the truck from each of the defendants, which was by each of them refused. Plaintiff's prayer covers a considerable territory, but he finally prays for general relief. Where an answer is filed in a case, even where there are many defendants, the plaintiff's relief is not limited as to any given defendant either to what he has asked for in his prayer for relief as against such defendant, or as to either or all the other defendants. Such relief may be granted to any party to the action as may be justified by the facts of the case, provided such facts are embraced within the issues. Section 580, Code Civ. Proc.; Tyler v. Mayre, 95 Cal. 169, 26 Pac. 160, 30 Pac. 196; Murphy v. Stelling, 8 Cal. App. 707, 97 Pac. 672; Hoffman v. Kirby, 136 Cal. 29, 68 Pac. 321.

[2] The record on this appeal shows that both defendant Drollinger and his counsel thoroughly understood the issues involved in the action and were fully prepared to meet them at the time of trial. Hence, although the allegations of the complaint might have been more direct and more certain, defendant Drollinger was in no wise prejudiced by reason of the manner in which the complaint was drawn. Moreover, section 4½ of article 6 of the California Constitution provides in effect, so far as this particular point is concerned, that—

> "No judgment shall be set aside, * * * for any error as to any matter of pleading, * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

From an inspection of the complaint and from the reporter's transcript on appeal, as well as from the other papers in the record herein, it would appear that defendant Drollinger was in no manner misled to his prejudice by reason of the state of the pleadings. On the contrary, the case was tried, so far as Drollinger was concerned, openly and avowedly on the issues covered by allegations in effect and substance as herein set forth, and therefore from an examination of the entire cause, including the evidence, the court is unable to discover any miscarriage of justice as a result of any error as to any matter of pleading in the case.

[3] Following appellant's brief, his next specification of error relates to a finding. Appellant states in his specification that plaintiff should not be permitted to recover if he rest his case in equity, because plaintiff knew that there was serious trouble between Dawson and his wife Nora, and that plaintiff had no right to rely upon Dawson's statement that his wife Nora had abandoned a prior agreement to purchase the truck and had returned it to Drollinger. The gist of that allegation was set up in the complaint; it was not denied by the answer of Drollinger, as will appear by appellant's specification in his opening brief, that the complaint alleges:

> "That he (Dawson) and his wife at the time were having marital difficulties which were being considered in the court, and that she had abandoned the agreement to purchase the truck and had returned it to Drollinger. These allegations are not denied by the answer of Drollinger."

Irrespective of any prior rights or interests which Mrs. Dawson may have had or claimed in the truck, she had therefore abandoned same, according to Drollinger's admissions, at the time when plaintiff made his contract with Drollinger with reference to the truck. Moreover, on this particular point, the court found:

> "That said defendant Charles J. Dawson represented to the plaintiff that the defendant Nora Dawson had no right, title or interest therein (referring to the truck), and that plaintiff at the times he paid the moneys hereinafter set forth had no notice or knowledge of any claim of the said defendant Nora Dawson to said truck or any interest therein, and that plaintiff paid and advanced the moneys hereinafter set forth in good faith and without notice or knowledge of any claim or interest of the defendant Nora Dawson in said truck."

It would therefore clearly appear that both by the pleadings and by the findings appellant is concluded in regard to his contention that the plaintiff is without equity.

The other alleged errors of which appellant complains relate, first, to the failure of the court to find on certain issues; or, secondly, that some of the findings made by the court are on immaterial issues or that they are outside the issues; or, thirdly, that conclusions of law are placed among certain findings of fact.

On the material allegations of the complaint as herein set forth, the court found that the representations referred to in the complaint were made by Dawson to plaintiff, and the findings show, among other things:

> "That on or about the 17th day of May, 1920, the said defendant Charles J. Dawson interviewed the defendant Drollinger and represented to the said defendant Drollinger that he could obtain the balance of the purchase price which remained unpaid under the said contract from the plaintiff, and that the plaintiff would take title to the said truck to secure the advances that he had and would make to purchase the said truck and hold the same for the use and benefit of the said defendant Charles J. Dawson, and that the said Charles J. Dawson produced the plaintiff to carry out the said agreement, and that it was then and there agreed between the plaintiff and the defendant Drollinger that plaintiff should pay to the said Drollinger the sum of $250 cash, and the sum of $100 on or before the 1st day of June, 1920, and the sum of about $188, the balance of the purchase price, on or before 30 days thereafter, and that the said Drollinger agreed to hold possession of the said truck and to deliver the same to the plaintiff, provided that the plaintiff would make the said payments within the said time, and that said Drollinger then and there declared that he had the right to sell said truck and that the said Dawsons had no right therein as against him, and at the same time that the said Drollinger, contemporaneous with the said payment of $250, agreed with the plaintiff that he would hold the possession of the said truck and deliver it to the plaintiff, provided the plaintiff would pay to him the balance of the said purchase price in monthly installments. That plaintiff then and there, relying upon the said statements of the said Drollinger, and upon the agreement he had made with the said defendant Charles J. Dawson, and on the 19th day of May, 1920, paid to the defendant Drollinger the sum of $250 cash, and on the 1st day of June, 1920, paid the sum of $100, and that the plaintiff, within the said time provided for the payment, tendered to the said Drollinger the sum of $188.25, the balance which remained due after the last payment of the sum of $100. That the said defendant Drollinger refused to receive the said sum and refused to deliver the said truck to the plaintiff on the ground that he had delivered the same to the defendant Nora Dawson."

It is further found:

> "That the said Charles J. Dawson paid to the said defendant S. C. Drollinger the sum of $101.65 of the plaintiff's money on or about April 13, 1920, and that the defendant Drollinger had notice that the said sum was paid on the purchase price by the plaintiff."

Further findings by the court included the facts:

> "That the defendant Nora Dawson, prior to the time when said $188.25 became due under the said contract, voluntarily paid the said amount to the said defendant Drollinger and received possession of the said truck from him;

that said payment by the said defendant Nora Dawson was without any request or knowledge on the part of plaintiff or of the defendant Charles J. Dawson; and that she obtained the possession of the said truck upon said payment without the consent of the plaintiff or the said defendant Charles J. Dawson and without the knowledge of either of them, and that she, after receiving the possession of the said truck, immediately sold and delivered the same to the defendant Henry Bedford."

It will therefore be seen that each of the material allegations of the complaint affecting plaintiff's right to recover as against defendant Drollinger is substantially covered by the findings of the court, and that judgment was given in plaintiff's favor as against defendant Drollinger in the sum of $451.65, which amount was within the allegations of the complaint.

[4, 5] Specifically, appellant complains that there was no finding on the issue of conspiracy; on the fictitious sale of the truck by Mrs. Dawson to Bedford, as well as to Bedford's use of the truck; and that Nora Dawson defaulted on a prior purchase contract of the truck. Appellant also complains that certain facts were found by the court which were not embraced within the issues; for example, that plaintiff paid to Dawson for Drollinger's use and benefit $101.65. But assuming that to be true, it is merely evidentiary of payment to Drollinger himself and would be included within a general allegation of so much money paid by plaintiff to Drollinger. As to the objections that there was no finding on the issue of whether any contract was made between plaintiff and Drollinger, or on the issue of conspiracy, or on the issue of the fictitious sale of the truck by Mrs. Dawson to Bedford, each of such findings is immaterial to plaintiff's case as against defendant Drollinger. He is not and cannot be interested in them, nor in any wise harmed by such immaterial findings. The case against him is complete without them. They might just as well have been omitted as far as he is concerned; and it follows that, being in, they are of no effect as producing any results either for or against Drollinger. It is well settled that findings on immaterial facts, although erroneous, are not sufficient to disturb a judgment. Klockenbaum v. Pierson, 22 Cal. 160; Dougherty v. Coffin, 69 Cal. 454, 10 Pac. 672; Sherman v. Sandell, 106 Cal. 373, 39 Pac. 797; Collins v. Gray, 154 Cal. 135, 97 Pac. 142; and there are many other California cases to the same effect. The cases are also numerous and without apparent conflict which hold that a failure by the court to find on an immaterial issue or on an issue which, as judged by other facts found and the entire record, must necessarily have been against appellant, affords no grounds for reversal of the judgment.

The complaint by appellant that there was no finding on the issue of whether any contract was made between the plaintiff and Drollinger, and that said Drollinger then and there declared that he had the right to sell the said truck, and that the said Dawsons had no right therein as against him, must be completely disposed of by an examination of the findings as hereinbefore set forth.

[6, 7] As to the other findings to which appellant takes exception, he says that the court by its findings created a new and independent form of contract which is in no way set out in the complaint; but a glance at the record will show that the only substantial difference between the complaint and the findings in that regard rests in the amount which the court found was paid by plaintiff to Drollinger as being $451.65, as against the amount alleged in the complaint as having been a considerably greater sum. Appellant also complains of what are termed "inconsistencies" in the findings; but if there are any inconsistencies they are of no moment, and certainly not such as would justify a reversal of the judgment on that ground. Findings are to be read and considered together and, if possible, are to be reconciled so as to prevent any conflict on material points; and unless the conflict is clear and the findings incapable of being harmoniously construed, the judgment will not be reversed on the ground of a conflict in the findings. Syllabus, Haight v. Haight, 151 Cal. 90, 90 Pac. 197. The same thing is true of the findings which, instead of being strictly confined to matters of fact, state conclusions of law; for example, one of the findings is to the effect that the delivery of the truck by Drollinger to Nora Dawson "was a wrongful delivery as to plaintiff"; and another finding is "that at the time said defendant Drollinger delivered said truck to said defendant Nora Dawson she had no right, title, or interest therein as against plaintiff." The statutory provision that the facts found and the conclusons of law must be separately stated has been repeatedly held to be merely directory. Butler v. Agnew, 9 Cal. App. 330, 99 Pac. 395; Spencer v. Duncan, 107 Cal. 426, 40 Pac. 549; McKelvey v. Wagy, 157 Cal. 409, 108 Pac. 268; In re Bullard's Est., 3 Cal. Unrep. 688, 31 Pac. 1119.

Having noticed all of the alleged errors arising on the trial and it conclusively appearing that appellant Drollinger has not been substantially prejudiced by them or by any of them, it is ordered that the judgment as against S. C. Drollinger be and the same is affirmed.

We concur: CONREY, P. J.; JAMES, J.

190 Cal. 624

PEOPLE ex rel. WEBB v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 10597.)

(Supreme Court of California. March 16, 1923.)

1. Injunction 🔑105(1)—Prohibition 🔑10(2)—Sentence of death lawfully imposed cannot be stayed by injunction.

Injunction will not lie to restrain or interfere with the execution of the death penalty under judgment of conviction for murder on the ground that the condemned did not have a fair trial, his only remedy being an appeal to the executive for pardon; and where a court undertakes to interfere with such judgment by injunction prohibition will issue to prevent such interference.

2. Injunction 🔑105(1)—No authority to sue for vacation of judgment of conviction.

It is not within the power of a court of equity nor of the judge of the superior court upon an ex parte affidavit or complaint for injunction to stay or set aside the execution of a judgment entered by the trial court for the punishment of crime of which the accused was found guilty after trial by a jury; there being no authority in law to sue the state for vacation of a judgment, and the only remedy being application for pardon.

In Bank.

Prohibition by the People of the State of California, upon the relation of U. S. Webb, against the Superior Court of the City and County of San Francisco and James M. Troutt, Judge thereof, to prevent interference by injunction or otherwise with the execution of Ullah Mohammed, convicted of murder, and under sentence of death. Writ granted.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., D. M. Edwards, of Visalia, J. H. Linne, and J. C. Thomas, of Susanville, for petitioner.

Humphrey, Grant, Zimdars & Warren, of San Francisco, for respondents.

PER CURIAM. [1] The writ of prohibition will be granted, including an order vacating the restraining order and the temporary injunction heretofore issued. It is very clear to the court there is no law sustaining this application for an injunction, and that there is no relief other than an application to the Governor for a pardon. The constitutional grant to the Governor of the right to pardon is to enable the state to do justice in those cases where the ordinary procedure results in injustice in individual cases by reason of extrinsic fraud or for any other reason. There is thus a procedure established for the purpose of doing justice in this type of cases, and we must assume that, if, as claimed here, Ullah Mohammed did not have a fair trial, and for the reasons he alleges in his complaint has not been able to present his defense, an application to the Governor for pardon will be given due consideration, and, if the representatives are there made on his behalf that have been made here, and are established to the satisfaction of the Governor, that he will extend to him such a degree of leniency as is proper under the circumstances.

[2] Application was made to the respondent court to set aside the judgment of conviction and stay the execution thereof after an appeal, and after the affirmance of the judgment by this court. It is not within the power of a court of equity, nor of a judge of the superior court, upon an ex parte affidavit, to stay or set aside the execution of the judgment entered by the trial court for the punishment of the crime of which he was found guilty after a trial before a jury, for the verified complaint filed before the respondent amounts to no more than an affidavit of the convicted man or of some one on his behalf. The fundamental reasons for this, as suggested by Mr. Justice LENNON and by myself during the oral argument, are these: That there is no authority, as far as the defendant is concerned, to sue the state of California for a vacation of the judgment; and that the remedy provided by law is by an application for a pardon.

This opinion was delivered orally from the bench by the Chief Justice, and is transcribed and filed as the written opinion of the court, as ordered.

Writ granted as prayed for.

WILBUR, C. J., and LAWLOR, LENNON, WASTE, SEAWELL, KERRIGAN, and MYERS, JJ., concur.

---

190 Cal. 507

MORRISON v. VEACH et al. (L. A. 6947.)

(Supreme Court of California. March 1, 1923.)

1. Sales 🔑479(1)—Seller can impose any condition to revival of forfeited conditional sales contract.

After a conditional sales contract has been forfeited by the seller for the buyer's default, he can impose any condition upon the right to have the contract revived, and therefore can require the payment of an attorney's fee incurred by him, even though the buyer was not liable for such fee under the original contract.

2. Sales 🔑477(1)—Notice of installments given before previous check was dishonored does not waive forfeiture.

The conditional seller's right to forfeit a contract for the buyer's default was not waived by his giving notice of subsequent installments which became due after he received the buyer's check for the amount agreed upon to revive the contract after forfeiture for previous default, and before he was notified by the bank that the check was not paid for want of funds, since there can be no waiver of a default unless the party against whom the waiver is claimed had knowledge of the default.

3. Assignments 🔑119—Assignee for collection can maintain action.

One to whom the conditional seller assigned the contract and all rights thereunder for the purpose of recovery became the legal owner of the cause of action, and was entitled to maintain claim and delivery for the property sold; the assignor retaining an equitable interest therein.

In Bank.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action of claim and delivery by J. R. Morrison against Oscar Veach and others. Judgment for the named defendant, and plaintiff appeals. Reversed.

Andrew J. Copp, Jr., of Los Angeles, and J. Stewart Ross, of El Centro, for appellant.

J. E. Simpson, of Holtville, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of defendant Oscar Veach in an action of claim and delivery. Said defendant purchased an automobile under a conditional contract of sale, binding him to the performance of certain covenants, including payment of a balance of the purchase price in monthly installments. The vendor, upon the execution of the contract, assigned it to the Pacific Finance Corporation (hereafter referred to as the corporation), which later, after its alleged breach, assigned it to the plaintiff, who thereafter commenced the present action in claim and delivery, under which he took possession of the car. Judgment went for the defendant for the return of the automobile, and, in case delivery could not be had, then for its value fixed at $550, together with damages for the detention thereof in the sum of $400 and costs.

The chief question to be decided is, Does the evidence support the finding that there was no forfeiture by defendant of his rights under the contract, entitling the plaintiff to maintain this action?

The contract under which the automobile was sold provided for the payment of $316.67 upon the signing of the contract, and a balance of $541.10 in monthly installments of $54.11, commencing on the 1st day of June, 1920. It further provided that if the buyer failed to pay any of said installments when due, the seller, at his option, and without notice to the buyer, might elect to declare the whole balance of the purchase price immediately due and payable, or the seller might declare the rights of the buyer under the contract forfeited, and, without demand, immediately take possession of the car and hold the same discharged from further liability under the contract. Title to the automobile was to remain in the seller until the covenants of the contract on the part of the buyer were fully performed, and time was declared to be of the essence of the contract. That instrument also imposed upon the buyer certain collection charges if any installment was not paid when due, and an attorney's fee under specified circumstances.

An installment of the purchase price falling due on September 1, 1920, not having been paid, the corporation on the 8th of that month wrote to the defendant, calling his attention to the fact, and stating that a "collection fee of $1 on payment delinquent over seven days makes the total amount due on this installment $55.11," and advised him that, unless the amount so due were paid within four days from the date of the letter, it would elect to bring suit immediately for the entire balance remaining unpaid, "or retake possession of said property * * * and all your rights under said contract will be terminated." Receiving no reply to this communication, the corporation on the 15th day of September wrote to the defendant, demanding possession of the car. Three days later the corporation assigned the contract to the plaintiff for the purpose of collection. The plaintiff thereupon employed counsel, who later prepared and filed the complaint in this action, procured a surety company claim and delivery bond at an expense of $10 for premium, and paid certain notarial fees in connection with the suit. On September 22 the corporation received from the defendant a check for $55.11, on which was written the notation, "Sept. payment on car contract." On the same day counsel for plaintiff wrote defendant a letter, reciting the expenditures and occurrences we have detailed, and acknowledging receipt of the check. The letter also contained the following:

> "Your check does not cover the various items of your indebtedness for the September installment in the event the Pacific Finance Corporation would waive its remedy taken on the 16th inst., and if it is your desire to avail yourself of such waiver, will you please send your additional check for $28.50, upon receipt of which both checks will be deposited for collection. In the event of collection the proposed action will be abandoned."

The letter stated that the items making up the demanded sum of $28.50 were:

> "Attorneys fees $25.00, provided by section 9 of the contract; replevin bond $2.50, two notarial acknowledgments at 50 cents, $1.00."

The communication closed with the statement that if the sum of $28.50 were not received within three days the check for $55.11 would be returned to the defendant and the action would proceed. Under date of September 23 defendant mailed his check for

$28.50 to counsel for plaintiff, and the two checks were immediately deposited for collection. The check for $55.11 was duly honored, but the check for $28.50 was not, because of the fact that defendant had not sufficient funds in the bank to meet it. Before the dishonor of this check was brought to the notice of plaintiff, the installment of $54.11, payable on October 1st, fell due. On October 4 the corporation wrote to defendant, calling his attention to this new delinquency, and asking that the amount be remitted. On October 8, the payment still not having been made, the corporation in writing notified the defendant that, unless the amount, with a collection fee of $1.08 added, being the total amount of $55.19, were paid within four days, the corporation would elect to bring suit for all unpaid installments or to retake the car, etc. Under date of October 14 defendant remitted to the corporation check for the last-mentioned amount. It was not until after these notices were mailed that either the plaintiff or the corporation learned of the dishonor of the check for $28.50. The check for the October payment was not presented for payment, and it, with the dishonored check, was returned to the defendant at the trial.

[1] The findings of the trial court appear to have been based upon the theory that the $25 attorney's fee going to make up the charge of $28.50 demanded by the plaintiff was not warranted under the terms of the contract. We think this position is untenable, but in any event the question of the attorney's fee is immaterial in this case, since the defendant on September 13, 1920, was admittedly in default, and the corporation, as it had an undoubted right to do, elected to terminate the contract and to retake the car, and notified the buyer of such election. This had the legal effect to terminate all of the defendant's rights in the car. The plaintiff's offer of September 22 to waive its remedy and to revive the contract on condition that the defendant should within three days pay $55.11, plus $28.50, was not availed of by him; hence the remedy was not waived, and the contract, which was terminated, was not revived. The corporation having lawfully terminated the contract, and elected to retake possession of the car, thereby became the owner thereof, freed from any obligation under the contract, and had a right to dictate the conditions upon which the contract would be revived. These conditions, as we have seen, were not complied with.

[2] The suggestion that by giving the two notices respecting the nonpayment of the October installment, thus treating the contract as still in force, the corporation waived the accrued forfeiture, is not well founded. The uncontradicted evidence is to the effect that when these notices were sent the corporation did not know of the dishonor of the defendant's check, and in fact assumed that the defendant had accepted and complied with the terms on which it had offered to reinstate the contract. It is elementary that there can be no waiver of a default unless the party against whom the waiver is claimed had knowledge of the default.

[3] There is no merit in the assertion that plaintiff is not the proper party plaintiff. The evidence shows without conflict that the corporation, prior to the commencement of the action, assigned the contract and all its rights thereunder to the plaintiff for the purpose of recovery. The assignee thus became the legal owner of the cause of action, and was entitled to maintain the suit; the assignor retaining an equitable interest in the thing assigned. Barlow v. Lande, 26 Cal. App. 424, 147 Pac. 231.

Judgment reversed.

We concur: WILBUR, C. J., MYERS, J.; LENNON, J.; SEAWELL, J.; LAWLOR, J.; WASTE, J.

190 Cal. 526

SCOTT v. STUART. (L. A. 7415.)

(Supreme Court of California. March 3, 1923.)

1. Venue 🔑52(1)—Change for convenience of witnesses largely in discretion of court.

Determination of motion for change of place of trial for convenience of witnesses rests largely in the sound discretion of the court to which it is addressed.

2. Appeal and error 🔑965—Denial of change of venue for convenience of witnesses disturbed only for abuse of discretion.

Determination of motion for change of place of trial for convenience of witnesses will be disturbed only for abuse of sound discretion.

3. Venue 🔑68—Denial of change for convenience of witnesses not abuse of discretion in view of opposing affidavit of inconvenience.

It is not an abuse of discretion to deny plaintiff's motion for change of place of trial on the ground of convenience of witnesses, where defendant's affidavit in opposition shows his witnesses will be inconvenienced by change.

4. Venue 🔑52(1)—Change for convenience of witnesses not concluded by comparative number.

A mere preponderance in number of witnesses expected to be produced by one party will not necessarily determine the order to be made on motion for change of place of trial for convenience of witnesses.

5. Venue 🔑52(1)—Change for convenience of witnesses not concluded by need of records in another suit.

The question of what order shall be made on a motion for change of place of trial for convenience of witnesses is not settled by the necessity of producing the records and files in another suit, tried in the county to which change is sought, and the expense incident to such production.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Action by Russell Scott against Z. B. Stuart. From an order denying motion for change of place of trial, plaintiff appeals. Affirmed.

C. C. Baker, of Salinas, for appellant.

C. W. Byres, of Los Angeles, for respondent.

KERRIGAN, J. This is an appeal by plaintiff from an order denying his motion for a change of the place of trial.

The action is to recover the reasonable value of legal services alleged to have been rendered by the plaintiff for the defendant and certain of the latter's clients at the instance of defendant in a suit for partition theretofore tried in the county of Monterey. By his answer the defendant admits that the plaintiff performed part of the alleged services, but denies all liability therefor, claiming that there was no contract of employment or agreement for compensation, and that the services were gratuitously rendered. Within a reasonable time after the cause was at issue, the plaintiff made the motion above mentioned to change the place of trial from the county of Los Angeles, where the defendant resides, to the county of Monterey, on the ground of the convenience of witnesses, as provided in subdivision 3 of section 397 of the Code of Civil Procedure.

We are unable to agree with the appellant that the court erred in denying such motion.

[1, 2] The determination of a motion of this character upon the ground of the convenience of witnesses rests largely in the sound discretion of the court to which it is addressed, and its order thereon will be disturbed only for an abuse of such discretion. Pascoe v. Baker, 158 Cal. 232, 110 Pac. 815. The pleadings in the action disclose but two issues to be decided, namely, were the services of plaintiff gratuitously rendered? and, if not, what is their reasonable value?

It appears from an affidavit of plaintiff filed in support of his motion that he intends to call 16 witnesses, 4 of whom will give testimony tending to show that defendant intended to employ the plaintiff to act for him as associate counsel in the partition suit mentioned; that 3 others will testify that plaintiff actually appeared in court on behalf of the defendant in the capacity of an attorney at law in said suit and rendered therein certain services; that 7 of the witnesses whom plaintiff expects to call are expert witnesses, some of whom will testify to the same effect as the 3 just mentioned, and all of whom will testify that the services so rendered were reasonably worth the sum of $2,500. The affidavit also avers that plaintiff will call as a witness the county clerk of Monterey county, who is the custodian of the papers and files in the partition suit, which he expects to introduce in evidence, and which constitute material evidence in the case; that the presence of such clerk or his deputy will be necessary at the trial; also, that he intends to produce Ralph C. McComish as a witness, without stating, however, what he expects to prove by his testimony; and that all of said witnesses reside in or near Monterey county.

The defendant filed a counter affidavit, in which he states that he expects to call eight certain witnesses, who all reside in the county of Los Angeles, and all material and necessary for proof of the allegations and denials of his answer. The testimony of three of these, it appears, will tend to limit the participation of plaintiff in the trial of the partition suit; and others of them will testify that such services were rendered without expectation of compensation. In this affidavit it also appears that seven of the eight witnesses will testify that the services so rendered by the plaintiff were not reasonably worth more than the sum of $100.

[3] This brief statement fairly reflects the condition of the record; and we fail to see how it can be reasonably said that the court abused its discretion in denying the motion for change of the place of trial. The defendant being a resident of the county of Los Angeles at the time of the commencement of the action, is entitled to have the trial take place in that county, unless it appear from the evidence submitted on the motion that the convenience of witnesses and the ends of justice will be promoted by the removal of the cause. From such evidence it appears without contradiction that plaintiff, in his capacity as an attorney and counselor at law, in conjunction with others represented the defendant in the partition litigation. As to whether or not he was to be paid therefor will depend in large measure upon his own testimony and that of the defendant. Upon this point, and also upon the issue of the reasonable value of the services, there will be practically an equal number of witnesses convenienced by the transfer or retention of the case. In these respects the parties stand on a parity. It is no abuse of the trial court's discretion to deny a motion for a change of the place of trial made on the ground of the convenience of witnesses, if the affidavit of the defendant in opposition to the motion shows that his witnesses will be inconvenienced if the change be ordered. McNeill & Co. v. Doe, 163 Cal. 338, 125 Pac. 345.

[4, 5] There is no merit in the suggestion that the larger number of witnesses reside in or near the county of Monterey. A mere preponderance in number of the witnesses

which either party expects to produce will not necessarily determine the order to be made. Reavis v. Cowell, 56 Cal. 588. Nor will the necessity of producing in this case the records and files in the partition suit and the expense incident thereto settle the question. This, in common with the other matters, is a consideration addressed to the discretion of the court.

The order is affirmed.

We concur: WILBUR, C. J.; LAWLOR, J.; WASTE, J.; MYERS, J.; SEAWELL, J.; LENNON, J.

---

190 Cal. 577

DUFTON v. DANIELS et al. (S. F. 10418.)

(Supreme Court of California. March 10, 1923.)

1. Extradition 🔑40—State agent held entitled to recover from state expenses in bringing back to state extradited fugitive; the latter having been "placed on trial," although tried on another information.

Under Pen. Code, § 1557, an agent of the state *held* entitled to recover from the state his expenses in bringing back to the state a fugitive from justice extradited in another state, on the ground that the latter had been "placed on trial" within the proviso of said section, although he was not actually tried until after he had escaped after such return, and had been returned to the state a second time, and was then tried and convicted on another and amended information making the same charge.

2. Mandamus 🔑101—May issue against board of control.

That the board of control, in auditing claims against the state, acts in a sense judicially, does not preclude the issuance of a writ of mandate to control its action, where the facts are all admitted, and are susceptible to but one construction.

3. States 🔑183—Findings of board of control conclusive only on questions of fact.

Although a finding of the board of control on conflicting evidence on a disputed question of fact is conclusive, a finding by it that a claim against the state is not valid is not conclusive as a finding of fact, where the substantive facts in relation to the claim are admitted, and are susceptible to but one construction, namely, that the claim is a valid one; the claimed finding in such case being but an erroneous conclusion of law.

4. Courts 🔑207(4)—Supreme Court has original jurisdiction to issue writ of mandate against board of control.

Under Const. art. 6, § 4, the Supreme Court has original jurisdiction to issue writ of mandate against the board of control.

5. Mandamus 🔑3(6)—Legal remedy of state agent against state to collect expenses held not effective.

Mandamus lies against the board of control to compel audit and allowance of expenses, under Pen. Code, § 1557, of state agent in returning to the state a fugitive from justice; his remedy at law against the state, under St. 1893, p. 57, and St. 1921, p. 1592, not being equally convenient or beneficial.

6. Mandamus 🔑3(2)—Remedy at law must be equally effective to preclude mandamus.

The remedy by mandamus will be denied only when the party seeking relief has a plain remedy at law, which is not only speedy, but adequate, in the sense that in and of itself it is capable of directly affording and enforcing the relief sought.

7. Mandamus 🔑101—Lies to enforce official duty.

Mandamus lies against the board of control to compel audit and allowance of expenses, under Pen. Code, § 1557, of state agent in returning to the state a fugitive from justice, as seeking merely to compel the performance of a duty especially enjoined by law, as a duty resulting from an office and arising from the plain provisions of statute.

In Bank.

Application by John S. Dufton for writ of mandate against Gilbert B. Daniels and others. Writ granted.

Leon E. Gray and Robert M. Ford, both of Oakland, for petitioner.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for respondents.

MYERS, J. This is an application for a writ of mandate to compel the state board of control to audit and allow petitioner's claim for his necessary traveling expenses as a state agent in returning to the state of California a fugitive from justice, under the provisions of section 1557 of the Penal Code. The admitted facts are that one Newell, a fugitive from justice under a charge in Alameda county of a violation of section 476a of the Penal Code, was arrested in the state of New York. Thereupon the Governor of California issued a demand for his extradition and appointed petitioner a state agent for the purpose of returning him to California. Petitioner went to New York, secured the prisoner, returned him to California, and delivered him to the city prison in Oakland. Upon a preliminary hearing he was held to answer, and the district attorney thereupon filed an information in the superior court of Alameda county, charging him with the offense for which he had been extradited. Thereafter he was admitted to bail, and when his case was called for trial failed to appear, whereupon the court declared the bail forfeited, and ordered that a bench warrant issue. Thereafter he was rearrested in Arizona, and again returned to California upon extradition proceedings, this time by another agent of the state appointed for that purpose. His case was again called for trial, a jury impaneled and sworn, and a trial had, at the conclusion of which the court, acting under Pen. Code, § 1165, advised the jury to acquit, ordered that the prisoner be detained in custody, and that the district attorney file an amended information upon the same charge, which was done. His case again came on for trial and he was tried, convicted, and sentenced to San Quentin.

[1] Petitioner presented to the respondent, board of control, his claim for traveling expenses incurred in bringing back the prisoner from New York, pursuant to section 1557 of the Penal Code, which provides:

> "When the Governor of this state, in the exercise of the authority conferred by section 2, article 4, of the Constitution of the United States, or by the laws of this state, demands from the executive authority of any state of the United States, or of any foreign government, the surrender to the authorities of this state of a fugitive from justice, who has been found and arrested in such state or foreign government, the accounts of the person employed to bring back such fugitive must be audited by the board of control and paid out of the state treasury: Provided, however, that the state shall not pay the expenses of any such person so employed where the fugitive returned is not placed on trial, but such expense shall be a charge upon the county asking the requisition."

No question is made as to the form or sufficiency of the claim presented, and no contention is made that the items thereof were not actually and properly expended by petitioner in the performance of his duty. The claim was disallowed solely on the ground that it did not constitute a legal claim against the state of California; the sole contention of the board being that the fugitive returned was not "placed on trial," as required by said section, because of the circumstance that he was not actually tried until after he had escaped and had been returned to California a second time. Respondents argue that the fugitive was in fact "placed upon trial in connection with that second return from Arizona," and that therefore he was not placed upon trial in connection with the first return from New York. From this they conclude that petitioner is not entitled to reimbursement for his traveling expenses from the state. There is no merit in this contention. The Code section makes it the plain duty of the board of control to audit and allow the necessary traveling expenses of the petitioner incurred as above recited, unless in fact the fugitive so returned by him was not placed on trial. The language of the section is plain and unambiguous, and it is not necessary to invoke the settled rule of construction that an exception contained in a statute to a general rule laid down therein is to be strictly construed (Black, Interpretation of Laws, p. 275; Lewis' Sutherland, Statutory Construction [2d Ed.] § 352), and that "where the enacting clause is general in its language and objects and a proviso is afterwards introduced, that proviso is construed strictly and takes no case out of the enacting clause which does not fall fairly within its terms" (U. S. v. Dickson, 15 Pet. 141, 165, 10 Ed. 689). Neither is it necessary to consider here whether, if the fugitive had in fact been tried upon a charge different from that upon which he had been extradited, the proviso in the section would apply. The fact is admitted herein that the fugitive so returned was actually placed upon trial upon the precise charge on which he had been extradited and was actually tried, convicted and sentenced. It requires no involved argument to demonstrate that this does not present a case falling within the purview of the said proviso.

[2] The fact that the board of control, in auditing claims against the state, acts in a sense judicially, does not preclude the issuance of a writ of mandate to control its action, where, as here, the facts are all admitted and are susceptible to but one construction. Grand Lodge, etc., v. Markham, 102 Cal. 169, 36 Pac. 423; Robertson v. Board of Library Trustees, etc., 136 Cal. 403, 69 Pac. 88; Wood v. Strother, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249; Raisch v. Board of Education, 81 Cal. 542, 22 Pac. 890; U'ren v. State Board of Control, 31 Cal. App. 6, 159 Pac. 615; Puterbaugh v. Wadham, 162 Cal. 611, 123 Pac. 804.

[3] It is urged that the conclusion of the board of control that this was not a valid claim against the state must be construed as a finding of fact that the returned fugitive was not placed on trial in this state, and that such finding of fact is conclusive upon this court. It cannot be so regarded. All of the substantive facts are here admitted, they are susceptible to but one construction, and the claimed finding of fact is but an erroneous conclusion upon a question of law. San Diego, etc., Ry. Co. v. State Board of Equalization, 165 Cal. 560, 564, 132 Pac. 1044; Grand Lodge, etc., v. Markham, supra; Wood v. Strother, supra; Harelson v. South San Joaquin Irr. Dist., 20 Cal. App. 324, 128 Pac. 1010; Inglin v. Hoppin, 156 Cal. 483, 489, 105 Pac. 582. It may be conceded for the purposes hereof that, if there had been a disputed question of fact determined by the board upon conflicting evidence, its finding thereon would be conclusive, but such is clearly not the case here.

[4] That this court has original jurisdiction to entertain such a proceeding does not admit of serious question. Const. art. 6, § 4; Scott v. Boyle, 164 Cal. 321, 128 Pac. 941; Santa Cruz, etc., Co. v. Board of Supervisors, 62 Cal. 40, 41; San Diego, etc., Ry. Co. v. State Board of Equalization, supra; Grand Lodge, etc., v. Markham, supra.

[5, 6] Respondents' contention that mandamus will not lie in the instant case, because there is available to petitioner a plain, speedy, and adequate remedy at law, is pred-

icated upon the existence of two statutes, Stats. 1893, p. 57; Stats. 1921, p. 1592. It may be conceded that the latter, at least, of these two statutes does provide a plain remedy at law, available to petitioner, in the pursuit of which he will be entitled, under the facts alleged in his petition, to a judgment against the state for the amount due upon his claim. But it does not necessarily follow therefrom that mandamus is unavailable, because of the existence of such a remedy. "It has been held in this state that, to supersede the remedy by mandamus, the party must not only have a specific adequate legal remedy, but one competent to afford relief upon the very subject-matter of his application, and one which is equally convenient, beneficial, and effective as the proceeding by mandamus." Robertson v. Board of Library Trustees, etc., 136 Cal. 403, 405, 69 Pac. 88. See, also, Raisch v. Board of Education, supra; Babcock v. Goodrich, 47 Cal. 488; Ross v. Board of Education, 18 Cal. App. 222, 122 Pac. 967. The remedy afforded by the statutes above cited is manifestly not equally convenient, because the action therein provided for must be transferred to Sacramento county upon demand of the Attorney General, regardless of the residence of the plaintiff, and it is not equally beneficial or effective, because the plaintiff therein, though successful, cannot recover his costs, and because, as pointed out by Beatty, C. J., in Polk v. State, 138 Cal. 384, 389, 71 Pac. 435, 648, he has no means of enforcing the payment of such judgment after obtaining it. As was well said in Ross v. Board of Education, supra:

> "The remedy by mandamus will be denied only when the party seeking relief has a plain remedy at law which is not only speedy, but adequate, in the sense that in and of itself it is capable of directly affording and enforcing the relief sought."

We find nothing in conflict with these conclusions in Chapman v. State, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158. That case may be regarded as authority for the contention that petitioner here is entitled to maintain an action at law against the state upon his claim; but that is here conceded. The dictum in Crandall v. Amador County, 20 Cal. 72, 75, to the broad effect that the existence of an appropriate legal remedy (without regard to the adequacy or effectiveness thereof) will preclude a resort to the writ of mandate, does not appear to have since been followed or approved by this court, and cannot now be regarded as an accurate statement of the law.

[7] Petitioner herein is seeking merely to compel the performance of a duty especially enjoined by law as a duty resulting from an office. Code Civ. Proc. § 1085; Spaulding v. Desmond (Cal. Sup.) 207 Pac. 896; Ott Hardware Co. v. Davis, 165 Cal. 795, 801, 134 Pac. 973; Puterbaugh v. Wadham, supra. The duty arises unequivocally from the plain provisions of the Code section above quoted under the facts admitted.

It is, therefore, ordered that a peremptory writ issue as prayed.

We concur: WILBUR, C. J.; LENNON, J.; KERRIGAN, J; LAWLOR, J.; SEAWELL, J.; WASTE, J.

(190 Cal. 513)

PEOPLE v. WOODS. (Cr. 2510.)

(Supreme Court of California. March 1, 1923.)

1. False pretenses 🔑39—Inference of falsity of representation authorized.

From the fact that a month after the making of the representations that an oil well derrick had been, or was being, erected on the land, there was there no derrick or evidence of the construction of one, the jury were entitled to infer that no erection had been made or commenced.

2. Criminal law 🔑1032(7)—No reversal for variance not suggested at trial.

There should be no reversal for variance, not suggested at the trial, between allegation of information that defendant represented that an oil well was being constructed, and proof that he represented that one was wholly constructed; there being no miscarriage of justice therefrom.

3. Criminal law 🔑1130(2)—Statute as to including evidence in brief directory.

Code Civ. Proc. § 953c, requiring the printing in the briefs of the record and evidence relied on on appeal (especially since amendment by St. 1919, p. 261), is to be regarded as for the convenience of the appellate court, and therefore directly only, to be disregarded by the appellate court when justice requires.

4. Criminal law 🔑1130(2)—Evidence in record, though not in brief, to be considered on rehearing to prevent reversal.

Under Const. art. 6, § 4½, directing and clearly contemplating an examination of the entire record, including the evidence, to see whether there has been a miscarriage of justice, before there shall be a reversal for error, it may be examined to discover evidence not in the briefs to prevent a reversal on the ground of insufficiency of evidence to sustain a conviction, and this though first called to the court's attention by petition for rehearing, unless it appears that failure to include it in the brief was for purpose of securing an unfair advantage.

In bank.

Appeal from Superior Court, Orange County; Rex B. Goodcell, Judge.

J. K. Woods was convicted of obtaining money by false pretenses, and appeals. Affirmed.

See, also, 212 Pac. 41.

W. T. Kendrick, Jr., of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

WILBUR, C. J. The defendant sold a worthless desert lot to one Francis A. Nelson. In order to induce her to purchase the lot, he represented to her that the land was oil land, stating that there was oil there; that they were now putting up a derrick on the land; that they would soon be drilling for oil and that it would be but a short time before the purchaser would be getting money out of it; that there was a little town on the land and that there was plenty of water there. There was no town there; there was no water in the vicinity except in the Los Angeles aqueduct, and that was not available; there was no reason to believe that the land was oil land or that the purchaser would derive a profit from the land. Upon the basis of these misrepresentations, the defendant was charged with obtaining money by false pretenses. He was convicted and appeals from the judgment of conviction. He contends for a reversal of the judgment that some of the statements were mere expressions of opinion, others were not relied upon by the purchaser, and the falsity of the others was not proved. The trial court was of the opinion that the representation that the land was oil land was a mere expression of opinion, and the district attorney concurred in this opinion and apparently did not ask for a conviction upon that ground. The purchaser testified that she purchased the land because it was oil land, and she made certain statements concerning her state of mind which would indicate that she was not influenced to purchase by the fact that there was a town there or that there was water there. The Attorney General contends that, although the purchaser did state that she was not particularly influenced by the statements concerning the town being there or water being there, nevertheless the jury from the whole evidence of the witness was justified in concluding that these representations were inducing causes for her purchase, for it is obvious that the availability of water and the location of a town would bear upon the availability of the lot for the development of oil.

The appellant, however, did state to the purchaser that they were putting up an oil derrick on the land, and it is, of course, conceded that such a representation being false and one of the inducing causes for the purchase, would justify the verdict of conviction. It is contended, however, that there was no sufficient proof of the falsity of this representation to justify the conviction based upon its falsity. The prosecuting witness testified that the defendant told her that they had the oil derrick up and that they were probably drilling; that the defendant showed her a picture of the derrick and of the land before they started the derrick and then when the derrick was finished. These representations were made about the 1st of June, and in the latter part of June the complaining witness accompanied by two friends visited the alleged town. The prosecuting witness testified as follows:

> "Q. * * * What did you see, what was the character of the land there? A. It was a little rocky, small bushes, small rocks, some brush, and a few cactus trees. Q. Were there any oil derricks there? A. No oil derrick. Q. Were there any evidences or preparations of drilling for oil? A. Not a piece of board as big as my hand that I could see. Q. Were there any buildings there of any kind? A. Not a thing. Q. What kind of land was it there, what was the character of the land? A. Rather level, only there would be little low places like that in it."

A month later the complaining witness again visited the land with a surveyor to assist them in locating Aqueduct City. With reference to her observations at that time, she was questioned and replied as follows:

> "Q. Did you see any oil derrick anywhere, is there any in that country anywhere? A. No, I could say for myself I didn't see any oil derrick anywhere."

The witness also testified that the defendant pointed out to her the location of the alleged oil derrick at the time he induced her to purchase the property and that the location was about three blocks away from the lot purchased by her. The evidence also shows that the defendant indicated upon a map, by marking thereon with a pencil, the location of the oil well derrick. The defendant himself testified upon that subject as follows:

> "Q. You said to this jury a while ago, you said to these people that there were derricks within a few miles of this place? A. Yes, sir. Q. How far is a few miles, give an estimate. A. Well, I am not a judge of distance as I stated on here, I believe in the neighborhood of the same distance stated on the stand before by me."

This statement was 14 miles. Counsel for the appellant contends, as we understand him, that the fact that there was no oil derrick or any trace of a derrick on the land or in the vicinity a month after the representations were made is no evidence that there was not an oil derrick in some state of construction at the time the representations were made. Appellant states:

> "There is some evidence that there was not a derrick for several miles around what is known as Aqueduct City tract, but no one testified that an oil derrick was not being put up at the time the representation is alleged to have been made by the defendant. It is well established that the averment that the representation is false must be clearly established beyond a reasonable doubt."

[1, 2] The jury were entitled to infer from the fact that there was no visible evidence of the construction of a derrick or the derrick itself a month after the representations were made that no such derrick was ever under process of construction or was actually erected. Nor do we think that the appellant should have a reversal of the judgment because of the alleged variance between the allegations of the information that the defendant represented that an oil well derrick was being constructed—that is, was partly constructed—and the proof that he represented that one was wholly constructed. It is perfectly evident from the whole record that the defendant procured from the complaining witness the purchase price of the land by false pretenses; that he was sufficiently advised of the nature of those pretenses by the allegations of the information; no objection was taken at the trial by reason of such alleged variance between the pleading and the proof, and that there has been no miscarriage of justice.

[3] A transfer was made in this case upon the respondent's petition because the District Court of Appeal, after reversing the case, declined to grant a rehearing upon evidence pointed out in the respondent's petition for a rehearing in that court, for the reason that such evidence had not been set out in the original briefs filed on behalf of the people. People v. Woods, 39 Cal. App. Dec. 232, upon the authority of Peterkin v. Randolph Marketing Co., 48 Cal. App. 300, 191 Pac. 947, decided by Division One of the Second District Court of Appeal. The statute requiring the printing in the briefs of the record and evidence relied upon on appeal (section 953c, Code Civ. Proc.), particularly since the amendment of 1919 (Stats. 1919, p. 261), must be regarded as one for the convenience of the appellant tribunals, and for that reason directory only, and should be disregarded by the court wherever substantial justice requires it to be done.

[4] The Constitution (article 6, § 4½) directs and clearly contemplates an examination of the entire record, including the evidence, for the purpose of ascertaining whether or not there has been a miscarriage of justice before a case shall be reversed because of errors in the instructions or in the admission or rejection of evidence or because of errors of pleading or in any matter of procedure.

The record on appeal is that provided by section 953a, and comprehends all the pleading, evidence, and matters included in the typewritten transcript prepared as required by law. Section 953a, Code Civ. Proc. It is true that the Constitution does not expressly require the examination of the entire record where the question presented is the insufficiency of the evidence to sustain the verdict or decision, but it is more necessary to do so in such a case than in one merely involving a question of procedure, for the fundamental question involved in such a contention is that there has been a miscarriage of justice because of a conviction or decision wholly unsupported by the evidence in the record, instead of one merely induced by an error of procedure. See, also, section 475, Code Civ. Proc.

When the question presented to the reviewing court is the insufficiency of the evidence to sustain a verdict, the court may properly assume that the parties have complied with the statute requiring them to print in their briefs the portions of the record upon which they rely, and therefore may confine its investigation to such evidence, but the statute requiring such evidence to be printed in the briefs (section 953c, Code Civ. Proc., as amended in 1919) now provides that:

> "* * * No appeal shall be dismissed nor shall any appeal be decided adversely to any party for failure to print in his brief the portion of the record or any part thereof in support of his points, but in such case the court hearing the appeal shall direct such party to print and serve on the adverse party and file with it a supplement to his brief in which shall be set forth in full that portion of the record relied on by such party and not printed in any former brief. The court shall fix the time within which such supplement shall be served and filed and shall permit or require such additional portions of the record to be printed, served and filed as may be desirable for the full presentation of the points at issue."

This procedure is wholly useless, for if the members of the court discover evidence in the record while considering the matter which would assist in a proper determination of the case, the decision can be arrived at as well without as with the printing of it in the briefs. And this method of relying on the record as shown by the typewritten transcript, without requiring it to be printed in the briefs, has been the usual practice in this court for some years. In O'Connor v. West Sacramento Co. (Cal. Sup.) 207 Pac. 527, the decision construing a lease was based in part upon portions of the lease not called to the attention of the District Court of Appeal or this court in briefs or petitions for transfer or rehearing. In Oliver v. Robnett (Cal. Sup.) 210 Pac. 408, neither the pleadings, findings, nor decree were printed in the briefs, yet the court nevertheless considered the sufficiency of the evidence to support the findings attacked by the appellant and reversed the judgment. In Gibbons v. Yosemite Lumber Co. (Cal. Sup.) 211 Pac. 4, the evidence that the plaintiff kept all stock other than his own off the land was neither printed in the briefs nor called to the attention of the court by the parties, yet our decision as to notice due to occupancy was based thereon.

In short, it has been the uniform practice of this court, at least since 1919, to examine the typewritten record in all cases where the sufficiency of the evidence to support the findings is attacked. Section 953c, requiring the evidence relied upon on appeal to be printed or set out in the briefs, at least since the amendment of 1919 (Stats. 1919, p. 261), must be considered as directory for the convenience of the court, and where evidence is pointed out to the court, even in a petition for rehearing, as a basis for its action, such action ought not to be refused merely on the ground that the parties had neglected to fully set out the evidence in their briefs. For instance, in this case the Attorney General claimed in his brief that there was evidence to support the conclusion of the jury, and set out in his brief the evidence which he deemed sufficient to support a verdict. After the court had declared this evidence insufficient, he then called the attention of the District Court of Appeal to additional evidence included in the typewritten record and asked for a rehearing, which was denied. There was no indication that the omission of this evidence from the respondent's brief was due to anything other than overconfidence, perhaps, in the sufficiency of the evidence set out in his brief to support the verdict. It was only after the District Court of Appeal declared the evidence insufficient to establish the fact that no oil derrick was being constructed at the time the representation was made by the defendant that the significance of the testimony of the prosecuting witness that there was not even a board in sight when she saw the premises, and the evidence of the other witnesses that there was not the slightest indication of any attempts to develop oil, was fully appreciated. This evidence was set out in the petition for rehearing and in the order denying a rehearing by the District Court of Appeal, and was assumed to be sufficient to require an affirmance of the conviction, instead of a reversal as theretofore ordered. In this we think the District Court of Appeal was in error. When it appears from evidence presented in the petition for reconsideration of the case by the District Court of Appeal that there was in fact evidence adduced at the trial and incorporated in the record before the court on appeal which would show that the conclusion arrived at by the court, by confining its attention to the portions of the record printed in the brief, was erroneous, a rehearing should be had in that court and in default of such rehearing by the District Court of Appeal this court, upon an application for transfer, disclosing the existence of evidence amply sufficient to sustain the verdict, must grant a transfer of the case and affirm the conviction or judgment, notwithstanding the failure of the parties to include in their briefs before the District Court of Appeal the portion of the record which, in the judgment of that court and of this court, would sustain the verdict, unless it appears that the conduct of the parties who failed to print such matter in their brief was the result of an effort to secure an unfair advantage.

Judgment affirmed.

We concur: LAWLOR, J.; LENNON, J.; SEAWELL, J.; KERRIGAN, J.; MYERS, J.; WASTE, J.

190 Cal. 611

SIEMON v. FINKLE et al. (L. A. 6895.)

(Supreme Court of California. March 15, 1923.)

1. Libel and slander 🔑77—Joinder as parties defendant the writer and receiver of libelous letters held not misjoinder.

In an action for libel based upon the publication of two letters, it is not a misjoinder of parties to make both writer and receiver of the letters parties defendant.

2. Conspiracy 🔑19—May be inferred from surrounding circumstances.

Conspiracy is usually provable by circumstantial evidence, and may be inferred from nature of acts, individual and collective interest of the alleged conspirators, the situation and relation of the parties at the time, and generally all circumstances preceding and relating to the culmination of the claimed conspiracy.

3. Libel and slander 🔑112(1)—Evidence held sufficient to establish concerted action and publication of libelous letter by sender and receiver.

Evidence that a letter was written to a district attorney who was engaged in a political fight with deputies whom he had discharged, and who were working for his recall, offering evidence against one of the deputies, and the fact that the offer was accepted and the evidence requested to be forwarded, *held* sufficient to warrant a finding that the sender and receiver of the letter acted in concert, and that the publication by the receiver was in fact a publication contemplated by the sender.

4. Libel and slander 🔑51(1)—The communication to be privileged must be without malice.

A communication, to be privileged under Civ. Code, § 47, subd. 3, must be made without malice.

5. Libel and slander 🔑112(2)—Evidence held to show malice in publication of libelous letter.

Evidence that one wrote a letter to a district attorney who was engaged in a political fight with some deputies whom he had discharged, and who were seeking his recall, offering information concerning one of the deputies who had once appeared against the writer in litigation, and the fact that such information was subsequently requested and sent and published, *held* to sustain a finding that malice existed so as to preclude a claim of privilege.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

6. Libel and slander ⚷112(2)—"Malice" may be proven directly or indirectly.

"Malice," as used in Civ. Code, § 47, subd. 3, relating to privileged communication, is used in its popular sense—that is, a desire or disposition to injure another founded upon spite or ill will—and may be proven either directly or indirectly taking into consideration the general course of defendant's conduct and specific acts or external evidence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Malice.]

7. Appeal and error ⚷1050(1)—Admission of merely cumulative testimony, though improper, held not reversible error.

The admission of testimony, though improper, is not reversible error when it is merely cumulative, and several other witnesses have testified similarly without dispute.

In Bank.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Action by Alfred Siemon against F. C. Finkle and another. From judgment for plaintiff, defendants appeal. Affirmed.

Frank M. Gunter and Janeway, Beach & Pratt, all of Los Angeles, for appellant Finkle.

Foster & Barnhart, of Bakersfield, for appellant McCowan.

Rowen Irwin and W. W. Kaye, both of Bakersfield, for respondent.

LENNON, J. This is an action for libel instituted by Alfred Siemon, plaintiff below and respondent here, an attorney at law, practicing at Bakersfield, against the defendants, F. C. Finkle and Barclay McCowan. The action was based uopn the publication of two letters written by Finkle at Los Angeles to McCowan at Bakersfield and shown by the latter to various persons. Plaintiff's complaint proceeded upon the theory that the two defendants jointly published the letters, to the damage of the plaintiff. The facts of the case as revealed by the pleadings, proof, and findings are as follows:

In 1916 plaintiff was discharged from the office of deputy district attorney by defendant McCowan, then district attorney of Kern county. The reason given by McCowan for such discharge was that plaintiff had been using the county's time and its employees for his private practice. Defendant Finkle, having read in Los Angeles papers an account of the discharge of plaintiff and the reasons therefor, sent to McCowan the following letter:

"January 20, 1917.

"Personal.

"Mr. Barclay McCowan, District Attorney, Bakersfield, California—Dear Sir: The press dispatches convey to me the information that you have discharged a number of your deputies who are threatening you with recall. Should you require any information about one of your former deputies, Mr. Alfred Siemon, whom you have discharged, as to his practices in regard to taking private business, I will be glad to furnish it. He has, to my knowledge, undertaken some very questionable business while one of your deputies, and while I have never met him, from what he has been doing, I am convinced that he was not a suitable person to act as deputy district attorney anywhere. I have never met you personally, but I am well known in Bakersfield, and, should the information I have concerning Mr. Siemon be of interest to you, I will be glad to give you the particulars.

"Very truly yours,

"FCF/LVH. [Signed] F. C. Finkle."

To this letter McCowan replied, thanking the sender "for the information * * * so kindly offered." The reply letter from McCowan also stated that he, McCowan, was interested, as a ranch owner, in an irrigation project involving the storage of the waters of Kern river, and asked for information and ideas on the subject. This letter concluded with a request that Finkle send to McCowan "the Siemon particulars in a separate letter."

On the 27th day of January Finkle sent to McCowan a lengthy letter, in which it was stated that plaintiff, while he was deputy district attorney of Kern county, had represented, as an attorney, one Hubbard in litigation which had arisen between said Hubbard and the defendant Finkle. The letter last referred to charged plaintiff with having used information which he had received from Finkle to assist Hubbard in defeating the claims of his creditors, of whom Finkle was one. It also charged plaintiff with having advised Hubbard to go through bankruptcy proceedings for the purpose of avoiding the payment of his just debts, when, as a matter of fact, Hubbard was not insolvent, and with having assisted Hubbard "to put under cover" as much of his property and assets as possible. The letter concludes with the following paragraph:

> "As stated to you, I have never met Siemon, but from my correspondence with him and the way in which I know he has conspired with Hubbard to assist the latter in defrauding his creditors, I have formed the opinion that he is a shyster of the worst kind which unfortunately now and then are found to exist in the ranks of the legal profession."

Each of the two letters written by Finkle to McCowan forms the basis of a cause of action set out in two separate counts in plaintiff's amended complaint. Both counts allege and proceed upon the theory that the defendants, with the intent of injuring the plaintiff, combined and conspired together with the purpose of publishing the said letters.

[1] Both defendants demurred to the plaintiff's first amended complaint upon the ground, among others, that there was a misjoinder of parties defendant. No misjoinder appearing upon the face of the complaint, and the remaining grounds of demurrer not being well taken, the demurrers were properly overruled.

The respective demurrers of defendants having been overruled, they elected to separately defend against the action, and accordingly interposed separate answers. The answer of the defendant Finkle, in addition to denying all of the material allegations of the complaint, interposed and separately pleaded three additional defenses: (1) Misjoinder; (2) privilege; and (3) justification. The defense of defendant McCowan was rested solely upon a denial of the allegations of the plaintiff's complaint. No misjoinder in his behalf was pleaded, and therefore, in so far as he was concerned, the defense of misjoinder was waived. Upon the issues thus raised the case was tried by the court below sitting without a jury, and resulted in a judgment for the plaintiff in the sum of $750 as actual damages, to which was added an award in the sum of $250 against defendant McCowan as punitive damages for a malicious publication.

The trial court found that as to the first letter "the statements pertaining to the plaintiff were false and defamatory," but that the publication thereof by each of said defendants was not joint and that for that reason plaintiff was not entitled to recover on the first count.

As to the second letter, the trial court found in effect that certain statements therein were false and defamatory, and known at the time of their publication by the defendants to be false, and that the publication was by each of said defendants, and was wanton and malicious and done for the purpose of injuring the plaintiff as an attorney at law and aspersing his good name and standing in his profession. In addition thereto the express finding was made:

> "That the publication of the said letter by each of said defendants was the result of the joint acts of said defendants combining and conspiring together for the purpose of injuring the plaintiff in his name and reputation."

The main contention of defendants urged in support of the appeal is that the evidence falls short of proving a conspiracy to publish the letter in question and is wholly insufficient to support the trial court's finding in that behalf.

With this contention we cannot agree.

[2] A conspiracy is almost always of necessity provable only by circumstantial evidence—that is to say, by inference reasonably deduced from facts proven—and this is so because the law recognizes the intrinsic difficulty of establishing a conspiracy by direct evidence. Consequently the conspiracy complained of may oftentimes be inferred from the nature of the acts complained of, the individual and collective interest of the alleged conspirators, the situation and relation of the parties at the time of the commission of the act, and generally all of the circumstances preceding and attending the culmination of the claimed conspiracy. Revert v. Hesse, 184 Cal. 295, 301, 193 Pac. 943.

[3] It may be conceded that the plaintiff failed to prove any formal agreement between the defendant Finkle and the defendant McCowan concerning a concert of action for the publication of the statements complained of. Nevertheless we think the facts of the entire transaction warranted the trial court in arriving at the conclusion and making and finding that the defendants acted in concert in the publication of said statements.

There are, for instance, the established facts that the defendant Finkle, knowing that the defendant McCowan was embroiled in a bitter battle, politically, with the plaintiff, who, with other persons, was endeavoring to procure McCowan's recall from the office of district attorney, wrote to McCowan the letter of January 20th, maliciously making the false and defamatory accusations against the plaintiff.

Standing alone these particular facts would not, of course, suffice to support the finding of a concert of action between the two defendants in the publication of the statements in question. But they are to be considered in conjunction with other facts shown in evidence. Thus in this behalf the further facts will be noted that the defendant Finkle suggested that defendant McCowan might "require" the proffered information. And this suggestion, when read and considered with the context of the entire letter, readily enough warrants the inference that it was the defendant Finkle's intent and purpose that defendant McCowan could and should use the said information for the purpose of damnifying and defeating the plaintiff, Siemon, in his purpose to recall the defendant McCowan.

Again, there is the fact shown in evidence that McCowan requested Finkle to "send the Siemon particulars in a separate letter." Considered in connection with the facts above narrated, this request of McCowan tended strongly to warrant and support the inference that it was McCowan's intent and purpose to suggest to Finkle that the proffered information, when received, could, if separately stated, be more readily and effectively published. And if it be a fact, as the trial court in effect found, that in keeping with the suggestion and its probable purpose Finkle forwarded the desired information, then it may be fairly said that he was acting in concert with McCowan for the publication complained of. True, the defendant Finkle testified in effect that he expected McCowan to make an independent investigation as to the correctness of the statements contained in the letter, and that "after being tipped off" he expected McCowan to use the information on his own authority. The trial court, however, was not required to accept this testimony at its face value, and, in view of the inference readily deducible from the evidence that an independent investigation would have demonstrated Finkle to be a falsifier, the trial court may well have concluded that he was deliberately disseminating false information with the intent and purpose of inducing McCowan to use it against the plaintiff in the recall fight.

Moreover, it may be fairly said, we think, from all of the circumstances involved in the writing and publication of the letters in question, that the act of McCowan in publishing the second letter was the natural and probable result of defendant Finkle's act in writing and sending the same to McCowan. That it to say, under the circumstances existing at the time of the writing and receipt of the letter, the publication by McCowan was a result which Finkle might have reasonably foreseen as likely to occur. This being so, it follows that Finkle's act in writing and sending the letter was the proximate cause of the publication by McCowan. In short, all of the circumstances hereinbefore narrated warrant the inference that the publication by McCowan was in fact a publication contemplated and countenanced by Finkle.

[4, 5] The other two defenses specially pleaded by defendant Finkle, (1) that the letter was a privileged communication under subdivision 3 of section 47 of the Civil Code, and (2) that the defamatory charges were true, cannot be sustained.

Conceding, for the purpose of discussion, that the publication comes within the category of privileged communications, in order to bring the publication in question within the provisions of section 47 it is necessary that there should be an absence of malice. The finding of the trial court that the publication "of each of said letters by each of said defendants was with malice" is, in our opinion, supported by the evidence.

[6] The malice referred to by this section of the Civil Code is malice in the popular conception of the term; that is to say, as a desire or disposition to injure another founded upon spite or ill will. Davis v. Hearst, 160 Cal. 143, 116 Pac. 530. The absence of malice is the absence of enmity. Malice in fact may be proved either directly or indirectly—either by direct evidence of the evil motive or by legitimate inferences to be drawn from other facts and surrounding circumstances. And for the purpose of ascertaining the existence or nonexistence of actual malice there may be taken into consideration not only the general course of defendant's conduct toward plaintiff and any specific act or acts tending to prove or disprove the existence of an evil motive, but also the internal evidence furnished by the nature of the libel itself. Davis v. Hearst, supra.

The general tone of the letter, the language employed therein to characterize plaintiff and plaintiff's conduct, considered in the light of defendant's motive for resentment therein disclosed, together with the fact that defendant Finkle unsolicited volunteered the first offer to furnish information about the plaintiff, warrant and support the inference that defendant Finkle was actuated in the publication of the false and defamatory statements by enmity and ill will.

No serious attempt was made at the trial of the case to establish the truth of the defamatory charges. The chief proof offered consisted merely of the reiteration by Finkle of the facts upon which he based his opinion that plaintiff was a "shyster." These facts were those set out in the letter of January 27th, some of which facts were themselves libelous.

[7] It is urged that the testimony of one Thorton, stenographer of McCowan, should have been excluded. Inasmuch as the fact of publication about which Thorton testified was proved by the direct and undisputed testimony of several other witnesses, this testimony was merely cumulative, and need not, therefore, be discussed.

Judgment affirmed.

We concur: WILBUR, C. J.; MYERS, J.; WASTE, J.; LAWLOR, J.; SEAWELL, J.

---

190 Cal. 608

RUSTIGIAN v. PHELPS et al. (S. F. 10375.)

(Supreme Court of California. March 15, 1923.)

1. Vendor and purchaser ⟹134(1)—Rights of way held incumbrances; vendee held entitled to recover down payment where certificate of vendor's title did not comply with escrow agreement.

Where the escrow agreement provided for a transfer to vendee of property free of all incumbrances excepting as therein stated, but the certificate of title furnished by vendor showed property was subject to rights of way for ditches and roads and for conveyance of water across land, not included in the exceptions in the escrow agreement, *held*, that such rights were incumbrances, and, not having been removed, justified plaintiff vendee in seeking to recover the down payment made under the purchase agreement.

2. Vendor and purchaser ⚷134(1)—When vendor not entitled to defense that guaranty of absence of incumbrances does not include visible burdens stated.

The rule that an agreement to convey land free and clear of incumbrances does not refer to visible physical burdens upon the land permanent in character will not be applied in the absence of evidence to show that the vendee knew of their existence.

In Bank.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by E. M. Rustigian against F. M. Phelps and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Everts, Ewing & Wild, J. R. Fitch, and Harris, Johnson, Willey & Griffith, all of Fresno, for appellants.

W. D. Crichton and Gallaher, Simpson & Hays, all of Fresno, for respondent.

WASTE, J. Defendants appeal from a judgment in favor of plaintiff in an action to recover a deposit of $1,000, made upon a tentative receipt for the purchase of land. Plaintiff entered into a contract with defendant Phelps, as agent for the owner of the purchased land, paid Phelps the above sum as and for a deposit and partial payment on the full purchase price of the property, and received an escrow deposit receipt and agreement which provided that, upon payment of $5,000 cash, including the amount deposited, he should receive a good and sufficient contract for a deed conveying said property to him, together with an abstract or certificate of title, to be furnished at the owner's expense, showing title to such property to be in the owner, free and clear of all incumbrances whatsoever, except as otherwise expressly stated in the escrow receipt and agreement. The only exception noted by this agreement was a provision that the property in question was covered by a contract between the owner and the California Associated Raisin Company.

The defendant Brooks, as owner, in writing accepted the terms of the escrow agreement, and agreed to execute and deliver a good and sufficient contract for a deed conveying the property to the plaintiff. Thereafter the defendant Brooks delivered a certificate showing title to the property to be vested in him, but subject to the payment of certain taxes and rights of way for ditches shown on the map accompanying the certificate and referred to as reserved in various deeds of record, and also subject to an annual payment to the Fresno Canal & Land Corporation for water right appurtenant to the land and right of way thereover to convey water to other lands, as provided by an agreement of record. Brooks also tendered to plaintiff an agreement for a deed to be executed when one-half of the total purchase price of the property, together with interest to that date, had been paid, and when the plaintiff otherwise performed the conditions and covenants of the tendered contract. The contract provided, further, for the execution by Brooks and his wife, and the delivery to the plaintiff, of a deed conveying the property to plaintiff free and clear of any liens except taxes, agreed to be paid by plaintiff, and defects of title, "save and excepting rights of way for roads and ditches, and any contract which is now in force." This plaintiff refused to execute, and brought this action to recover his deposit of $1,000. Judgment was entered in his favor, and defendants have appealed.

[1] The plaintiff based his rejection of the contract tendered by Brooks upon the ground that the escrow agreement provided for a transfer to him of the property free and clear of all incumbrances excepting as therein otherwise stated, whereas the certificate of title furnished by Brooks, in compliance with the provisions of the preliminary contract, disclosed the title to the property to be subject to rights of way for ditches and roads and the annual payment to the Canal & Land Corporation for water right appurtenant to the land and a right of way to convey water over the property. This contention was upheld by the trial court, and we are satisfied that its judgment must be affirmed. The rights of way for ditches and for the conveyance of water across the land constituted an incumbrance thereon. Cosby v. Danziger, 38 Cal. App. 204, 208, 175 Pac. 809. These restrictions and incumbrances upon the title of the defendant Brooks, not being included in the exception carried in the escrow agreement, and not being removed, justified the plaintiff in seeking a recovery of his partial payment under defendant's contract to convey to him a title free and clear of all incumbrances except as in the escrow agreement noted. Tandy v. Waesch, 154 Cal. 108, 110, 97 Pac. 69.

[2] In combating the contention of the respondent and the finding of the trial court, the appellants assert that the incumbrances complained of existed openly, notoriously, and continuously throughout the entire period covered by the transaction in question; that their existence was known to the respondent; and that the real subject-matter of the dealings between the parties was the land subject to visible easements. The record in the case discloses no such facts. There is not a word of testimony, nor was there a scintilla of evidence before the trial court, to justify even an inference that the Fresno Canal & Land Corporation, up to that time, had ever constructed a ditch or canal on the land in question. The certificate of title referred to "rights of way for ditches shown on

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the map hereinafter referred to, as reserved in various deeds of record." The map was not produced, and no deeds are found in the record of the evidence. Neither is there testimony that the plaintiff ever saw the land. The case, therefore, does not fall within the application of the rule relied upon by appellants that an agreement to convey land free and clear of all incumbrances does not refer to visible physical burdens upon the land, permanent in character.

The judgment is affirmed.

We concur: WILBUR, C. J.; MYERS, J.; KERRIGAN, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.

---

190 Cal. 529

In re BONDS OF GARDEN GROVE DRAINAGE DIST.

GARDEN GROVE DRAINAGE DIST et al. v. ALL PERSONS, etc.

(L. A. 7538.)

(Supreme Court of California. March 6, 1923.)

Drains 🔑18—After defeat of drainage district bonds, another election cannot be called without petition therefor.

In view of St. 1903, pp. 301, 307, §§ 33, 56, *held*, that in section 27, providing that after defeat of drainage district bonds another election may be called on a "petition of the character hereinbefore provided for in this section," the petition provided for in section 1 of the act is the one referred to; that is, one signed by 50 or a majority of the holders of title within the district, and the board of directors has no authority to call a second election except on such a petition.

In Bank.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Proceeding to establish validity of bonds of the Garden Grove Drainage District, brought against all persons, etc. From the judgment, defendants appeal. Reversed.

Bishop & Wellington, of Santa Ana, for appellants.

Head, Rutan & Scovel, of Santa Ana, for respondents.

WILBUR, C. J. The Garden Grove Drainage District was created in pursuance of the statutes of 1903. Stats. 1903, p. 291. An election was called for the purpose of creating the original bonded indebtedness authorized by section 27 of the act for the construction of the necessary improvements for which the district was organized. This section provides for the issuance of such bonds, and, if necessary, for a supplemental issue of bonds to complete the work, when authorized by a vote of the electors of the district. With reference to the result of the election, the statute provides:

> "At such election the ballots shall contain the words 'Bonds—Yes' or 'Bonds—No,' or words equivalent thereto. If a majority of the votes cast are 'Bonds—Yes,' the board of directors shall cause bonds in said amount to be issued; if a majority of the votes cast at any bond election are 'Bonds—No,' the result of such election shall be so declared and entered of record. Whenever thereafter, a petition of the character hereinbefore provided for in this section, is presented to the board, it shall so declare of record in its minutes, and shall thereupon submit such questions to said electors in the same manner and with like effect as at such previous election."

The bonds were defeated at the election, and thereafter, without any petition therefor from electors or property holders, the directors called another election at which the bonds carried. This action was brought to establish the validity of the bonds about to be issued as a result of the second election. The trial court held that the election was valid.

The sole question presented by this appeal is whether or not the board of directors of the Garden Grove Drainage District was authorized by the statute to call such second election without a petition therefor.

This involves an interpretation of the last sentence of section 27 (Stats. 1903, p. 299), above quoted. The uncertainty as to its proper construction arises from the fact that section 27 does not thereinbefore provide for any petition whatever. The appellants contend that this whole sentence should be disregarded because void for uncertainty. The respondents suggest that the word "act" was intended instead of "section," and that the petition provided for in section 1 of the act is the one referred to in the concluding sentence of section 27. That petition is one signed by 50 or a majority of the holders of title within the proposed district, and addressed to the board of supervisors asking for the calling of an election for the foundation of the district, etc.

We are satisfied that the petition referred to in section 27 is a petition signed by "fifty or a majority of the holders of title," and that the phrase "a petition of the character hereinbefore provided for," relates, not to the form and subject-matter of the petition mentioned in section 1 of the act, but to the character of signers thereof, to wit, "fifty or a majority of the holders of title." Not only is this petition the only one mentioned in the act before the concluding sentence of section 27, and, therefore, of necessity, the one there referred to, but it is reasonable to suppose that the Legislature so intended.

It is such a petition which initiates the proceedings for the establishment of the district which is to pay for the necessary improvements by the issuance of bonds. Thereafter the subject of the issuance of bonds is voted for at an election called by the directors, at which election all the electors of the district, regardless of whether or not they own land, vote upon the issuance of the bonds. Section 27, supra. If the proposed bond issue is defeated, it is evidently intended that the majority of the holders of the land of the district susceptible of drainage or 50 of them can by petition require a second election. But the board of directors has no power to call an election for the issuance of bonds, unless expressly authorized by law, and the statute nowhere makes provision for an election authorizing a bond issue after such issue has once been defeated, except such authority as is given in the concluding sentence of section 27, and this authority on the part of the board of directors is predicated upon a petition therefor. Section 56 provides that the board of directors shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of the act.

If we reject the whole of the last sentence of section 27, there is no authority for the calling of the election in question. That we have arrived at the intention of the Legislature with reference to the necessity of a petition by a majority, or 50 of the holders of title, as a basis for a second election is indicated by a similar requirement in the statute concerning the refunding of bonds.

Section 33 provides for an election for refunding bonds already issued, upon a petition presented to the board of directors, signed by a majority in number of holders of title or evidences of title to real property in such district.

We think it clear that the Legislature intended to authorize an election only upon petion of "fifty or a majority of the property owners," after the defeat of such a proposition. The judgment of the lower court holding the bond issue valid is erroneous.

The judgment is reversed.

We concur: LENNON, J.; SEAWELL, J.; WASTE, J.; MYERS, J.; LAWLOR, J.; KERRIGAN, J.

---

190 Cal. 569

SHAFFER et al. v. BEINHORN. (Sac. 3303.)

(Supreme Court of California. March 7, 1923.)

1. Brokers 🔑82(1)—Complaint held to show plaintiffs' services were not those of real estate broker or salesman, within statute, so as to prevent recovery of compensation without a license.

A complaint alleging that defendant, a licensed real estate broker, employed plaintiffs to introduce prospective purchasers for certain property to defendant, who thereafter negotiated the sale of the property to such purchasers, and expressly denying, in the language of the statute, that plaintiffs were employed as brokers or real estate salesmen, *held* to show that the services performed by plaintiffs, for which they claimed a share of the commission, were not those within the Real Estate Brokers' Act, so as to prevent them from recovering compensation for such services without having been licensed under that act.

2. Brokers 🔑42—Unlicensed person cannot claim compensation for single act as broker or salesman.

Since Real Estate Brokers' Act makes it unlawful for a licensed broker to pay a commission for performing any of the acts therein specified to any person who is not a licensed broker or a licensed salesman, compensation cannot be claimed for the performance of a single act as broker or salesman, regardless of whether such act would constitute a partial vocation or not

In Bank.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Carl H. Shaffer and another against Charles A. Beinhorn. Judgment for defendant, when demurrer to the amended complaint was sustained, and plaintiffs appeal. Reversed, with instructions to overrule the demurrer with leave to defendant to answer.

Earl A. Bagby, of Visalia, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., amici curiæ.

Karl A. Machetanz, of Exeter, for respondent.

LENNON, J. The case is here on rehearing, after decision by the District Court of Appeal. The facts of the case, and the point presented in support of the appeal, are as follows:

"The appeal is from a judgment based upon an order sustaining defendant's demurrer to the amended complaint of plaintiffs. As far as necessary to quote said complaint is as follows:

" 'That on or about the 5th day of March, 1920, the defendant was a real estate broker, duly licensed as such, residing and having his principal place of business in the city of Exeter, county of Tulare.

" 'That on or about the said last-mentioned date the said defendant as such broker was the real estate agent and broker, by writing duly appointed for the sale of certain real property situate in the county of Tulare, state of California, commonly known as the Rockford ranch, and that by the terms of the agency agreement, as aforesaid, as plaintiffs are informed and believe, the said defendant was to receive from the owner of said ranch as compensation for the selling of the same as such real estate broker, and the owner of said ranch in said agency agreement did agree to pay as such compensation to defendant, as such real estate broker, a commission of 5 per cent., to be computed upon the total selling price.

" 'That on or about the 5th day of March, 1920, the said defendant as broker and agent for the sale of said real estate, as aforesaid, entered into an agreement with these plaintiffs whereby the defendant agreed that, if the plaintiffs, or either of them, would find any one interested in the purchase of such a ranch, to whom the said defendant would be able to negotiate a sale thereof, or would introduce to said defendant any one to whom the said defendant would be able to negotiate a sale thereof, he (the said defendant) would pay unto the plaintiffs a sum of money equal to two-thirds of the gross commission which the said defendant might receive on account thereof.

" 'That thereafter these plaintiffs, relying on their said agreement with defendant, did procure and produce to defendant a prospective purchaser for the said real property, to whom the said defendant did thereafter and as such agent and broker negotiate a sale of the said real property, and on account of which sale the said defendant did, on or about the 26th day of October, 1920, receive, as a part of the compensation and commission aforesaid, the sum of five thousand seven hundred and fifty ($5,750) dollars.'

"Then follows an allegation of a demand upon defendant for the payment of their proportion of said commission and his refusal to pay any portion of it, and the complaint proceeds:

" 'That neither of said plaintiffs are, or ever have been, a real estate broker or real estate salesman within the meaning of the act of the Legislature of the state of California, defining a real estate broker and salesman, approved May 27, 1919, and that neither of said plaintiffs have at any time sold or offered to sell, bought or offered to buy, or negotiated the purchase or sale or exchange of real estate, or negotiated loans on real estate, leased or offered to lease, rented or placed for rent, or collected rent from any real estate or improvements thereof for others, either as a whole or partial vocation, and that neither of said plaintiffs have ever at any time or in any manner acted as a broker or salesman or agent for the purchase, sale, or exchange of real estate of or for another, and that at no time other than the time herein mentioned have the plaintiffs or either of them ever engaged for a compensation to find, procure, or introduce to any person, another person, firm, or corporation to whom or with whom a contract of sale, purchase, or exchange might be made.'

"It is conceded that the demurrer to the complaint raised the point and was decided upon the ground that plaintiffs by their allegations disclosed an attempt to induce the defendant to violate an express mandate of law and that the enforcement of their demand would be against public policy.

"Section 1 of said real estate act (Stats. of 1919, p. 1252), provides: 'It shall be unlawful for any person, copartnership or corporation to engage in the business, or act in the capacity of a real estate broker, or a real estate salesman within this state without first obtaining a license therefor.'

"Section 2 provides: 'A real estate broker within the meaning of this act is a person, copartnership or corporation who for a compensation, sells, or offers for sale, buys, or offers to buy, or negotiates the purchase or sale or exchange of real estate * * * for others as a whole or partial vocation. A real estate salesman within the meaning of this act is one who for a compensation is employed by a licensed broker to sell, or offer for sale, or to buy, or to offer to buy, or to negotiate the purchase or sale or exchange of real estate, * * * as a whole or partial vocation.'

"Section 17 provides the penalty for acting as a broker or salesman without license, and section 18 is as follows: 'It shall be unlawful for any licensed broker to pay a commission for performing any of the acts herein specified to any person who is not a licensed broker, or a licensed salesman.'

"Section 20 provides: 'No person, copartnership or corporation engaged in the business or acting in the capacity of a real estate broker or a real estate salesman within this state shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any of the acts mentioned in section two hereof without alleging and proving that such person, copartnership or corporation was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose.'

"As to the validity of said act, no question, is raised by appellants. Indeed, the Supreme Court has recently upheld it as a legitimate example and exercise of the police power of the state. Riley v. Chambers, 181 Cal. 592, 185 Pac. 855, 8 A. L. R. 418. It was declared that even lawful and useful occupations may be subjected to regulation in the public interest and that the proper test as to whether the Legislature has exceeded its authority is whether the purpose and effect of the regulation 'go no further than throwing reasonable safeguards in the public interest around the exercise of the right'; and the conclusion was reached that 'the single primary purpose of the act is to require of real estate brokers and salesmen that they be honest, truthful, and of good reputation' and that said legislation embodies a legal and reasonable scheme for that purpose. It is conceded that the measure was enacted for regulation and not for the purpose of revenue, and it is to be observed that the license fees are of nominal consideration and are imposed only for the purpose of defraying the expense attached to the administration of the law. But it is the claim of appellants that the act which they were employed to perform does not bring them within the purview of a broker or salesman as these terms are defined in said statute." Real Estate Brokers' Act (Stats. 1919, p. 1252).

[1] With this contention as a basis, it is argued that the complaint does state a case of action and was, therefore, proof against demurrer. We are in accord with this contention. The complaint does not on its face show that plaintiffs were engaged in the business, or acting in the capacity, of a real estate broker or real estate salesman when

they performed the act for which they seek compensation. In order to come within the definition of real estate broker or real estate salesman, a party must "sell or offer to sell, buy or offer to buy, or negotiate the purchase or sale or exchange of real estate. * * *" By the terms of their contract as pleaded the plaintiffs were only required "to find" or "to introduce" to defendant a person "interested" in purchasing and who subsequently did purchase, in order to recover the sum agreed by defendant to be paid to them. By the terms of the contract, as set forth in the complaint, the "negotiation" of the sale was to be left entirely to defendant. Plaintiffs' only duty was to produce a prospective purchaser. This, the complaint alleges, they did. The complaint expressly negatives any further act or acts on the part of plaintiffs which might tend to bring them within the scope of the definition, denying specifically and in practically the identical words of the statute itself that they "sold or offered to sell, bought or offered to buy, or negotiated the sale * * * of real estate. * * *" The truth of this allegation is admitted by demurrer. The acts of plaintiffs, therefore, as alleged in the complaint, fall short of those defined by the Real Estate Brokers' Act, as constituting either a real estate broker or real estate salesman.

In Schomig v. Keiser (Cal. Sup.) 209 Pac. 550, it was held that any employment by any person of another, to collect payments on an agreement which had already been negotiated, did not make the party a real estate broker, or real estate salesman. By a parity of reasoning, the employment of any person to perform an act preceding the negotiation of a sale does not, in the absence of subsequent assistance rendered in the ultimate negotiation of the sale constitute the party thus employed a real estate broker, or real estate salesman.

It may be that, upon a trial of the case, the defendant may be able to prove that plaintiffs did in fact actually assist in negotiating the sale. If he can do this, it is a good defense. But for the purpose of passing upon a demurrer it is not permissible to predicate a ruling upon the presumption that plaintiffs did actually assist in the subsequent negotiations which ultimately resulted in the sale.

[2] The question of whether or not a single act can be held to constitute a "partial vocation" need not, under the view which we have taken of the facts pleaded in the plaintiffs' complaint, be decided.

Moreover, a consideration of that question is immaterial in this particular case, by reason of the provisions of section 18 of the Real Estate Brokers' Act (Stats. 1919, p. 1259), which provides that:

"It shall be unlawful for any licensed broker to pay a commission for performing any of the acts herein specified to any person who is not a licensed broker, or a licensed salesman."

In view of this section, it follows as a matter of course that, although it be conceded that it was but a single act, nevertheless if the plaintiffs' participation in the transaction in question was in fact that of a salesman or broker, as defined by the act, then, of course, payment for the service rendered in that behalf could not be enforced under the provisions of this section. It, therefore, makes no difference whether a single act does or does not amount to a partial vocation.

Judgment reversed, with instructions to the court below to overrule the demurrer, with leave to defendant to answer within a designated time.

We concur: WILBUR, C. J.; KERRIGAN, J.; SEAWELL, J.; LAWLOR, J.; MYERS, J.; WASTE, J.

190 Cal. 554

LUTZ v. WESTERN IRON & METAL CO. et al. (L. A. 7260.)

(Supreme Court of California. March 7, 1923.)

1. Trade-marks and trade-names and unfair competition ⟹92 — Complaint to restrain use of plaintiff's business name held to state sufficient facts.

A complaint alleging that plaintiff had been engaged in business under a fictitious name, that he had filed the certificate as required by statute, and that the individual defendants had organized a corporation having the same name, which corporation was also made a defendant, and were about to engage upon an extensive campaign to advertise its business under that name, thereby causing injury to plaintiff by inducing people to believe defendant corporation was plaintiff, and thereby injuring the good will which he had established, *held* to state sufficient facts, in addition to conclusions of law, to entitle plaintiff to the injunction sought.

2. Injunction ⟹118(2)—Complaint need not describe at length injury inevitably resulting from defendants' acts.

Where the situation is such that injury or damage will inevitably accrue to plaintiff if defendants are permitted to do the threatened acts, plaintiff is not required to describe in extenso such injuries.

3. Injunction ⟹146—Verified complaint held to support injunction in view of admissions in answer.

Where a verified complaint alleged positively all facts contained therein except that defendants were about to engage in extensive advertising of their business under the name under which plaintiff had been doing business, which was alleged only on information and belief, an answer admitting defendants intended to advertise their business in the usual way, and denying only that the advertisement would be as extensive as alleged by plaintiff, was sufficient to entitle plaintiff to an injunction under the rule that, where a verified complaint is relied upon as the basis for an injunction, its allegations must stand the test to which oral testimony would be subjected.

4. Injunction 🔑146 — Temporary injunction not always denied because verified answer denies every allegation of complaint.

It is not an invariable rule that a temporary injunction must be denied in all cases where the verified complaint is unsupported by affidavits and all its allegations are denied by the verified answer.

5. Trade-marks and trade-names and unfair competition 🔑95(2)—Temporary injunction against use by another of plaintiff's established business name held proper.

Where it appeared from positive averments that plaintiff was first in engaging in business under a particular name, and had been conducting his business for six or seven years before defendants entered the field, and had expended much time and energy in building up his business, he is entitled to a temporary injunction against the use by defendants of that name, notwithstanding a denial by their verified answer of the allegations of his complaint.

6. Injunction 🔑135—Right to temporary injunction rests within discretion of trial court.

The granting, denying, dissolving, or refusing to dissolve a preliminary or temporary injunction rests in the sound discretion of the trial court.

7. Trade-marks and trade-names and unfair competition 🔑68—Right to prevent use of trade-name does not depend on trade-mark.

Plaintiff's right to prevent defendants' use of the name under which plaintiff had been engaged in business for seven years does not depend upon an exclusive right to the use of a trade-mark or a trade-name altogether, but rests upon the broad equitable ground that the use by defendants would be unfair competition in commercial dealings.

8. Injunction 🔑114(3)—Officers of corporation can be joined with it as defendants.

There was no misjoinder of parties in joining as defendants the officers of defendant corporation in a suit to enjoin the use by the corporation of plaintiff's trade-name.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Suit by A. Lutz, doing business under the fictitious name of the Western Iron & Metal Company, against the Western Iron & Metal Company and others. From an order overruling a demurrer to the complaint and continuing in force a temporary restraining order against the use of plaintiff's firm name, defendants appeal. Affirmed.

Joseph L. Lewinson, of San Francisco, and William A. Barnhill, of Los Angeles, for appellants.

R. F. Church and Timon E. Owens, both of Los Angeles, for respondent.

SEAWELL, J. This is an action by respondent, doing business under the fictitious name of Western Iron & Metal Company, for an injunction against the Western Iron & Metal Company, a corporation, and Albert K. Lucas, Lester W. Roth, and David H. Miller, organizers and, as shown by the answer, officers of said corporation, praying that the latter be enjoined from using the name Western Iron & Metal Company and from conducting business thereunder in the city of Los Angeles and elsewhere, and from using said name in any manner whatsoever, and for general relief and costs. No special damages are pleaded or claimed. Relief is sought on the ground of unfair dealing on the part of defendants.

A temporary restraining order was granted upon the verified complaint without notice, respondent being required to file a bond in the sum of $1,000. After hearing on the order to show cause the trial court made an order continuing in effect the restraining order to abide a decision of the cause on its merits. The action of the court in this respect was equivalent to the granting of a temporary injunction.

The complaint sets out the acts complained of with considerable elaboration. Demurrers, both general and special, were interposed to the complaint, which were overruled by the court. A verified answer was filed by appellants.

This appeal is taken from the order overruling said demurrers and continuing said restraining order in force as aforesaid.

The only ground of demurrer which we are required to pass upon at this time is whether or not a cause of action is stated by the complaint. That a cause of action is stated we entertain no serious doubt. It is not necessary to set out the allegations of the complaint in full. The portions descriptive of respondent's business are:

> That on the 1st day of October, 1915, he commenced business in said city of Los Angeles, and ever since said time has been and is still engaged in conducting in said city "an extensive and profitable wholesale and retail iron, metal, and machinery business, both new and secondhand, and a general iron and scrap iron business; that in said business respondent buys and sells all kinds of machinery and supplies and acts as agent in buying and selling all kinds of machinery and necessary supplies therefor both manufactured and unmanufactured; that he is also engaged in the business of buying and selling new and secondhand engines, boilers, machinery, grading equipment, tools, machine shops, and electrical supplies and appli-

ances, foundry and factory supplies, and hardware of all kinds in all parts of the state of California, and several of the principal cities of the United States west of the Rocky Mountains; that by reason of the competent and efficient manner in which respondent has ever since October, 1915, and does now conduct said business, and by reason of advertising said business under said fictitious firm name of Western Iron & Metal Company, respondent has acquired and now commands an extensive patronage in the city of Los Angeles and throughout the state of California, and that he has acquired under said name and now enjoys a good will therein of great value."

The usual allegations of damage and injury that would accrue to respondent if appellants, a competitor, be permitted to do business under the same name heretofore adopted by respondent and to advertise said business under said name, follow:

It is admitted that appellant said Western Iron & Metal Company was duly incorporated on January 7, 1922, with its principal place of business at the city of Los Angeles; that thereupon David H. Miller was elected president, Lester W. Roth, vice president, and Albert K. Lucas, secretary and treasurer of said corporation. Said defendant corporation had not at the time of filing its answer been granted permission by the state corporation commissioner to issue or sell any of its capital stock upon its application made January 18, 1922. Appellant corporation denied that it is about to engage in an extensive campaign of advertising its said business under the name of the Western Iron & Metal Company, but does admit that it intends to advertise its name and its said business in the manner usually employed by persons conducting a business of a similar character.

Before bringing the action respondent filed with the county clerk of Los Angeles county a certificate setting out the name in full of his business, the place of business, and gave due notice of publication of said certificate as required of every person transacting business in this state under a fictitious name by the provisions of section 2466, Civil Code.

On the 16th day of January, 1922, before appellants made application to the corporation commissioner to issue or sell any stock, they were notified by respondent that, by reason of the latter having conducted the business heretofore described for a great many years prior to said day last above named under the name of Western Iron & Metal Company, he had acquired the right to use the same, and demanded that appellants and each of them refrain from using said name, but appellants have at all times refused to refrain from using said name.

[1] As an answer to the earnest objection made by appellants that the complaint is lacking in necessary and substantial averments, and that no allegations of ultimate facts are set out, but conclusions of law merely are pleaded, we deem it sufficient to quote therefrom. It alleges:

> That appellants "organized said corporation and adopted said name therefor with the intent and for the purpose of defrauding plaintiff and appropriating for their own use and benefit the good will of plaintiff's business and deluding and deceiving plaintiff's customers and the public in general into the belief that the business of plaintiff conducted at said city of Los Angeles would be and was being conducted by defendants. Plaintiff is informed and believes, and on that ground alleges, that defendants are about to commence and to continue, unless restrained by this court, an extensive campaign of advertising their said business under said name of Western Iron & Metal Company, and that, if said defendants so advertise their said business, they will actually mislead many customers of the plaintiff both actual and prospective to patronize said defendant Western Iron & Metal Company in the belief that the said persons were and are patronizing the plaintiff.
>
> "That, if the defendants herein and each and all of them are permitted to carry on business under the corporate name of Western Iron & Metal Company at said city of Los Angeles, or elsewhere, the prospective customers of plaintiff and the public in general will, at all times be deceived, misled, and defrauded into believing that the business so conducted by defendants is the business of plaintiff, all of which is and will be to the injury and damage of plaintiff and to the public in general.
>
> "That, unless restrained from so doing by the court, the defendants will continue and proceed to carry on their said business under the said name of Western Iron & Metal Company, a corporation, for and with the express purpose of deceiving plaintiff's customers and the public in general into the belief that plaintiff's business is defendant's business; that the name adopted by said defendants was at all times, and is now, calculated and intended to deceive customers of plaintiff herein, together with the public in general; that each and all of the acts of said defendants so made with the intention and purpose of defrauding and deceiving and influencing the business and injuring plaintiff have created and will continue to create much confusion in plaintiff's said business; that plaintiff gave to his said business the fictitious firm name of Western Iron & Metal Company, and for more than five years last past has conducted said business under said name; that plaintiff has no plain, speedy, and adequate remedy at law, and that actions at law will not afford plaintiff plain, speedy, and adequate remedy for said continuing unlawful acts of said defendants, and that the remedy hereby sought is necessary to prevent a multiplicity of judicial proceedings; that plaintiff has had for many years the prior and exclusive right to the said name of Western Iron & Metal Company, for which reason the said defendants herein and none of them have any right to use said name Western Iron & Metal Company."

[2] It is true that conclusions of law, strictly speaking, are to be found within the quoted portions of the complaint, but nevertheless sufficient allegations of fact appear to save

the complaint from total demolition because of a few apparent infirmities. From the nature of the situation the injury or damage that will accrue to respondent if appellants are permitted to do the threatened acts in the name attempted to be appropriated is plain. A pleader is not required to describe in extenso by a superfluity of words a result that must inevitably follow, provided the premises of a stated proposition be acceded to. Can there be any doubt as to the natural and logical effect the competition described in the complaint would have on respondent's business? Our attention has been called to the fact that the allegations of the complaint before us follow very closely, and confessedly were patterned after, the allegations of the complaint in Mills v. Conservatory of Music, 47 Cal. App. 300, 191 Pac. 546. We regard them as sufficient.

[3] Appellants contend quite vigorously that, where a verified complaint is the basis for injunctive relief, the facts stated therein must stand the test to which oral testimony would be subjected; and, further, where all the material allegations of the complaint are denied, and there are no affidavits supporting the complaint or other proof, the injunction should be dissolved. As an answer to the first statement of the rule it will be observed that all of the material allegations of the complaint except one are positive and direct, while several of the denials made of important allegations are on information and belief. The exception to the allegation in the complaint above mentioned is in respect to the allegation that appellants intend to advertise their competitive business under the same name that respondent is conducting and has heretofore conducted his business. Appellants admit that they actually intend to do the act alleged on information and belief, denying only that the advertising was to be as extensive as alleged. The admission, which is an important one, supplies the failure to plead in positive terms. There are sufficient indisputable facts alleged in the complaint to have justified the court in the exercise of its discretion in continuing in force its order.

[4] It is not in every case that a temporary injunction will be dissolved or refused for a failure of a plaintiff to meet a verified answer specifically denying every material allegation of the complaint.

> "There may be," said this court in Kendall v. Foulks, 180 Cal. 171, 179 Pac. 886, "peculiar circumstances in a case [and which we think exist in the instant case] justifying a temporary injunction even in the face of the absolute denials of the answer."

[5, 6] We think the case before us is a proper one for the granting of injunctive relief. It appears from positive averments that respondent was first in time in business and first in the selection of a combination of words as a designation of a business which he had established and conducted some six or seven years before appellants entered the field, and which business was extensive, and to the development of which respondent had expended much time and devoted energy and doubtless some skill. The complaint upon its face brings the instant case within the exception stated in Kendall v. Foulks, supra. We think the case last above cited fully disposes of appellants' contention that the court should have dissolved the temporary restraining order. It is there said:

> "It is a rule so universally followed and so often stated as to need only to be referred to that the granting, denying, dissolving, or refusing to dissolve a preliminary or temporary injunction rests in the sound discretion of the trial court upon a consideration of all the particular circumstances of each individual case. White v. Nunan, 60 Cal. 406; Marks v. Weinstock, Lubin & Co., 121 Cal. 53, 53 Pac. 362; Piper v. Hawley, 179 Cal. 10, 175 Pac. 417; 22 Cyc. 746. * * * 'The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the rights claimed by him.'"

We cannot say that the court here abused its discretion in granting the temporary injunction.

[7] The case of the respondent does not depend upon an exclusive right to the use of a trade-mark, or, indeed, a trade-name, altogether, but rests upon the broad equitable ground that the methods employed by appellants fall under the ban and are denounced as unfair competition in commercial dealings. Unquestionably the public would be misled, deceived, and confused as to respondent's identity, and he would be placed at a greater business disadvantage than he could possibly otherwise be placed if the competition was conducted along the lines of ordinary legitimate business competition.

A discussion of the facts of this case is not to be confused with the principle announced in the line of cases which discuss the exclusive right to the use of trade-marks. The principle of law here invoked is entirely separable from the principles controlling trademark cases, the intermixing of which has sometimes confused the issue.

Upon a full consideration of the case as presented we are of the opinion that the temporary injunction against a continuance of the existing and threatened acts was properly granted.

[8] There is no misjoinder of parties defendant. It is admitted that the individual defendants named in the caption of the complaint are officers of the corporation.

The temporary injunction is broader that it should have been made, but doubtless there will be no attempt to enforce it without the limits of the state.

The orders appealed from are affirmed.

We concur: WILBUR, C. J.; KERRIGAN, J.; LAWLOR, J.; LENNON, J.; MYERS, J.; WASTE, J.

(190 Cal. 539)

PEOPLE v. JUNG SAM. (Cr. 2522.)

(Supreme Court of California. March 7, 1923.)

1. Criminal law 🔑736(2)—Voluntary character of admissions of accused a question for trial court.

The question whether statements made by the accused to a deputy sheriff while wounded and in hospital were free and voluntary is in the first instance for the trial court.

2. Criminal law 🔑406(5), 741(3)—Admissions of accused competent as against objection that statement did not refer to fatal difficulty, and question was for the jury.

In a prosecution for murder, a statement of the accused to an officer, made while accused was lying in the hospital wounded, *held* admissible as against objection that it was not apparent from the statement that the accused referred to the fight in which deceased came to his death, it being for the jury to determine from the whole case whether his statement referred to the killing in question.

3. Criminal law 🔑409—Evidence held to warrant jury in concluding that admission of accused referred to killing of deceased.

Evidence, in a prosecution for murder, tending to show that deceased was lying down at the time he was shot, that a struggle thereafter ensued, during which the deceased was repeatedly wounded, being shot twice in the neck and six times in the back, together with other circumstances, *held* to warrant the jury in finding that a certain admission by accused to an officer referred to the killing of deceased.

In Bank.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Jung Sam was convicted of murder, and he appeals. Affirmed.

Zabala & Sargent, of Salinas, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

WILBUR, C. J. The defendant was convicted of murder in the first degree, and sentenced to be hanged. Soo Hoo Kay was murdered between 10 and 10:30 p. m. on the evening of May 20, 1922, at the old American Hotel, in the town of Castroville, Monterey county, Cal. A dozen or more shots were fired into the body of the deceased. These shots were heard by people in the neighborhood, and almost immediately after the shooting three Chinamen were seen to come out of the alley leading from the rear of the hotel and jump into an automobile. This same automobile was finally stopped near San Jose after an exciting chase, during which the automobile was driven almost 60 miles an hour. At the time of the arrest three Chinamen were found in the machine. The defendant Jung Sam was lying in the rear of the machine. He was wounded by a bullet in his right arm near the elbow, another in his breast, and a third in his right side near the edge of the rib. These three Chinamen were arrested for the murder, and were tried jointly. Wong Yuen and Lee Sing were acquitted.

It is unnecessary to state in detail the many circumstances leading to the conclusion that the three defendants were the same persons who fled from the rear of the American Hotel immediately after the shooting. Suffice it to say that at the time of the arrest some loose Smith & Wesson 38-caliber cartridges were found in the automobile, and were of the same caliber as those extracted from the body of the deceased; that a pair of tennis shoes were found in the machine, and that these fitted the tracks found in the rear of the American Hotel at Castroville immediately after the murder, and that the defendant had on a pair of unlaced leather shoes.

[1, 2] The only matter complained of by the appellant is the introduction of a statement made by him while he was in the hospital, and it is claimed that the injurious character of this evidence is made manifest by the fact that his co-defendants were acquitted while he was convicted. It should be noted in this connection that the fact that the defendant was wounded by bullets and that he was wearing unlaced shoes tended more definitely to connect him with the murder than the evidence with reference to his codefendants. However that may be, it is clear that the evidence was amply sufficient to sustain his conviction, and this is not seriously controverted by the defendant.

It is unnecessary to repeat in detail the evidence which is objected to. The witness Eastwood, who was at the hospital as a representative of the sheriff, to prevent the escape of the defendant, testified that he stated to the defendant:

> "Sam, you damn poor gunman. You miss your man three times; all three shots miss his head and go into the baseboard, and he jump up and fight like hell. What you do when he jump and fight?"

To this statement the defendant replied:

"I push him back and hold him."

Two objections are made to the introduction of this testimony: First, it is claimed that no proper foundation was laid, in that it did not appear that the statement was freely and voluntarily made. This matter was primarily for the consideration of the trial court. The witness was closely interrogated and cross-examined upon the subject, and it is clear from his testimony that the statement was free and voluntary. The other objection made is that it is not apparent from the statement made that the defendant referred to the fight with the deceased. It is true that the name of the deceased was not mentioned, and that the circumstances of the killing were not stated, but under the circumstances it was proper to admit the testimony, and the jury were to determine from the whole case whether or not it applied to the killing of the deceased.

[3] It appeared from the evidence that three bullet holes were found in the baseboard of the room in which the deceased was apparently sleeping at the time he was assaulted. The circumstances introduced in evidence tended to show that the deceased was lying down at the time he was shot, and that a struggle thereafter ensued, during which the deceased was repeatedly wounded. The deceased was shot twice in the neck and six times in the back.

From these circumstances the jury was justified in concluding that the conversation between the witness Eastwood and the defendant related to the shooting of the deceased. We find no error in the record.

Judgment affirmed.

We concur: WASTE, J.; LENNON, J.; SEAWELL, J.; LAWLOR, J.; MYERS, J.; KERRIGAN, J.

---

190 Cal. 575

WALKER v. WALKER. (L. A. 6741.)

(Supreme Court of California. March 8, 1923.)

Divorce 🔑221—Order requiring plaintiff husband to pay defendant wife's court costs and attorney's fees held proper.

In an action by a husband for divorce, where he pleaded and the court found that defendant was his wife, and he admitted that he was able to pay her court costs and attorney's fees, and that she was wholly without means, the court was authorized, under Civ. Code, § 137, to require the husband to pay the wife's court costs and attorney's fees to enable her to defend the action.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Action for divorce by Harry C. Walker against Luella Walker. From an order requiring plaintiff to pay money to be applied as defendant's costs and attorney's fees, plaintiff appeals. Affirmed.

Clark & Law, of Los Angeles, for appellant.

Frank B. Amend, of Los Angeles, for respondent.

WASTE, J. Appellant, who is the plaintiff, brought an action against the respondent, who is his wife, for a divorce. After answer filed and due proceedings therefor had the court made an order that appellant pay to respondent the sum of $100 on account of court costs and attorney's fees incurred in defense of the action. This appeal, which is without merit, is from that order.

The appellant alleged in his complaint that he and the respondent intermarried at the place and time stated, "and ever since said date last mentioned have been, and now are, husband and wife." The trial court found that the defendant was the wife of plaintiff, as alleged by him. On the hearing of the motion it was established—in fact, the appellant admitted—that he was well able to pay the costs and attorney's fees awarded by the court, and the court found that the defendant was wholly without means. Under such circumstances section 137 of the Civil Code in terms authorizes the court at any time during the pendency of an action for divorce, in its discretion, to require the husband to pay as alimony any money necessary to enable the wife to prosecute or defend the action. Ex parte Joutsen, 154 Cal. 540, 544, 98 Pac. 391; Stewart v. Stewart, 156 Cal. 651, 655, 105 Pac. 955.

The order is affirmed.

We concur: WILBUR, C. J.; KERRIGAN, J.; SEAWELL, J.; MYERS, J.; LENNON, J.; LAWLOR, J.

---

190 Cal. 544

PACIFIC SEASIDE HOME FOR CHILDREN v. NEWBERT PROTECTION DISTRICT. (L. A. 6788.)

(Supreme Court of California. March 7, 1923.)

1. Levees and flood control 🔑10—Protection district liable for negligent diversion of waters.

The Newbert protection district is a public corporation (St. 1907, p. 16) entitled to maintain and defend actions in law and in equity (section 25), and is liable for the negligent diversion of storm waters upon the property of another.

2. Levees and flood control 🔑11—Complaint against protection district held to state cause of action.

A complaint alleging that defendant protection district constructed channels for the water of the Santa Ana river so defectively and negligently that they would not carry the waters of the stream, and that, had the defendant not changed the natural course of the river or in any wise interfered with its natural flow, its waters would have flowed on into the ocean and no damage would have accrued to the plaintiff, *held* to state a cause of action for damage.

In Bank.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by the Pacific Seaside Home for Children against the Newbert Protection District. Judgment for defendant, and plaintiff appeals. Reversed.

See, also, 49 Cal. App. 326, 193 Pac. 169.

James Donovan, of Los Angeles, for appellant.

Clyde Bishop, of Santa Ana, for respondent.

WILBUR, C. J. This is an action for damages done by flood water. The appeal was taken upon a typewritten transcript prepared in accordance with the provisions of section 953a, Code of Civil Procedure. The appellant does not print any part of the record in its brief. The respondent has filed no brief whatever. Appellant requests us to look in the record upon another appeal taken from an order sustaining a demurrer and dismissed by us for the reason that such an order was not appealable. The appellant states:

> "The theory upon which the court must have sustained the demurrer is that the defendant was a municipal corporation and that it was exempt from any liability, and that a cause of action could not be stated against the defendant upon the facts alleged in the plaintiff's third amended complaint. The trial court, as appellant maintains, erred in holding that the defendant was exempt from liability. That the defendant is not a municipal corporation, within the meaning of that term, is clearly established in the citations in our original brief."

[1, 2] The plaintiff undertakes to state a cause of action based upon damages to its real property resulting from the negligent construction of the levees erected by the defendant whereby water was diverted on to the defendant's land. The defendant was a public corporation (Stats. 1907, p. 16) entitled to maintain and defend actions in law and in equity (Stats. 1907, p. 16, § 25) and would be liable for the negligent diversion of storm waters upon the plaintiff's property. Elliott v. County of Los Angeles, 183 Cal. 472, 475, 191 Pac. 899. The gist of the plaintiff's complaint is that the defendant constructed channels for the water of the Santa Ana river so defectively and negligently that they would not carry the waters of the stream. Plaintiff alleges that—

> "Had the defendant not changed the natural course of the Santa Ana river, or in any wise interfered with its natural flow, the waters of the Santa Ana river would have flowed on into Newport Bay and no damage would have accrued to the plaintiff had the said river been permitted to flow as it naturally would had not the defendant constructed its channel to divert the same. * * *"

It is further alleged in effect that the injury occurred to the plaintiff by reason of the fact that the defendant negligently turned the waters of the Santa Ana river into a channel which was too small, and which was negligently constructed and maintained, and that by reason thereof it was damaged.

These facts sufficiently state a cause of action.

Judgment reversed.

We concur: LENNON, J.; SEAWELL, J.; MYERS, J.; WASTE, J.; KERRIGAN, J.; LAWLOR, J.

190 Cal. 542

PEOPLE v. PARISI. (Cr. 2524.)

(Supreme Court of California. March 7, 1923.)

Criminal law ⟹661—Defendant's admission does not prevent prosecutor from proving guilt.

That the proof showed that defendant killed deceased and that defendant admitted that he killed deceased did not make it error for the district attorney to insist on introducing in evidence deceased's dying declaration, as against the contention that the only effect that the dying declaration could have was to prove that fact and put into the record testimony concerning deceased's children, which could only excite the minds of the jury.

In Bank.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Mauro Parisi was convicted of murder in the first degree, with sentence of death, and he appeals. Affirmed.

W. D. Crichton, Geo. G. Graham, and Retallick & Tuttle, all of Fresno, and Sylvester Andriano, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and B. W. Gearhart, Dist. Atty., of Fresno, for the People.

WILBUR, C. J. The defendant was convicted of murder in the first degree and sentenced to be hanged. The jury was justified in believing that the defendant laid in wait for the deceased, Felix Paladino, in the vicinity of Fresno and H streets, Fresno, Cal., about 6 p. m., May 17, 1922; that the decedent was returning from his work, carrying a crate of strawberries, which he was taking home; that the defendant stopped the decedent, spoke to him, and then drew a revolver and began firing at him. The deceased dropped the crate of strawberries and fled as fast as he could, while the defendant followed him, firing at him as he ran, and finally overtook him. The defendant, having used all his ammunition, began beating the deceased over the head. Two firemen, Earl Hartman and R. M. Hicks, and a special police officer named J. T. Kennedy, intervened while the defendant was beating the deceased over the head with the butt of his revolver and placed the defendant under arrest and sent the deceased to a hospital, where he died as a result of his wounds. Four shots struck the deceased, one of which penetrated the lower abdomen, resulting in peritonitis, from which the decedent died. The defendant testified that when he met the deceased an altercation ensued, during which the deceased slapped him in the face and told him he would like to kill him; that the deceased then reached toward his hip pocket and drew a gun, but that the defendant succeeded in shooting first; and that a revolver duel ensued. A number of witnesses testified that at the time of the arrest of the defendant a bystander, who had been shot in the leg during the fusilade, ran up and struck the defendant in the face. The jury undoubtedly believed that the blow in the face which the defendant attributed to the deceased was in fact delivered by this bystander under the circumstances related by at least four witnesses.

[1, 2] The appellant's sole claim on appeal is that he should have been convicted of manslaughter, and that the verdict of murder in the first degree was the result of passion and prejudice induced in the jury by the admission of evidence which tended to incite the jury and led them to bring in the verdict of murder in the first degree. In support of this contention the appellant quotes some of the testimony adduced by the district attorney as a foundation for the introduction of the dying declaration of the decedent. It is not claimed that these statements or that this evidence was immaterial, but the ground advanced for the charge of misconduct on the part of the district attorney is as follows:

> "As a matter of fact there was no necessity for a dying declaration, or rather there was proof sufficient connecting the defendant with the killing without any dying declaration. As a matter of fact it was admitted, and all the dying declaration could do was to prove that fact, and therefore the persistent and continued and long drawn out attempts to get this dying declaration into the record and the testimony concerning his poor little children, etc., could only have been for the purpose of exciting the minds of the jury, and in our opinion it had the desired effect. We believe that the strongest critic of the conduct of the defendant and appellant would not say that he should be hung for the offense."

It is a sufficient answer to this claim to say that an admission by the defendant does not prevent the district attorney from presenting proof of the fact admitted. There is no error in the record.

Judgment affirmed.

We concur: LENNON, J.; SEAWELL, J.; WASTE, J.; MYERS, J.; LAWLOR, J.; KERRIGAN, J.

---

190 Cal. 583

CROCKETT v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.

(L. A. 7518.)

(Supreme Court of California. March 10, 1923.)

1. Master and servant 🔑361—Workmen's compensation employment may be dual in character.

Employment may be dual in character, and, in so far as the employee acts in one capacity, he may be within the provisions of the Compensation Act, and in so far as he works in another capacity his employment will be exempt from its provisions.

2. Master and servant 🔑375(1)—Workmen's compensation; injury held received in "course of employment"; "household domestic service."

Where employee, engaged as carpenter to assist employer in converting barn into residence, was asked by employer's wife to clean away cobwebs and dirt which covered floor joists above a place where she wished to set a stove, and while doing so some dirt fell in his right eye, injuring it, *held*, that the Commission's conclusion was justified that the injury was compensable under Workmen's Compensation Act, § 6, in that the employee was performing services growing out of and incidental to his employment, and had not departed from his regular duties and engaged in household domestic service, excluded from compensation by section 8.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

3. Master and servant 🔑417(7)—Workmen's compensation; Commission's finding conclusive.

Whether or not an employee when injured was engaged in an excluded employment is a question of fact for the Commission, whose finding, if supported by any rational view of the evidence, is beyond judicial review.

4. Master and servant 🔑405(6)—Evidence held to support finding of complete loss of eye.

In compensation proceeding, evidence *held* to support finding of the Commission that employee had completely lost the sight of one eye.

In Bank.

Proceeding under the Workmen's Compensation Act by J. B. Smith, employee, opposed by P. M. Crockett, employer. Award by the Industrial Accident Commission to applicant, and employer brings certiorari. Affirmed.

Fred A. Watkins, of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

WASTE, J. Petitioner is here seeking an annulment of an award of the Industrial Accident Commission. An application for an adjustment of claim having been filed, the Commission found that—

> "J. B. Smith, applicant, while employed as a carpenter on November 2, 1920, at Los Angeles, by defendant, P. M. Crockett, sustained injury occurring in the course of and arising out of his employment, as follows: While sweeping down some walls in defendant's residence at the request of defendant's wife, a foreign body entered his eye, resulting in ulceration and complete loss of sight of right eye."

As, at the time of the injury, both the employer and employee were subject to the provisions of the Workmen's Compensation Act, an award was made in favor of the applicant in the amount of $2,041, with an additional sum for medical expenses.

The circumstances surrounding the employment and injury, as found by the Commission, were as follows: Crockett, the employer, was engaged in converting a barn into a residence. He hired Smith as a carpenter to assist him in that work. Crockett and his family occupied the structure as a residence during the time the alterations were being made, the structure not being entirely habitable until the completion of the alterations. The contract of hire, contemplating employment for more than 10 working days, and at a labor cost of more than $100, was not, therefore, casual in its nature. In the course of his employment Crockett directed Smith to comply with any orders or directions which might be given him by Mrs. Crockett, petitioner's wife. It appears that during the progress of the work, while the principal task assigned to Smith was that of carpentry, yet due to the fact that he was the only man employed upon the place, he was called upon by Crockett to do a number of incidental jobs which would ordinarily, on a larger job, be performed by some one else. The record shows that Smith frequently went to a nearby lumber yard and transported lumber on his shoulders from that yard to the place where he was working. He cleaned up the débris which accumulated as the old portions of the barn were torn down. He also cleaned up the litter from the work performed by him. Under Crockett's specific orders he assisted in unloading a wagon of furniture, and on an occasion other than that of the time of the injury, under Crockett's specific direction, he cleaned cobwebs from the studding. On the day that the injury occurred Crockett, having an errand elsewhere, left the place, but before going gave Smith certain specific instructions as to carpentry work he wished performed, and then directed Smith to do whatever Mrs. Crockett might demand of him. While Smith was engaged upon the carpentry work Mrs. Crockett stated to him that she wished to move the cooking stove from the yard into the building, and asked him to clean away cobwebs and dirt which covered the floor joists above the place where the stove was to be set. She gave Smith a long-handled broom, and showed him where she wished the sweeping of the joists to be done. Smith accordingly undertook the task, and while engaged therein some dirt or foreign substance fell into his right eye, which resulted in the injury complained of.

[1] Employment may be dual in character. In so far as the employee acts in one capacity, he may be within the provisions of the Compensation Act; and in so far as he works in another capacity, his employment will be exempt from its provisions. George v. Ind. Acc. Comm., 178 Cal. 733, 174 Pac. 653; Kramer v. Ind. Acc. Comm., 31 Cal. App. 673, 677, 161 Pac. 278.

[2] On the theory that the facts narrated present such a case, the petitioner contends that when Smith stopped his carpentry work and began sweeping off the floor joists he departed from his regular duties, and engaged in household domestic service, and therefore, under the rule of excluded employments contained in section 8 of the Workmen's Compensation Act, he is not entitled to any recompense for his injury. The petitioner relies upon the two decisions last cited. In the first George was employed as janitor and gardener. He was injured while trimming a tree. The Commission found that it was while he was solely employed in doing a gardener's work that he was injured, and therefore not subject to compensation under the act because engaged in horticultural labor. In the second case the applicant was engaged in the capacity of a janitor for a dancing hall, and as a gardener to look after and care for the grounds. He was injured while pruning a tree, and the Commission concluded that he also was not entitled to the benefit of the act because engaged in horticultural labor. These cases are not in point under the facts here. When Crockett hired Smith, he had in contemplation the remodeling and reconstruction of the old barn. While Smith was by occupation a carpenter, events prove that it was the real intention of Crockett that Smith should do whatever was necessary and incidental to the work at hand. The findings and conclusions of the Commission on questions of fact are conclusive and binding, and are not subject to review.

[3] Whether or not at the time of his injury Smith was engaged in an excluded employment was a question of fact to be determined by the Commission. Its finding, if

supported by any rational view of the evidence, is beyond review here. George v. Ind. Acc. Comm., 178 Cal. 733, 735, 174 Pac. 653. In the light of the testimony in the record, it cannot be said that the conclusion of fact in this case was an unreasonable or improper one. At the time of the injury Smith was performing services growing out of and incidental to his employment. He was acting within the course of his employment, as found by the Commission, and the injury was proximately caused thereby. On this basis he was entitled to compensation. Workmen's Compensation, etc., Act, § 6 (St. 1919, p. 912).

[4] Petitioner claims that there is no evidence to support the finding of complete loss of the sight of the eye. The eye injured was "the master eye." The specialist who examined and treated the applicant testified that the injury caused an infected ulcer of the cornea, and resulted in the loss of vision of the right eye. He thought the patient could distinguish light. From the certificate of permanent disability filed with the Commission by the same specialist when the maximum restoration of the function of the injured eye had been attained, it appears that Smith has no acuteness of sight for far, near, or any working distance. He has vision of objects only. Glasses will afford no relief for the injured eye. The evidence fairly and substantially supports the finding of the Commission.

The award is affirmed.

We concur: WILBUR, C. J.; KERRIGAN, J.; LENNON, J.; MYERS, J.; LAWLOR, J.; SEAWELL, J.

190 Cal. 546

McILLMOIL v. FRAWLEY MOTOR CO. et al. (S. F. 10286.)

(Supreme Court of California. March 7, 1923. Rehearing Denied April 5, 1923.)

1. Contracts 🔑153—Law leans against destruction of contract because of uncertainty.

The law leans against the destruction of contracts because of uncertainty, and it will, if feasible, so construe contracts as to carry into effect the reasonable intentions of the parties if ascertainable.

2. Contracts 🔑9(1)—Enforceable, though description of subject-matter is indefinite.

Though the description of the subject-matter of a contract may be indefinite, the contract is enforceable if the subject-matter is capable of being identified and rendered definite and certain by evidence outside the contract.

3. Sales 🔑1(4)—Contract for sale of old automobile and purchase of new one held not void for uncertainty.

Where defendants were automobile dealers selling all models of new M. cars, the prices of which were standard and fixed, a contract wherein plaintiff authorized defendants to sell his old M. car for a price of $1,000 to himself and retain $500 as a deposit on a new M. car, which plaintiff agreed to buy, was not void as being uncertain, though it failed to state the model or the price of the new car.

4. Sales 🔑82(2)—Where instrument is silent, time of payment is time of delivery.

Where a written contract of sale is silent as to the terms of payment, the law will supply the deficiency, and require that payment be made at time of delivery.

5. Contracts 🔑169—Circumstances surrounding parties at time of contracting may be considered in ascertaining intent.

For the purpose of arriving at the true intent of the parties, a contract is always to be construed in the light of the circumstances surrounding them at the time of its making.

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by D. P. McIllmoil against the Frawley Motor Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Rehearing denied; LENNON, J., dissenting.

George D. Collins, Jr., of San Francisco, for appellant.

Dunn, White & Aiken, of Oakland, for respondents.

SEAWELL, J. This cause was transferred to this court from the District Court of Appeal of the First District, Division 1. After decision in this court a rehearing was granted. The cause is again before us, and after further consideration we are of the opinion that the law of the case was correctly stated by Mr. Justice Myers, and we adopt his opinion, with added comment, which was as follows:

"Upon further consideration we are satisfied with and adopt as part hereof the following opinion filed herein by the District Court of Appeal, written by Mr. Justice Kerrigan:

" 'This is an appeal by the plaintiff in an action to recover the sum of $1,000 as money had and received by the defendants for his use and benefit. The case was submitted for the decision of the trial court upon an agreed statement of facts, the material part of which is as follows:

" 'That on the 6th day of November, 1920, the following contract was made, executed, and delivered by the plaintiff, McIllmoil, to the defendants, to wit:

"'"License 306-815 San Francisco, Calif., Nov. 6th, 1920.

"'"Memorandum for sale of used car:

"'"Whereas I, D. P. McIllmoil, am the owner of one 1917 Mitchell roadst. automobile, serial No. ——, motor No. 79293, and am desirous of selling said automobile, and have requested Frawley Motor Co. to sell it for me:

"'"Now, therefore, I hereby authorize Frawley Motor Co. to sell said automobile for my account at a net price to me of $1,000.00.

"'"I will buy a new Mitchell car. It is understood that Frawley Motor Co. shall keep $500.00 as a deposit on the new car.

"'"It is understood that if the car is left on your premises it shall be at my risk.

"'"Equipment on car is —— regular ——.

"'"[Signed] D. P. McIllmoil.

"'"Approved: Used Car Department
"'"By E. C. DeBruton."

"'That pursuant to the terms of said contract the defendants sold the said 1917 Mitchell roadster automobile of the plaintiff and received as the purchase price on said sale the sum of $1,000, no part of which sum has been paid the plaintiff.

"'That the consideration to the defendants for the services rendered plaintiff in the sale of his Mitchell roadster was the profit to be derived from selling him such new Mitchell car.

"'That $500 of said sum has been deposited by the defendants and in the name of the plaintiff with a bank of deposit of good repute within said state of California, * * * and said defendants have duly tendered to plaintiff said sum of $500, deposited as aforesaid in said bank.

"'That said plaintiff insists upon payment to him of the said entire sum of $1,000, the price paid defendants on the sale of said 1917 Mitchell roadster, * * * but said defendants claim the right to retain and do retain $500 of said sum of $1,000 as a deposit on the sale to plaintiff of a new Mitchell car as provided in said contract. * * *

"'That on said 6th day of November, 1920, and for a long time prior thereto, and ever since then, the defendants have been, and now are, dealers in new Mitchell cars of different models and prices, and at all times have been ready and willing to sell and deliver to the plaintiff a new Mitchell car to be by him selected and for a price to be agreed upon by the plaintiff and defendants and payable on such terms and conditions as might be agreed upon by said parties.

"'That the plaintiff has since the said 6th day of November, 1920, failed to agree to purchase a new Mitchell car, and has failed and refused to agree upon a price for a new Mitchell car, and has failed and refused to agree on any terms or conditions on which the purchase price is to be paid by him for a new Mitchell car.

"'That the prices of new Mitchell cars are all standard and fixed.

"'That the selection of the car will determine the price to be paid.

"'That on said 6th day of November, 1920, and long prior thereto, and ever since then, there have been more than three different classes or varieties of Mitchell new cars, each variety or class having a different price.

"'Plaintiff claims that he is entitled to a judgment against the defendants for $1,000, the entire sum received by defendants on account of the sale of plaintiff's old Mitchell car, for the reason, as he contends, that the agreement, above referred to, is void and unenforceable, being nothing more than an agreement to enter into an agreement, the terms of which have not been determined, and concerning a subject-matter itself yet to be ascertained and selected by future negotiations and consent of the parties.

[1, 2] "'The law does not favor, but leans against, the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if that can be ascertained. Sutleff v. Seidenberg, S. & Co., 132 Cal. 63, 64 Pac. 131, 469. The description of the subject-matter of agreement may be indefinite, and yet, if it is capable of being identified and rendered definite and certain by evidence aliunde, the contract is enforceable. Mebius & Drescher Co. v. Mills, 150 Cal. 229, 88 Pac. 917; Elliott on Contracts, § 179.

[3, 4] "'Applying this rule to the facts of this case, we think the contention of plaintiff that the contract is void for uncertainty cannot be sustained. It is true that the written contract did not specify the particular model of new Mitchell car which the plaintiff was to purchase, nor the price to be paid therefor, nor the time of payment; but in law "that is certain which may be made certain." Here the plaintiff had agreed to purchase from the defendants a new Mitchell automobile. The particular car to be taken was not thereafter a subject of negotiations, all that remained to be done in this behalf being the selection by the plaintiff of one of the various models of Mitchell cars on sale by the defendants. Nor was the price to be paid therefor a subject of future agreement, since, the prices of the various models, according to the agreed statement of facts, being fixed and standard, the selection by plaintiff of the car desired determined the price and made the contract definite in that respect also. As to the terms of payment, the written contract being silent upon this point, the law itself supplies the deficiency, and requires that payment shall be made at the time of delivery.

"'"Where one buys personal property at an agreed price, he, by implication of law, agrees to pay the price, and if no time of payment is agreed upon, the law fixes the time of delivery as the time of payment. If the time of delivery is postponed until the occurrence of some act to be done by the seller, the time of payment, if not otherwise provided for, will be postponed, by implication of law, to the time of such delivery. This rule applies to cases where the time of payment of part of the price is specifically fixed and the time of the payment of the remainder is left unprovided for." Gilfallan v. Gilfallan, 168 Cal. 23, 141 Pac. 623, Ann. Cas. 1915D, 784.

"' It is true that in the agreed statement of facts it is stated that the defendants "were ready and willing to sell and deliver to the plaintiff a new Mitchell car to be by him selected and for a price to be agreed upon by plaintiff and defendants payable on such terms and conditions as might be agreed upon by said parties. That plaintiff * * * has refused to select for purchase a new Mitchell car, and has failed and refused * * * to agree upon any terms or conditions on which a new Mitchell car is to be sold to him, * * * nor the conditions on which the purchase price is to be paid by him for a new Mitchell car." An argument is made by the appellant based upon this part of the statement of facts that the terms of delivery and payment were left to future negotiation; but it will be observed that the language in question merely describes what the defendants did or attempted to do, and what the plaintiff refused to do after the agreement to purchase the car (which was in writing) was made. The respective obligations of the parties are to be found by reference to the contract itself, and not by what one or other of the parties thereto might be willing to do in order to induce the other to comply with its terms. Evidently the defendants were willing to go much farther than their contract compelled them, and in their anxiety to consummate the transaction endeavored to agree with the plaintiff upon a price and terms of payment which should be satisfactory to him. But the inclusion in the agreed statement of facts of these matters did not alter the rights of the parties. The defendants could have insisted upon the list price and cash on delivery; and an argument based upon their complaisance in this regard comes with bad grace from a person denying any obligation under the contract.

"'As we have seen, the alleged uncertainty of the contract in the matter of the particular car to be taken and the price to be paid therefor disappears upon the performance by the plaintiff of an act which he under the contract was compelled to do, namely, select the particular car desired by him; and the omission of the contract to state any terms of payment merely furnished the occasion to apply thereto the principle of law that payment is to be made upon delivery.'

"We have examined all of the long list of authorities collated by appellant in his petition for a hearing by this court, and find in them nothing contrary to the conclusions here expressed, with the single exception of one Alabama case which appears to be at variance with settled decisions of this state, and which we do not feel impelled to follow. The real controversy herein is not as to the rules of the law, but only as to their application to the present situation.

"It is to be noted that the defendants are not here seeking specific enforcement of the contract or damages for its breach. They are not asking the court to decree a forfeiture, or adjudge a penalty or award damages; neither are they seeking to be relieved from the contract. They have performed their part, so far as they have been permitted to do so, and they stand ready to complete their performance whenever the plaintiff will enable them to do so. We are here confronted with the peculiar situation of a plaintiff, while retaining the benefits which have accrued to him from the contract, asking the court to secure to him the fruits of his own violation thereof; the contract having been entered into in entire good faith, at least on the part of the defendants.

[5] "It is nevertheless true, as plaintiff contends, that, if the contract leaves some essential element undetermined, and provides no means for the determination thereof, but leaves it to the future negotiation and agreement of the parties, it is void, and the plaintiff is entitled as a matter of law to the relief here sought. But we are satisfied such is not here the case. The contract being silent as to the time of performance and the terms of payment, the law supplies these elements, and specifies a reasonable time for the performance, and cash on delivery as the terms of payment. This leaves only the question as to the subject of the sale, and the price. For the purpose of arriving at the true intent of the parties, a contract is always to be construed in the light of the circumstances surrounding them at the time of its making. Here it is admitted that the defendants were dealers selling all models of new Mitchell cars; 'that the prices of new Mitchell cars are all *standard and fixed;* that the selection of the car *will determine the price to be paid.*' (Italics ours.) It is thus obvious that the parties contracted with reference to those standard and fixed prices. The contract then is to be construed as if it read, with respect to plaintiff's promise, as follows: 'I will buy (from the defendants) a new Mitchell car of one of the following described models, to be selected by me, at the price hereinafter set opposite the description thereof. I will make the selection within a reasonable time hereafter, and will pay the balance of the said purchase price in cash on delivery' followed by a description of the different models with the price of each.

"It thus appears that the contract herein is identical in all essential respects with that which was held valid and binding in Mebius & Drescher Co. v. Mills, 150 Cal. 229, 88 Pac. 917. As was there said by way of illustration: 'Reduced to simpler terms, if a man should say to a seller, "I will take from you three dozen pocketknives of one or all of three described kinds," the price for each kind being specified, "but I want you to agree to give me a week in which to determine which of the kinds I will select," it would come with some astonishment to a merchant to be told that such an agreement was void in law for uncertainty. It is probably safe to say that a million of such transactions take place every month throughout the country without question or the possibility of question as to the legality of the agreement.'"

The transaction above related presents a situation that is doubtless common to the business world, and particularly so to the business of buying, selling, and exchanging automobiles. The agreement was to purchase an automobile of the Mitchell type or make from defendants, who were dealers in and the agents for the sale of said cars. Undoubtedly the agreement to purchase a Mitchell car was the consideration that moved the said agents to undertake to dispose of plaintiff's used Mitchell car at a price that would net the latter $1,000. In effect, it was agreed that $500 of the sum realized by the efforts of said dealers should be retained by them as a deposit to be applied to the purchase of a Mitchell car thereafter to be selected by plaintiff. The fact that plaintiff requested and was given wide range in the matter of selection could not have affected the question of certainty as to his right or privilege to make his election. The seating capacity or pattern of the automobile was in the absolute control of plaintiff. The moment he exercised his volition, that moment the price became fixed, or, better expressed, the fixed price attached.

From what has been heretofore said we are unable to see that plaintiff was in any way deceived or prejudiced by his contract if he really intended to comply with it. It must be presumed that he will be as fairly treated in the transaction into which he chose to enter as would any other purchaser. It must further be presumed that he will be dealt with on the same terms as are extended to the general business public dealing with like concerns. No presumption of oppression or unfairness on the part of defendants can be indulged against them. Should they attempt unconscionably or unfairly to oppress plaintiff the law provides a remedy.

We feel that the essential elements of certainty are to be found in the contract or irresistibly flow from its terms. The sale and purchase of a standard make of automobile, to wit, a Mitchell, was the subject of the contract. Plaintiff knew or had means of knowing the fixed price of the type, pattern, or capacity of the car that he wished to purchase. He also knew that, in the absence of a contract to the contrary, the price would be the fair market price of any car he might select. Placing ourselves in the position of the parties at the time the contract was made, we feel convinced that a compliance with its terms works no hardship against plaintiff, and that it may be equitably performed.

The judgment is affirmed.

We concur: WILBUR, C. J.; MYERS, J.; LAWLOR, J.; WASTE, J.

---

190 Cal. 532

In re SUTTER-BUTTE BY-PASS ASSESSMENT NO. 6 OF SACRAMENTO & SAN JOAQUIN DRAINAGE DIST. (Sac. No. 3405.)

(Supreme Court of California. March 6, 1923. Rehearing Denied April 5, 1923.)

1. Constitutional law 🔑329—Constitutional right to appeal cannot be destroyed nor delimited by legislative enactment.

If the right of appeal is constitutionally granted in any given case, such right cannot be destroyed nor delimited by legislative enactment.

2. Constitutional law 🔑56—Supreme Court cannot be deprived of constitutional grant of appellate jurisdiction, through creation of new remedy by Legislature.

The Legislature cannot, by the creation of a new remedy, deprive the Supreme Court of its constitutional grant of appellate jurisdiction conferred by Const. art. 6, § 4, in all cases in equity and at law involving the legality of any tax or assessment, if the right involved in the execution of the remedy is of a character which in its very essence is equitable and was of an equitable nature and character at the time of the adoption of the constitutional provision conferring appellate jurisdiction over the subject-matter of the remedy.

3. Appeal and error 🔑36, 41(1)—Supreme Court held to have appellate jurisdiction of judgment as to validation of drainage assessment; "case"; "special proceeding"; "action."

A proceeding to validate an assessment by a drainage district, created by St. 1913, p. 252, amendatory of St. 1911 (Ex. Sess.) p. 117, being one to establish the validity of an assessment, is a "case" and not a "special proceeding," which has reference only to such proceedings as may be commenced independently of a pending action by petition or motion upon notice, in order to obtain special relief, and the Supreme Court has jurisdiction of an appeal from a judgment therein by Const. art. 6, § 4, conferring on the Supreme Court appellate jurisdiction in all cases in equity and in all cases at law, which involve the legality of any tax, assessment, etc., notwithstanding that the statute (St. 1919, p. 1094, § 8) forbids an appeal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Action; Case (In Practice); Special Proceeding.]

In Bank.

Proceedings to validate Sutter-Butte By-Pass Assessment No. 6 of the Sacramento & San Joaquin Drainage District. On motion to dismiss appeal from a judgment in the proceeding. Motion denied.

Thomas Rutledge, Brown & Albery, and Seth Millington, Jr., all of Colusa, Theodore Chester, of Sacramento, George Clark, of Los Angeles (Morrison, Dunne & Brobeck and Burke Corbet, all of San Francisco, A. B. Cox, of New Orleans, La., K. C. Partridge and John S. Partridge, both of San Francisco, Elston, Clark & Nicols, of Berkeley, and Devlin & Devlin, amici curiæ), for appellants.

Frank Freeman, of Willows, for respondent.

LENNON, J. This is a motion to dismiss an appeal taken to this court from a judgment in "a judicial proceeding" (Stats. 1919, p. 1093, § 4) brought and heard in the superior court in and for the county of Sutter, three judges sitting, upon the ground that the judgment is final and not appealable, either to this court or to a district court of appeal. If the judgment is an appealable one and the appeal lies in the first instance to a district court of appeal, the appeal may be transferred by this court to the proper District Court of Appeal, as provided in article 6, § 4, of the Constitution (People v. McKamy, 168 Cal. 531, 533, 143 Pac. 752), or retained in this court pursuant to the power possessed by this court to order a transfer to it, either before or after judgment given in any case pending in a District Court of Appeal (Keech v. Joplin, 157 Cal. 1, 7, 106 Pac. 222).

The case now here upon a perfected appeal involves the validation of an assessment, aggregating in value some $8,000,000, of the Sacramento and San Joaquin drainage district, a governmental agency created by the special act of May 26, 1913 (Stats. 1913, p. 252), which is amendatory of the act of December 24, 1911 (Stats. 1911 [Ex Sess.], p. 117). No contention is made that the said district was not legally organized and, indeed, no such contention could be made, for the circumstances attending its creation are as adequate to justify such legislation for the creation of a drainage district as they were in People v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207, where similar legislation was upheld.

The act of May 27, 1919, authorized the issuance and sale of bonds of the Sacramento and San Joaquin drainage district (Stats. 1919, p. 1092), and provided that after an assessment had been levied by the reclamation board, upon lands within the district, the board had authority to determine that it would be best to issue bonds to pay the cost of the works, etc., and that, if the board did so determine, it should commence "a judicial proceeding for the validation of said assessment" in the superior court for the county "within which the largest acreage of land affected by said assessment is situate" (section 5), and that three judges should sit and act in the proceeding. Athearn v. Nicol, 187 Cal. 86, 200 Pac. 942. After taking the statutory steps enumerated, the board instituted such a proceeding as the one outlined in the superior court of Sutter county, which resulted in a judgment validating the assessment, which was rendered by a unanimous vote of the three judges. Thereupon the appeal from that judgment, here sought to be dismissed, was perfected, notwithstanding a provision of the statute that:

> "The decision of a majority of said court shall be final and conclusive, and no motion for a new trial of said proceeding shall be allowed, and no appeal from the judgment given and made by said court shall be had." Stats. 1919, p. 1094, § 8.

The provision forbidding an appeal is plain and unambiguous, and beyond question is applicable to the appeal here sought to be dismissed. We are relieved, therefore, from any difficulties respecting the interpretation or applicability of the provision purporting to prevent an appeal to the motion to dismiss now before us.

The motion to dismiss turns upon the solution of the question of whether or not the provision of the statute in question, denying an appeal, contravenes a claimed constitutional right of appeal. All of the several arguments of the appellants may be merged into the one proposition, that they have a constitutionally guaranteed right of appeal, and it will only be necessary for us to discuss and decide but one of the contentions made in that behalf, and that is that the validating proceeding provided for by the act in question is in its essence either a suit in equity or one at law, involving the validity of an assessment, and therefore falls within the appellate jurisdiction conferred upon this court and guaranteed to litigants by that constitutional provision which provides that this court shall have appellate jurisdiction "on appeal from the superior courts * * * in all cases in equity; * * * also, in all cases at law which involve the * * * legality of any tax, * * * assessment," etc. Const. art. 6, § 4.

[1] Concededly the right of appeal from the judgment of an inferior to a higher court must be found either in the state's Constitution or statutes, and it is the settled rule of law that, if the right of appeal is constitutionally granted in any given case, such right cannot be destroyed nor delimited by legislative enactment.

> "The courts of this state derive their powers and jurisdiction from the Constitution of the state. The constitutional jurisdiction can neither be restricted nor enlarged by legislative act. An attempt to take away from the courts judicial power conferred upon them by the Constitution * * * is void." Pacific Telephone, etc., Co. v. Eshleman, 166 Cal. 640, 690, 137 Pac. 1119, 1138 (50 L. R. A. [N. S.] 652, Ann. Cas. 1915C, 822).

The case last cited, and other cases assembled and referred to therein, recognize that litigants have a constitutionally guaranteed right of appeal in all litigated matters within the express jurisdiction of appellate courts. And if the Legislature cannot take away this right by direct enactment, neither can it accomplish the same result by any indirect devise. While the Legislature has, ordinarily, the power to create a new remedy for the enforcement of a right or a defense against a wrong, it cannot, under the guise of creating a new statutory remedy, deprive a litigant of an existing constitutionally guaranteed right to defend, even unto a court of last resort, against the enforcement of an alleged right. This right to so defend, once existing, continues, regardless of the form in which the Legislature may cast the remedy. In other words, as was said in the case of People v. Perry, 79 Cal. 105, 108, 21 Pac. 423, 424:

> "This court retains jurisdiction of the case, notwithstanding the Legislature may have changed the procedure, enlarged the remedy, and given it a new name. To hold otherwise would be to admit a power in the Legislature to abridge our jurisdiction, and take from parties the right of appeal, by the easy device of a change of procedure, in many cases, where the right and jurisdiction are unquestioned."

[2] In other words, the Legislature cannot, by the creation of a new remedy, deprive this court of its constitutional grant of appellate jurisdiction, if the right involved in the execution of the remedy is of a character which in its very essence is equitable and was of an equitable nature and character at the time of the adoption of the constitutional provision, which gave to this court appellate jurisdiction over the subject-matter of the remedy. It follows, therefore, that, if the proceeding before us is included in that class of cases, in contradistinction to special proceedings, over which appellate jurisdiction has been given by the Constitution, the appellants have a constitutionally guaranteed right of appeal of which they cannot be deprived.

The phrase "special proceeding" is used in the code practice in contradistinction to "action." That phrase has no reference to provisional remedies in actions at law or in equity. It has reference only to such proceedings as may be commenced independently of a pending action by petition or motion upon notice, in order to obtain special relief. Carpenter v. Jones, 121 Cal. 362, 53 Pac. 842; State v. District Court, 28 Mont. 227, 72 Pac. 613. And, generally speaking, any proceeding in a court of justice which was not, under the common-law or equity practice, either an action at law or a suit in equity, is a special proceeding. In re Central Irrigation District, 117 Cal. 382, 387, 49 Pac. 354. See, also, In re Joseph's Estate, 118 Cal. 660, 50 Pac. 768. The proceeding in question here would seem at first blush to be a special proceeding—one sui generis, and designed to constitute a remedy in itself, complete and entirely different from, and independent of, the remedies ordinarily afforded to the state for the enforcement of an assessment or to a taxpayer for relief from a void assessment.

But, in dealing with the subject-matter involved in the proceeding below, we must have regard to substance rather than to form. Even though the Legislature created in the instant case what is seemingly a new remedy, if it be in effect a proceeding to adjudicate old rights which are equitable in their nature or a proceeding which, in substance, is an action at law, it will be treated as a "case" rather than a special proceeding. Davis v. Judson, 159 Cal. 121, 113 Pac. 147; McNeil v. Morgan, 157 Cal. 373, 108 Pac. 69.

In the Estate of Cheda, 187 Cal. 322, 202 Pac. 133, we recognized the justice and obvious propriety of this conclusion. In that case there was an order made in probate which, considered strictly as a probate order, was not appealable. Nevertheless we held it to be appealable because, in substance and practice, it was, in effect, an action for specific performance, and hence a case in equity, and therefore within the constitutionally guaranteed jurisdiction of this court.

[3] We cannot escape applying the same rule here, for, after all is said and done, the proceeding before us is one to establish, pro tanto at least, the validity of an assessment, and moreover, it has all the characteristics of a case, somewhat after the manner of a suit in equity, to quiet title to land. The purpose of the proceeding is to establish the validity of an assessment with a view to a bond issue. Once the steps taken in the process of levying the assessment are adjudged in the proceeding in question to be legal, the obligation to pay will follow almost as a matter of course.

The proceeding instituted in the court below is undoubtedly a judicial proceeding. The statute creating and permitting the institution and prosecution of that proceeding declares and defines it to be a judicial proceeding; and it has been determined by this court to be a judicial proceeding in the case of Athearn v. Nicol, 187 Cal. 86, 200 Pac. 942. The proceeding in question has all the earmarks of a "case" in the ordinary acceptation of the term. The proceeding is instituted by the filing of what is practically a complaint; the parties to be affected thereby are brought into court by what is in effect a substituted service; a hearing is had in a court by a court composed of three judges; findings must be made and a judgment rendered and entered thereon; and, as was stated in Athearn v. Nicol, supra:

> "It is very clear that the Legislature contemplated a court proceeding. It provided that the judicial proceedings to validate the assessment should be commenced in the superior court. * * * And it is manifest throughout that the whole scheme was to have a judgment of the superior court affirming the validity of the bonds before they were issued and to permit no other attack thereon."

Clearly, therefore, it can be said to be a "case" in the general sense, and if it be a case, as we think it is, then it certainly is one involving the legality of an assessment and therefore well within the letter and spirit of the constitutional provision which grants to this court and guarantees to litigants the right, beyond legislative control, to an appeal in all cases, either at law or in equity, involving the validity of any tax or assessment.

The motion to dismiss is denied.

We concur: WILBUR, C. J.; KERRIGAN, J.; WASTE, J.; MYERS, J.; SEAWELL, J.; LAWLOR, J.

190 Cal. 587

LONDON GUARANTEE & ACCIDENT CO., Limited, v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 10335.)

(Supreme Court of California. March 13, 1923. Rehearing Denied April 13, 1923.)

1. **Master and servant ⟹375(2)—Workmen's compensation; injuries going to and from work not compensable.**

Generally, injuries sustained while an employee is traveling to and from his place of employment are not within the provisions of the Workmen's Compensation Act, but the rule does not apply to cases where an employee, either in his employer's or his own time, is going to or from his place of employment on some substantial mission for his employer growing out of his employment, where such mission is the major factor of the journey or movement and not merely incidental thereto.

2. **Master and servant ⟹375(2)—Workmen's compensation; injury at home after doing work for employer there and after meal there held not compensable.**

Where employee, with master's consent, took computing work home in order to figure at a quieter place than the office, and, after finishing his calculations, ate a light lunch, and slipped on the floor of his house while leaving to go to the office, fracturing his hip, the injury was not compensable; his object in going to the house for computing having been completed, and the carrying of the computations to the office being merely incidental to his main purpose of returning there.

Lawlor, J., dissenting.

In Bank.

Proceeding before the Industrial Accident Commission under the Workmen's Compensation Act by M. Schottik, employee, opposed by Hinz & Landt, a corporation, employer, and the London Guarantee & Accident Company, insurance carrier. The proceeding was dismissed as to the employer, award was made to the employee, and the insurance carrier brings certiorari. Award annulled.

Rehearing denied; Lawlor and Seawell, JJ., dissenting.

Carroll S. Bucher and Walter H. Linforth, both of San Francisco, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

KERRIGAN, J. This is an application for a writ of review of an award of the Industrial Accident Commission, made to defendant M. Schottik, an employee of Hinz & Landt, a corporation doing business in San Francisco, and against the petitioner, London Guarantee & Accident Company, the insurance carrier. The proceeding before the Commission was dismissed as to the employer.

The pertinent facts may be stated to be that M. Schottik was employed by Hinz & Landt in the capacity of assistant manager. He was injured on April 1, 1922, under the following circumstances: Having some important figuring to do for his employer, and desiring a quieter place than the office of his employer in which to do it, he, with such employer's approval, took the work to his home. He arrived there at about 11 o'clock in the forenoon, and he had finished his calculations about 12:30 o'clock. He then ate his lunch, and as he was approaching the outer door of his home to leave the premises for the purpose of returning to the office he slipped on the hardwood floor and sustained a fracture of the hip, the accident occurring a little before 1 o'clock. It was not his habitual custom to go home for lunch, but it was not an unusual occurrence for him to do so.

In support of its application for a writ of review, the petitioner urges that the accident having occurred after the completion of the work upon which Mr. Schottik was engaged for his employer and during the time that he was devoting to his ordinary midday cessation of activity for the purpose of taking lunch, it cannot reasonably be said to have arisen in the course of his employment, notwithstanding the fact that the purpose which had brought him to his home was to perform work for his employer, and hence is not a compensable injury under the terms of the Workmen's Compensation Act (St. 1917, p. 831).

[1] According to the provisions of that act an employee, in order to be entitled to compensation, must have been injured by an accident arising out of and in the course of his employment. As a general rule injuries sustained while an employee is traveling to and from his place of employment are held not to come within the provisions of the act (O. A. & G. Co. v. Ind. Acc. Comm., 173 Cal. 313, 159 Pac. 1041, L. R. A. 1917B, 336; Bradbury's Workmen's Compensation, p. 468), although in a broad sense they may be said to be incidental to his employment. Exceptions to the general rule are cases where an employee, either in his employer's or his own time, is going to or from his place of employment on some substantial mission for his employer growing out of his employment. In such cases it is held that the employee is within the protection of the act. But the mission must be the major factor in the journey or movement, and not merely incidental

thereto; that is to say, if incidental to the main purpose of going to or from the place of employment, it would not bring such person under the protection of the act. If, on the other hand, the main purpose of going or coming was to perform some act arising out of his employment, he would be under the protection of the act although, incident to the performance of such duty, he might be going or coming from his home.

[2] In the case at bar, if the injury had occurred while he was on his way to or from home, he intending to take lunch after his return to the office with the computations, we think his presence in his home would have been attributable entirely to the performance of the work which had taken him there; but under the circumstances of this case it must be held that, having remained in his home after the completion of the work for the purpose of taking his lunch, his object in going there was accomplished, and his service to his employer was not resumed until his return to his place of employment; and that the carrying of the computations to the office was merely incidental to his main purpose of returning there. He is in no different position than if he had gone to a restaurant for his lunch and had there slipped on the floor, or if he had finished his work in his home late in the afternoon, and had remained at home until the following morning, intending to take the computations with him to the office at that time. We think therefore that his injury, suffered under the circumstances detailed, was not one coming within the provisions of the act.

The author of Bradbury's Workmen's Compensation, in the chapter of his work devoted to the question of what injuries may be said to arise out of and in the course of the employment, cites a number of cases in which the injury was held not to be within the protection of the act. Thus a boy employed in a general store was accustomed on going to work each morning to buy vegetables for his employer at a market located on the direct route from his home to the store. He was accidentally injured by a collision with a street car while on his way to work and before reaching the market.

A laundry driver, after putting up his team for the night, was injured while riding home on his bicycle. It was held that the accident did not arise out of his employment; that the rights of the parties were not affected by the fact that the laundry driver was accustomed, after putting up his team for the night, to gather and leave laundry at residences while riding home on his bicycle, when, as a matter of fact, he was not performing these services on the evening of the accident; nor were the rights of the parties affected by the fact that the employee was taking his employer's account books home at night for the purpose of working on them, instead of doing this work at the employer's office, where desk room was furnished for the purpose. (Id., p. 469.)

An employee whose duty it was to mail letters on her way to the train while returning home at night from her place of work, while crossing the track after mailing the letters was struck by a train and injured, and it was held that the injury did not arise out of the employment. (Id., p. 470).

A police judge, under the terms of his employment, was expected to give only part of his time for such work, being allowed the remainder of the time for his private practice as a lawyer. He had no understanding with the city as to the exact number of hours he was to give it, what hours of the day he was to be available for public business, or what hours should be reserved for his private affairs. In fact, he set his own hours for holding court, and allowed himself to be interrupted at any time of the day or night to dispose of judicial duties arising outside the courtroom. He was accustomed to draw papers, fix bail, hear small cases, etc., at his private office or elsewhere whenever called upon. At the time of the accident he was returning to his private office from luncheon at his home, intending to get some police court papers at his office, where they had been prepared, and, about an hour afterwards, to go directly to the courtroom to call his calendar. While crossing the street in going toward his own office, he was struck by an automobile and severely bruised and injured. It was held that the injury did not arise out of his employment. (Id., p. 489.)

We think it follows from what we have said that the Industrial Accident Commission acted without its jurisdiction in making the award in question. The award should be annulled, and it is so ordered.

We concur: WILBUR, C. J.; WASTE, J.; MYERS, J.; LENNON, J.; SEAWELL, J.

LAWLOR, J. I dissent. In my opinion this is a case in which it may be said the employee's mission for his employer at the time of his injury was the "major factor in the journey." It was found that—

> "He sustained a fracture of the hip by reason of accidentally slipping and falling upon the floor of his own home as he was in the act of leaving it during the noon hour in order to return to the premises of employment, several blocks away, which he had quit about two hours previously in order to make certain exacting computations of prices, required by his employment, under the conditions of quiet offered by his home and not available at the place or vicinity of employment, and which computations he had finished just prior to partaking of a hurried luncheon immediately before starting for the place of employment."

The evidence offered on behalf of the employee, which is not contradicted, discloses that the employee often, with the full permission and authority of his superior in the company, took data home to figure prices from; that it was necessary he have a quiet place in which to do that particular work; that the office was too noisy; and that he had no place in which he could work quietly other than his home. He frequently would take the papers to his residence during the day, complete the work, and return to the office. No question is raised but that it was proper for him to do the figuring at home on the day of the accident. It does not appear that he was customarily required to take his lunch at any particular time. On the contrary, it does appear that his time was his own and that he came and went as he pleased, working at such hours as he saw fit.

On this occasion he had, an hour and a half before eating, gone home for the purpose of doing the figuring. It was not his custom to go home to lunch; he did so only five or six times a month, and he testified that on the day in question he would have taken lunch in a restaurant downtown had he not gone home on his employer's business. That his lunch on that day was a matter of minor import is shown by the fact that he ate only a piece of bread and cheese and that he got ready to go back to the office, washed his hands, ate lunch, and started, all in less than half an hour.

From these facts it seems clear that this is not similar to an ordinary case wherein an employee is injured while on his way to or from work, or while out at his meals. In the case at bar the employee, as part of his duty, had gone to the office, procured the papers on which he was to work, and had proceeded to his home because of the necessity of figuring on the prices in quiet. It was also necessary for him to return to the office with the completed calculations. If the figuring had been done at any time of the day, either at the office or at his home, and no other element were present, it would not be claimed the employer was not liable. It is conceded that if he had not stopped to eat the accident would be brought within the provisions of the act. It is asserted that because the employee had stopped to take lunch, the time of taking which was within his own volition, what followed was not in the course of and did not arise out of his employment and that the return trip was at his own risk. I know of no other authority which goes to this extent. This is not a case where the employee has departed from the course of travel for purposes of his own. The rights of the employer were not prejudiced in any way by the incident of the lunch, for when the employee picked up the papers to leave he proceeded back to the office just as he would have, had he left the house without eating. It is not claimed that the act of eating was an efficient cause of the accident, and the risk was the same whether he ate or not. But because he may have deviated slightly, notwithstanding such deviation was in no way connected with the injury and he had resumed his employment when the accident occurred, it is held the rest of the journey would be at his own risk. In other words, it is held that because there may not have been an unbroken line of action by the employee after the figuring was completed he must be denied compensation for his injury. Under the rule laid down in the majority opinion, it would be difficult to conceive of a case where the slightest lack of continuity in the work in hand would not relieve the employer of liability. Such a result is entirely opposed to the spirit of the compensation act and tends to a subversion of its beneficent purposes.

---

190 Cal. 576

WEISS v. CITY OF LOS ANGELES et al.
(L. A. 7176.)

(Supreme Court of California. March 9, 1923.)

Appeal and error ⟹781(4)—Case held moot, and dismissed.

On appeal by taxpayer in action to enjoin carrying out of purchase agreement between city and another, where appellant in his reply brief states, "Notwithstanding the fact that, pending this appeal, the so-called purchase agreement, the subject of this litigation, has been carried into effect, and under the circumstances the questions urged upon this appeal have become moot and purely academic, counsel desires to submit this case upon its merits," the appeal will be dismissed as moot.

In Bank.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Thomas Weiss against the City of Los Angeles and others. Judgment for defendants, and plaintiff appeals. Appeal dismissed.

Ingle Carpenter, of Los Angeles, for appellant.

Roy V. Reppy, E. W. Cunningham, and Gail C. Larkin, all of Los Angeles, for respondents.

PER CURIAM. This is an action by a taxpayer to enjoin the carrying out of a certain purchase agreement entered into between the city of Los Angeles and the Southern California Edison Company. In his reply brief the appellant states:

"Notwithstanding the fact that, pending this appeal, the so-called 'purchase agreement,' the subject of this litigation, has been carried into effect, and under the circumstances the questions urged upon this appeal have become moot

---

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

and purely academic, counsel desires to submit this case upon its merits."

The case having become moot, the appeal is dismissed.

WILBUR, C. J., and LAWLOR, LENNON, SEAWELL, KERRIGAN, and WASTE, JJ., concur.

190 Cal. 562

CITY OF SAN BERNARDINO v. RAILROAD COMMISSION OF CALIFORNIA.

(S. F. 10183.)

(Supreme Court of California. March 7, 1923.)

1. Railroads ⊂⇒95(2)—Statute giving Railroad Commission power over municipalities to determine terms of maintenance of railroad viaduct crossings held constitutional.

Public Utilities Act, § 43, as amended by St. 1917, p. 320, giving the Railroad Commission authority over municipalities to determine the terms of maintenance of railroad viaduct crossings, *held* not unconstitutional as exceeding the authority given the Legislature by Const. art. 12, § 22, in view of article 11, §§ 6, 8.

2. Railroads ⊂⇒95(6) — Order of Railroad Commission apportioning cost of maintenance of viaduct over tracks between city and railroad held proper.

Under Public Utilities Act, § 43, as amended by St. 1917, p. 320, order of the Railroad Commission, apportioning, between city and railroad, the cost of maintenance of a viaduct over tracks at a crossing, *held* proper, although the viaduct had already been constructed, and although the viaduct was not so out of repair as to interfere with the operation of the railroad.

In Bank.

Application by the City of San Bernardino for a writ of review to annul an order of the Railroad Commission of California apportioning cost of maintenance and repair of a viaduct. Order affirmed.

William Guthrie, of San Bernardino, for petitioner.

Hugh Gordon and William W. Clary, both of San Francisco, for respondent.

Robert Brennan, of Los Angeles, for Atchison, T. & S. F. R. Co.

MYERS, J. Writ of review to annul an order of the Railroad Commission apportioning between the petitioner and the Atchison, Topeka & Santa Fé Railway Company the cost of maintenance and repair of a viaduct over the railway tracks of the latter.

In 1907, and for a long time prior thereto, Mt. Vernon avenue was a public highway in the city of San Bernardino, which was crossed, at grade, between Third street and Fourth street, in said city, by three or more tracks of the railway company. The latter, being desirous of laying additional tracks to extend its switching yards, entered into negotiations with the city authorities which resulted in an agreement or understanding to the effect that the city should vacate that portion of Mt. Vernon avenue between Third and Fourth streets, in consideration whereof the railway company should erect over the portion thus vacated a viaduct for highway purposes, on condition that the city should thereafter maintain the same "so long as the same shall be used by the public for travel thereon." This agreement was carried out. The city by ordinance abandoned and vacated that portion of the highway, on the expressed condition that the railway company should construct the viaduct in accordance with plans and specifications therein referred to, and when completed should convey the same to the city; "said deed or conveyance to be upon condition that the expense of maintaining said viaduct will thereafter be borne solely by said city." The viaduct was constructed and conveyed to the city by deed of conveyance containing the above-quoted condition and the city by resolution accepted the same. Upon the completion of the viaduct there were 15 tracks laid across the land which previous to the closing had been Mt. Vernon avenue. In 1916 the railway company desiring to further extend its yards, negotiations resulted in a further agreement, or understanding, similar to the first, as a result of which an additional portion of Mt. Vernon avenue was vacated by ordinance. The railway company constructed an addition to the viaduct, extending the same approximately 300 feet further south, and conveyed the extension thereof to the city by deed. With respect to this extension, however, so far as the evidence discloses, nothing was said, either orally or in writing, upon the subject of the cost of future maintenance thereof. After completion of the extension to the viaduct there were approximately 38 tracks crossing thereunder. The viaduct consisted of a steel structure with a wood floor, constituting an elevated highway about 20 feet in width, in addition to the sidewalk thereon, and at a height sufficient to permit the operation of trains underneath. In 1920 the plank roadway of the old portion of the viaduct was and for three years had been, very badly out of repair, so much so that it constituted a danger to traffic passing over it.

In this situation the railway company filed an application before the Railroad Commission setting forth the facts above outlined and praying that the Commission after a hearing "make such orders and directions with respect to the maintenance and care of said viaduct as may be just." The city filed an answer and an amendment thereto, substantially admitting the facts alleged in the petition, but denying the jurisdiction of the Railroad Commission in said matter, and alleging that the city had no power or authority to enter into the agreement therein referred to for the maintenance of the viaduct by it. After hearings therein the Commission made the order which is now up for review, wherein it found as a fact that public safety, convenience, and necessity require the maintenance and repair of the viaduct, and require the making of an order apportioning the cost of such maintenance and repair between the railway company and the city, and ordered that the railway company shall maintain "at its sole cost and expense" the new portion of the viaduct, and that the city shall maintain "at its sole cost and expense" the old portion thereof.

With respect to petitioner's contention that its agreement with the railway company for the maintenance of the viaduct was ultra vires, it is to be noted that the Commission while taking cognizance of this agreement, expressed no opinion as to the validity thereof as between the parties thereto, but being of the opinion that even though valid as between the parties it would not be binding upon the Commission, it predicated its order not upon this agreement but upon its finding that the apportionment made by it was just and equitable. For this reason we are not called upon to determine the question of the binding effect of that agreement as between the parties thereto.

[1] Petitioner contends that the Commission was without jurisdiction to make the order in question and that it exceeded its jurisdiction in so doing. The authority vested in the Legislature by section 22 of article 12 of the Constitution to confer upon the Commission additional powers "which are not inconsistent with the powers conferred upon the Railroad Commission in this Constitution," and which authority is "expressly declared to be plenary and unlimited by any provision of this Constitution," has been held to be limited only by the authority conferred upon municipal corporations by the more specific provisions of sections 6 and 8 of article 11 with respect to municipal affairs (Civic Center Ass'n v. Railroad Comm., 175 Cal. 441, 449, 166 Pac. 351), and by the qualification that "the powers conferred * * * must be such as are cognate and germane to the * * * regulation and control of public utilities" (Pac. Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 656, 702, 137 Pac. 1119, 1143, 50 L. R. A. [N. S.] 652, Ann. Cas. 1915C, 822).

Pursuant to this plenary authority, the Legislature, in 1915 (St. 1915, p. 115), enacted the Public Utilities Act, and provided in section 43 thereof, as amended in 1917 (St. 1917, p. 320), as follows:

> "(a) No public road, highway or street shall hereafter be constructed across the track of any railroad corporation *at grade*, nor shall the track of any railroad corporation be constructed across a public road, highway or street *at grade*, nor shall the track of any railroad corporation be constructed across the track of any other railroad or street railroad corporation *at grade*, nor shall the track of a street railroad corporation be constructed across the track of a railroad corporation *at grade*, without having first secured the permission of the Commission; provided, that this subsection shall not apply to the replacement of lawfully existing tracks. The Commission shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe.
>
> "(b) The Commission shall have the exclusive power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, *maintenance*, use and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public road or highway by a railroad or street railroad and of a street by a railroad or vice versa, subject to the provisions of section two thousand six hundred and ninety-four of the Political Code so far as applicable, and to alter, relocate or abolish any such crossing, and to require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the state, county, municipality or other political subdivision affected. It shall be the duty of each corporation and political subdivision to which any of the expense is apportioned to pay from the funds available therefor in its treasury the amount apportioned to it at the time and to the parties specified by the order of the commission. * * *" (All italics herein are ours.)

The contention that the section is void in so far as it attempts to vest the Railroad Commission with power over municipalities was raised and disposed of in City of San Jose v. Railroad Commission, 175 Cal. 284, 289, 165 Pac. 967, 969, wherein it was said:

> "That the control of the manner of constructing [and, a fortiori, of maintaining] railroad crossings is a vital and material part of the regulation of railroads and is germane to that subject is too evident to need supporting argument."

It is true that in that case the court did not consider whether or not the regulation of such a crossing is a municipal affair because the city of San Jose had elected to transfer its control over public utilities to the Railroad Commission, and the city of San Bernardino has not done so; but it has since been determined that such regulation is a state affair, not a municipal affair (Civic

Center Case, supra, 175 Cal. 450, 166 Pac. 351), a determination which applies with even greater force to the instant case wherein it appears that the maintenance of both the railroad and the highway are matters of much more than local concern. The San Jose case is therefore authority herein, if authority be needed for a conclusion so obvious, and we conclude that section 43, as to the respects in which it is here challenged, is a valid exercise of the legislative authority.

[2] But, it is urged, section 43 is here inapplicable because, the separation of grades having been already accomplished, and the portion of the highway at the railroad level having been vacated we have not the case of "a crossing of a highway by a railroad"; but the case of "a highway passing over a railroad." It was held in the Civic Center Case, supra, that the city has power to "alter the construction of its streets, at such crossings, by elevating them upon a viaduct so as to pass over the railroad, or by making a subway passing under the railroad," without let or hindrance from the Railroad Commission. But it does not at all follow that the Commission would thus be deprived of its power to apportion the cost of maintenance of such a viaduct after its construction. It was also said by this court, in that connection:

> "But if it does interfere [with the operation of the railroad], either at the time or afterward, whether by natural causes or lack of repair of the street as changed, or by reason of changes in the construction or use of the railroad subsequently directed or approved by the Commission, the city must conform to the orders of the Commission so as to avoid such interference."

This is claimed to be obiter. Perhaps it was in the sense that it was not strictly necessary to the decision. But it was said in the course of a most carefully prepared opinion, for the guidance of the Commission in its hearing and determination of a great number of crossing cases, which this court was then directing it to proceed with. Viewed in this aspect, it was analogous to the rules which this court lays down for the guidance of the court below in sending a case back for retrial.

But it is not necessary to rest our conclusion upon this authority. A consideration of the language of section 43 above quoted, with particular reference to the words there italicized, compels the conclusion that the Legislature intended the provisions of subdivision (a) to apply only to crossings at grade, and that it equally intended the provisions of subdivision (b) to apply to all crossings including those at which the grades had been separated as well as those at grade; and that with respect to both sorts of crossings, it meant what it said, to wit:

> "The Commission shall have the exclusive power to determine and prescribe * * * the terms of * * * maintenance * * * of each crossing of a public road or highway by a railroad."

There can be no doubt that the viaduct in question is, and ever since its construction and acceptance by the city has been, a public highway. Neither is there room for doubt that the primary object sought and effected by the city and the railroad company by means of the various transactions above outlined was, in substance and effect, the separation of grades at that crossing; and the situation resulting therefrom is that of "a crossing of a public highway by a railroad," though not at grade.

It is urged, upon the authority of the Civic Center Case, that, conceding the authority of the Commission to apportion the cost of maintenance of the viaduct, it cannot exercise that authority unless or until the viaduct actually interferes with the operation of the railroad. That case does not so hold. Nor are we persuaded to adopt so narrow a view. To hold that the Commission, having this authority, may not exercise it until, perchance, a passenger train shall be derailed by a broken plank fallen from a viaduct which has been "badly out of repair," and unrepaired, for three years, would be, in large measure, to defeat the purpose of the act which conferred the authority. It is true that in the instant case the city repaired the viaduct before the Commission entered its order. But it is significant that no repairs were made until after this proceeding was instituted and a hearing had before the Commission.

Petitioner objects to the form of the order, requiring it to maintain its portion of the viaduct at "its sole cost and expense," which it construes to mean that the cost thereof must be paid out of the general or street fund of the city; thus precluding it from proceeding under any of the street improvement acts. We do not construe the order as having that effect. Having first determined that the public safety, convenience, and necessity required that it should apportion the cost of maintenance of the viaduct, the sole remaining question before the Commission was as to the manner in which that cost should be apportioned, as between the two parties who were interested in its maintenance, namely, the railroad company on the one hand and the city on the other. All of the repairs immediately necessary had been made. All that was determined by the order was that thereafter the burden of maintaining a specified portion of the structure should rest upon the city, as distinguished from the railroad company. The city was left free to provide the funds necessary thereto by any appropriate method available to it under the law.

The order is affirmed.

We concur: WILBUR, C. J.; KERRIGAN, J.; WASTE, J.; SEAWELL, J.; LAWLOR, J.; LENNON, J.

---

190 Cal. 521

APARTMENT BLDG. CO. v. DAUGHERTY, Com'r of Corporations. (L. A. 7617.)

(Supreme Court of California. March 1, 1923.)

Corporations ⚷66—Profit-sharing securities held in effect preferred stock.

Contemplated profit-sharing securities to be issued by an apartment building corporation *held* in effect preferred stock without the right to vote which would increase the capital stock of a corporation without compliance with laws relating to such increase of stock.

In Bank.

Application for writ of mandamus by the Apartment Building Company, a corporation, to be directed against Edwin M. Daugherty, Commissioner of Corporations. Writ denied.

Fickeisen & Richardson, of Los Angeles, for petitioner.

PER CURIAM. This is an application for writ of mandamus to compel the respondent to pass upon petitioner's application for approval of a plan for issuing profit-sharing securities. The Attorney General has held that such profit-sharing securities are in effect preferred stock without the right to vote. In short, that the scheme proposed is a scheme for the increasing of the capital stock of the corporation without compliance with the laws relating to such increase of stock. In this we think he is correct.

Writ denied.

WILBUR, C. J., and LAWLOR, LENNON, WASTE, SEAWELL, KERRIGAN, and MYERS, JJ., concur.

---

190 Cal. 593

TARPEY et al. v. McCLURE, State Engineer, et al. (S. F. 10411.)

(Supreme Court of California. March 13, 1923.)

1. Statutes ⚷123(6)—Provision of Water Storage District Act within subject in title.

Matters provided for by Water Storage District Act *held* not to constitute different subjects within Const. art. 4, § 24, limiting an act to a single subject to be expressed in title; the object of the act being reclamation and use of waste water, and incident thereto reclamation and use of waste land.

2. Statutes ⚷123(7)—Repeal of former statute not foreign to subject-matter.

Provision of Water Storage District Act for repeal of Irrigation Act of 1915 and its amendments is not foreign to the subject-matter of the later act, but a natural incident thereto; this act having had its origin in the earlier act.

3. Statutes ⚷64(10)—Water Storage District Act not voided by section not within title.

Even if Water Storage District Act, § 65, providing method by which a district may be dissolved, deals with a subject not embraced in the subject, it does not void the remainder of the act, as its failure would not affect the remaining provisions.

4. Statutes ⚷125(1)—Relative to subject and title, Water Storage District Act does not attempt to create new state officers.

Relative to subject and title, Water Storage District Act does not attempt to create new state officers; the executive directors therein provided for being employés.

5. Statutes ⚷97(1)—Water Storage District Act not local and special because of alternative methods of petition.

Water Storage District Act is not local and special because providing for initiation of proceedings, either by petition signed by holders of a majority in value of the lands in the proposed district, or by not less than 500 landowners representing not less than 10 per cent. in value of the land.

6. Constitutional law ⚷205(2)—Special privileges and immunities not granted by Water Storage District Act.

Water Storage District Act does not grant to one class of citizens privileges or immunities which on the same terms are not granted to all, in contravention of Const. art. 1, § 21, because authorizing petition for organization of a district to be signed by holders of a majority in value of the lands in the proposed district, or by not less than 500 landowners representing not less than 10 per cent. in value of the land.

7. Constitutional law ⚷232—Equal protection of law not denied by Water Storage District Act.

Equal protection of the law is not denied, in violation of the Fourteenth Amendment, by Water Storage District Act, because it authorizes petition for organization of a district to be signed by holders of a majority in value of lands in the proposed district, or by not less than 500 landowners representing not less than 10 per cent. in value of the land.

8. Waters and water courses ⚷226—"May" in Water Storage District Act does not mean "must."

In view of the legislative history of Water Storage District Act there is no merit in the claim that "may," in the provision that a district "may include the major portion of the lands in two or more district agencies of the state," should be construed to mean "must."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, May.]

9. Statutes 🔑64(5) — Unconstitutionality of part of Water Storage District Act would not destroy remainder.

If the provision of Water Storage District Act, § 6, making the state engineer's finding in certain matters conclusive against all except the state, be held unconstitutional, it would not destroy or render useless the remainder of the act.

10. Statutes 🔑97(1) — Water Storage District Act not special because of another act covering the same field.

There is no merit in the point that Water Storage District Act is special legislation because there is another act in effect which covers the same field of legislation.

11. Statutes 🔑85(4) — Water Storage District Act not special because making affidavit sufficient evidence of genuineness of signature to petition.

Water Storage District Act is not special because providing that an affidavit shall be sufficient evidence of the genuineness of signatures to petition.

12. Constitutional law 🔑60—Creation of water storage district nondelegable legislative act.

Creation of a water storage district is a legislative act, performance of which may not be delegated by the Legislature to an executive or judicial officer.

13. Constitutional law 🔑60—Matters which Legislature may intrust to other agency in creation of water storage district.

The Legislature may enact conditions, on the performance of which a water storage district shall be regarded as organized with the powers mentioned and described in the act, and intrust the doing of an act or the determination of a fact on which those conditions depend to some other agency.

14. Constitutional law 🔑62—Arbitrary power or uncontrolled discretion in creation of water storage district not to be vested in administrative officer.

Any attempt by the Legislature to vest in an administrative officer arbitrary power and authority, or an uncontrolled and unguided discretion, in matters essential to the creation of a water storage district is void.

15. Constitutional law 🔑62—Discretion controlled by prescribed rules vestable in administrative officer in creation of water district.

The Legislature may confer on an administrative officer a large measure of discretion in matters essential to the creation of a water storage district, if the exercise thereof is controlled and guided by rules prescribed therefor, even though in exercising the discretion he may be called on to exercise judgment of a high order.

16. Constitutional law 🔑62 — Assistants whom Water Storage Act authorizes state engineer to employ not officers relative to method of creating offices.

Relative to constitutionality of Water Storage District Act, § 1, authorizing the state engineer to employ such engineers, attorneys, and other assistants as he may deem necessary, such assistants are not officers, but mere employees.

17. Constitutional law 🔑62 — No unguided discretion given state engineer by Water Storage Act in employing assistants; "such as he may deem necessary."

Water Storage District Act, § 1, authorizing the state engineer to employ "such engineers * * * as he may deem necessary," does not give unguided discretion as to number to be employed; it being implied that there shall be facts reasonably justifying his conclusion.

18. Constitutional law 🔑62, 80(1)—Provision of Water Storage Act for state engineer ascertaining and determining practicability not delegation of legislative or judicial power.

Water Storage District Act, § 5, providing that the state engineer "shall ascertain and determine the practicability, feasibility and utility of the proposed projects," is not an attempted delegation of legislative or judicial power, but rather calls for performance of administrative functions, intended only for information and guidance of voters; no consequences being made to depend on such determination or to result therefrom.

19. Taxation 🔑28—Commitment to state engineer of uncontrolled and unguided discretion whether to levy assessment delegation of legislative power to levy taxes.

Water Storage District Act, § 5, providing that the state engineer may require certain preliminary expenses of a project to be paid by the proponents of the district, "or he may issue warrants therefor," in connection with section 16, requiring the board of directors to levy an assessment to pay such warrants, amounts to giving the engineer an uncontrolled and unguided discretion as to whether an assessment shall be levied; a prohibited delegation of legislative power to levy taxes.

20. Statutes 🔑64(5) — Water Storage District Act not unworkable because of unconstitutional provision for assessment.

Unconstitutionality of the delegation to the state engineer by Water Storage District Act, §§ 5, 16, of uncontrolled and unguided discretion to determine whether an assessment shall be levied for certain preliminary expenses of a proposed project, does not render the act unworkable; the act authorizing the engineer to require such expenses to be paid by the proponents of the project.

21. Constitutional law 🔑62—Authority given state engineer as to boundaries of proposed water storage district not delegation of legislative power.

The authority as to boundaries of a proposed district given the state engineer by Water Storage District Act, § 6, does not give him such arbitrary power as to amount to delegation of performance of the legislative act of creating a district, he being given power, other than to make recommendations, only, on objection, to exclude land not of the character described in the act, and to include other land, when in response to petition of its owners, he finds it is of the character described in the act.

22. Constitutional law 🔑62—No arbitrary authority conferred on state engineer as to dividing proposed water district into divisions and precincts.

Provision in Water Storage District Act, §§ 6, 7, for the state engineer dividing a proposed district into 5 to 11 divisions "possessing the same general character of water rights or interests," and establishing "a convenient number" of election precincts, do not confer arbitrary authority, but a controlled and guided discretion, dependent on the facts ascertained.

23. Statutes 🔑64(5)—Practical operation of water district act not dependent on validity of grant of power to engineer as to abandonment and investigations.

The remainder of Water Storage District Act is not affected by any invalidity in the provisions of sections 18, 53, authorizing the state engineer, under certain conditions, to declare the project abandoned, and to determine when public interest requires certain investigations.

24. Constitutional law 🔑284(2)—No "taking of property without due process" by provision of water district act for levy of preliminary assessments without hearing as to benefits.

Provisions of Water Storage District Act, § 16, for levy of assessments at a flat rate per acre on all the lands of the district to defray its preliminary expenses without any prior hearing on benefits, do not constitute a "taking of property without due process," the Legislature by sections 3, 5, laying down a fixed rule by which the boundaries of the district may be determined, with a hearing thereon before the state engineer, amounting to a legislative declaration that all the lands of the described character will be uniformly benefited to the extent of the necessary cost of organization and investigation work, and such legislative action not being grossly unequal in its application to a landowner who has a perfected and adequate water right, as he may be benefited by conservation and storage works serving to increase the total available supply of water in the district.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Taking (In Eminent Domain).]

25. Constitutional law 🔑284(2)—Notice of hearing of objections to assessment for water storage district need not state assessment roll has been filed.

Water Storage District Act, § 19, having required the assessment roll for the main assessment for cost of a project determined on, to be filed in the office of the state engineer before the giving of notice of hearing by the adjustment board of objections to the assessment made, it is not necessary for due process that the notice state that it has been so filed.

26. Constitutional law 🔑284(1)—No failure of due process because Water Storage District Act does not require filing of assessment roll in each county.

Absence of requirement in Water Storage District Act, § 19, that copies of the assessment roll, to be filed in state engineer's office, be filed in each county of the district, does not constitute failure of due process.

27. Constitutional law 🔑284(2)—Failure of Water Storage District Act to specify length of notice of increase in assessment not fatal.

Failure of Water Storage District Act to specify length of notice that must be given property owners of proposed increased assessment, is not fatal; they, in the absence of statute, being entitled to time to have full and fair hearing.

28. Eminent domain 🔑14—No taking of private property for private use by Water Storage District Act.

Water Storage District Act, not contemplating the sale of water or hydro-electric power to others than the inhabitants of the district, to whose use it is dedicated (except as to a possible surplus), does not provide for taking of private property for private use.

29. Taxation 🔑28—No attempted inhibited taxation or delegation of tax power in Water Storage District Act.

Const. art. 11, §§ 12, 13, inhibiting the Legislature from imposing or delegating to any special commission or individual power to impose taxes for certain purposes, is not violated by Water Storage District Act; its attempt to confer on the state engineer power to issue warrants which should automatically result in the levy of assessments being nugatory, and it giving the adjustment board power not to levy assessments, but merely to apportion them.

30. Waters and water courses 🔑216—"State engineer" in Water Storage District Act refers to Department of Public Works and appropriate officers.

In view of the provisions of St. 1921, pp. 1022, 1039, reorganizing the state department of public works, changing the office of state engineer to part of such department, and going into effect three days before, though pending at the same time as, Water Storage District Act, that, when, by any statute now in force, "or that may hereafter be enacted," a duty is imposed or authority conferred on any of said officers, it is hereby imposed on and transferred to such department and the appropriate officers thereof, "as though the title of said department had been specifically set forth and named therein," the words "state engineer" in Water Storage District Act are to be treated as referring to the "Department of Public Works and the appropriate officers thereof."

In Bank.

Application by M. F. Tarpey and others for writ of mandate to W. F. McClure, as State Engineer, and others. Writ issued.

T. T. C. Gregory, E. T. Houghton, and Max Thelen, all of San Francisco, James S. Bennett, of Los Angeles, A. E. Chandler, of San Francisco, M. B. Harris and Harris & Hayhurst, all of Fresno, H. Scott Jacobs, of Hanford, Guy Knupp, of Porterville, Linday & Conley, of Fresno, Power & McFadzean, of Visalia, Sidney J. W. Sharp, of Hanford, and Jesse H. Steinhart, of San Francisco (Warren Olney, Jr., and Milton T. Farmer, both of San Francisco, A. L. Cowell, of Stockton, and Edward F. Treadwell, of San Francisco, of counsel), for petitioners.

S. E. Burroughs, of Susanville, and C. C. Carleton, of Sacramento, for respondents. Barclay McCowan, of Bakersfield, and Haas & Dunnigan, of Los Angeles, amici curiæ.

MYERS, J. This is a proceeding in mandamus to compel the respondents to receive and act upon a petition for the organization of a water storage district under the California Water Storage District Act (Stats. 1921, p. 1727). It is submitted upon demurrer, the effect of which is to challenge the constitutionality of the act.

[1] It is urged that the act violates the provisions of section 24, art. 4, of the Constitution, in that it embraces more than one subject. It would be impracticable to attempt here to set forth even an outline of its comprehensive provisions. It must suffice to say that it provides for the organization, operation, maintenance, and government of water storage districts; for the acquisition by various means, and the storage, conservation, and distribution of water for irrigation, and for drainage and reclamation connected therewith; and for the generation and disposition of hydro-electric energy developed incidental thereto. It also provides for the repeal of the California Irrigation Act of 1915 and all acts amendatory thereof. The conservation of water by means of flood control works to restrain flood waters which otherwise would overflow the land and go to waste, and, incident thereto, the reclaiming of the lands which otherwise would be overflowed and rendered useless, the storage and distribution of such water for purposes of irrigation, and, incident thereto, the generation and use of hydro-electric energy as a by-product of such storage and distribution, all seem to us to be so legitimately and intimately connected one with another as not to constitute different subjects within the purview of the Constitution. It may be said that in these respects the act has but a single object, to wit, the better control and utilization of water, or, stated differently, the reclamation and use of waste water, and, incident thereto, the reclamation and use of waste land.

[2] A somewhat different question is presented by the provision for the repeal of the act of 1915 and the acts amendatory thereof. It is suggested that, while these two acts occupy, in general, the same field of legislation, neither of them need be an exclusive occupant thereof, and there is no reason why they should not both subsist, side by side, and that, therefore, the provision for the repeal of the former is foreign to the subject-matter of the latter, and constitutes a different subject. However, it fairly appears from the history of the legislation that the present act had its origin in the act of 1915 (Stats. 1915, p. 1173), which was amplified by the statute of 1917 (Stats. 1917, p. 1068), substantially re-enacted in 1919 (Stats. 1919, p. 671), its re-enactment being held unconstitutional in Mordecai v. Board of Supervisors, 183 Cal. 434, 192 Pac. 40, and finally enacted in its present form in 1921. So regarded, it is apparent that the repeal of the former acts is merely a natural and proper incident to the present enactment.

[3, 4] We do not think the act can fairly be said to embrace any subject not expressed in its title, with the possible exception of the provisions for dissolution contained in section 65 (the provisions of section 68 being concededly nugatory). Section 18 does not provide for the dissolution of a district, but rather specifies the conditions under which the organization of a proposed district may fail of completion. Section 65 does purport to provide the method by which such a district may be dissolved, and does, therefore, deal with a subject not embraced in the title, unless, as suggested, that subject may be said to be comprehended within the term "maintenance." It is not necessary to decide this question, because the failure of section 65 would in no way affect the remaining provisions of the act. The remaining "subjects" specified as not expressed in the title are not additional subjects, but mere incidents to those which are expressed. The act does not attempt to create new state officers. The executive directors therein provided for are employees, not officers. Of course the title does not state all of the details found in the body of the act. To do so would involve restating the entire act in the title.

[5-7] The act cannot be said to be local and special in that it provides for the initiation of proceedings, either by a petition signed by the holders of a majority in value of the lands within the proposed district, or by not less than 500 landowners representing not less than 10 per cent. in value of the land. It is obvious that in a very large district it would be impracticable to secure the signatures of a majority of the landowners, and that in a very small district the signatures of 10 per cent. of the owners might not be regarded as sufficient evidence of the merits of the proposal. The line had to be drawn somewhere between these two differing conditions, and it cannot be justly said that the Legislature acted "arbitrarily" in placing it where it did. Neither can it be said that this provision violates section 21 of article 1, in that it grants to one class of citizens privileges or immunities which upon the same terms are not granted to all, or that it violates the Fourteenth Amendment to the federal Constitution, in that it denies to certain persons equal protection of the law. This court cannot say, nor could the Legislature deter-

mine in advance, that it will require either greater or less effort to procure the signatures of a majority in one sort of district than it will to obtain the signatures of 10 per cent. in the other sort.

[8] In view of the legislative history of this act, there is no merit in the claim that, in the provision that the district, "may include the major portion of the lands situated within two or more district agencies of the state," the word "may" should be construed to mean "must."

[9-11] If the provision in section 6, making the finding of the state engineer in certain matters conclusive against all persons except the state, should be held unconstitutional, it would in no way destroy or render useless the remainder of the act. There is no merit in the point that this act is special because there is another act in effect which covers the same field of legislation. Los Angeles v. Leavis, 119 Cal. 164, 51 Pac. 34. Neither can it be said to be special because it provides that an affidavit shall be sufficient evidence of the genuineness of signatures to the petition. There are many provisions in the general laws and in the Codes making affidavits competent evidence for specified purposes.

[12-15] We come now to a more serious and difficult group of questions, presented by the claim that the act attempts to delegate legislative power to the state engineer in violation of section 1 of article 4 of the Constitution, and that it requires him to exercise both legislative and judicial powers in violation of article 3 thereof. Unquestionably, the creation of such a district is a legislative act, the performance of which may not be delegated by the Legislature to an executive or judicial officer. People v. Parks, 58 Cal. 624; Tulare Water Co. v. State Water Comm., 187 Cal. 533, 202 Pac. 874; Matter of Peppers (Cal. Sup.) 209 Pac. 896. On the other hand, it is equally well settled that the Legislature may enact conditions, upon the performance of which the district shall be regarded as organized with the powers mentioned and described in the act; and it may intrust the doing of an act or the determination of a fact, upon which those conditions depend, to some other agency. Inglin v. Hoppin, 156 Cal. 483, 105 Pac. 582; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106. If, as claimed by respondents, this act attempts to vest in them arbitrary power and authority, or an uncontrolled and unguided discretion, in matters essential to the creation of the proposed district, it is, to that extent, void. People v. Parks, supra; Tulare Water Co. v. State Water Comm., supra; Riley v. Chambers, 181 Cal. 589, 595, 185 Pac. 855, 8 A. L. R. 418. On the other hand, the Legislature may, without violating any rule or principle of the Constitution, confer upon an administrative officer a large measure of discretion, provided the exercise thereof is controlled and guided by rules prescribed therefor (Arwine v. Board of Medical Examiners, 151 Cal. 499, 91 Pac. 319; Hall v. Geiger-Jones Co., 242 U. S. 539, 553, 37 Sup. Ct. 217, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643), even though, in exercising that discretion, he may be called upon to exercise judgment of a high order (Frasher v. Rader, 124 Cal. 132, 56 Pac. 797; Cook v. Civil Service Comm., 160 Cal. 589, 592, 117 Pac. 663; Suckow v. Alderson, 182 Cal. 247, 187 Pac. 965; People v. Sacramento Drainage Dist., 155 Cal. 373, 103 Pac. 207).

[16, 17] The difficulty herein lies not so much in the ascertainment of the settled rules of constitutional law as in their correct application to the various provisions under consideration. The provision in section 1 authorizing the State Engineer to employ such engineers, attorneys, and other assistants as he may deem necessary, and to fix their compensation, does not contravene the rule in Farrell v. Board of Trustees, 85 Cal. 408, 24 Pac. 868, for two reasons: First, because the assistants here provided for are not officers, but mere employees; second, because the discretion as to the number to be employed is not unguided, as it was in the Farrell Case. The phrase "such as he may deem necessary," as here used, is precisely analogous to the provision under consideration in the case of Riley v. Chambers, supra, and which was there held not to confer arbitrary power. It was there said:

> "While the commissioner has the power to refuse a license if he is not satisfied as to the character of the applicant, his discretion is not arbitrary. There must exist facts which reasonably justify his conclusion that the applicant is not of good character and reputation."

Yet the law there under consideration did not expressly so state. This requirement was implied therein.

[18] It is provided in section 5 that the engineer "shall ascertain and determine the practicability, feasibility and utility of the proposed project." This does not appear to be an attempted delegation of legislative or judicial power, because no consequences are made to depend upon such determination or to result therefrom. It calls rather for the performance of administrative functions, evidently intended only for information and guidance of voters.

[19, 20] It is also provided that he may employ all necessary engineers, attorneys and assistants; that the cost thereof shall be deemed a part of the expense of said project, and that he "may require the same to be paid by the proponents of said district, or he may issue warrants therefor." Section 16 requires the board of directors to

levy an assessment of an equal amount per acre upon the land of such district to pay such warrants. This amounts, in effect, to an attempted delegation to the engineer of the legislative power to levy taxes. If he elects to issue the warrants, a mandatory duty is thereby imposed upon the directors to levy an assessment sufficient to pay the same; but if he elects to require these expenses to be paid by the proponents of the district the assessment will not be levied. Thus the decision to levy or not to levy this assessment is committed wholy to the discretion of the engineer, and in the exercise of this discretion he is uncontrolled and unguided by anything to be found in the act. If the act had made it the mandatory duty of the engineer to issue warrants for these necessary expenses and the mandatory duty of the directors to levy an assessment to pay those warrants, then it might well be said that such assessment was in fact levied, not by the engineer or by the directors, but by the Legislature itself. But where, as here, the power to decide whether or not a given tax shall be levied is committed to the uncontrolled and unguided discretion of an executive officer, it amounts to such a delegation of legislative power as is prohibited by the Constitution. It follows that the provision for the levy of an assessment for the payment of such warrants is void. This does not, however, render the act unworkable, because the engineer may require the necessary cost of these investigations to be paid by the proponents of the project.

[21] Section 6 provides that, upon the final hearing, the engineer shall make an order affirming the sufficiency of the petition and notice of hearing, and determining the practicability, etc., of the project, and "shall also in his said order establish the boundaries of the proposed district or describe the lands included therein, specify the location proposed for the storage of water to be used for any of the purposes of this act, and provide an estimate of the probable cost of the proposed project; and in so doing shall make such changes in any of the matter or proposals set forth in said petition as he may deem advisable. * * *" It is claimed that these provisions purport to vest in the engineer the arbitrary power to make such changes in the boundaries of the proposed district, or in the location and character of the proposed works therein, as he may see fit, thus bringing this situation within the rule of People v. Parks, supra. We do not so construe the act. It seems apparent from a consideration of its various provisions, particularly those contained in sections 3, 5, and 6, that, in establishing the boundaries of the proposed district, the engineer can make changes in the boundaries of the district as proposed in but two classes of cases: (1) He can exclude land therefrom when in response to objections filed by the owners thereof he finds as a fact that it is not of the character described in the act, i. e., "already irrigated or susceptible of irrigation from the common source and by the same system of storage and irrigation works"; (2) he can include other land therein when in response to petition filed by the owners thereof he finds as a fact that it is of the character described in the act. The authority to make changes other than these was evidently intended to apply only to the proposal or recommendation of such changes, in connection with providing an estimate of probable cost. It is obvious, for example, that the locations for the storage of water, either as proposed in the original petition, or as recommended by the engineer, would at the most be merely advisory upon the board of directors, and subject to change thereafter as the directors should deem best.

[22, 23] The provisions for the division of the district into 5 to 11 divisions "possessing the same general character of water rights or interests," and for the establishment of "a convenient number" of election precincts, confer not arbitrary authority, but a controlled and guided discretion, dependent upon the facts ascertained. It is not necessary herein to determine whether the provisions of section 18, authorizing the engineer, under certain conditions, to declare the project abandoned, and the provisions of section 53, authorizing him to determine when the public interest requires the making of certain investigations, are or are not valid. The practical operation of the law is in no way dependent upon either of them.

[24] We come now to the contention of respondents that the provisions of section 16, for the levy of assessments at a flat rate per acre upon all the lands of the district to defray the general expenses of the district, prior to any hearings on the question of benefits, require the taking of private property without due process of law. The general rule on this subject is that a hearing as to benefits must be provided at some time before the land is finally burdened by the assessment. Fallbrook Irr. Dist. v. Bradley, supra; Nickey v. Stearns Ranchos Co., 126 Cal. 150, 58 Pac. 459. But this general rule is subject to an equally well established exception, the existence of which is recognized by respondents and well stated in the following language from their brief:

> "Of course, when the Legislature itself determines the boundaries of the district, either by describing them or *by laying down a fixed rule by which they may be determined*, the property owners affected are not entitled to a hearing for they are conclusively presumed to have been heard through their representatives in the Legislature." (Italics ours.)

See Hadley v. Dague, 130 Cal. 207, 219, 62 Pac. 500; Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661; Ross v. Barber Asphalt Pav. Co., 158 Cal. 37, 109 Pac. 883; Larsen v. San Francisco, 182 Cal. 1, 14, 186 Pac. 757; Miller & Lux v. Drainage Dist., 182 Cal. 252, 265, 187 Pac. 1041; Houck v. Little River Drainage Dist., 239 U. S. 254, 36 Sup. Ct. 58, 60 L. Ed. 266, 274; N. P. R. R. Co. v. Pierce County, 51 Wash. 12, 97 Pac. 1099, 23 L. R. A. (N. S.) 286. The Legislature herein has done precisely that thing. It has itself determined the boundaries of the district "by laying down a fixed rule by which they may be determined." It provided, in sections 3 and 5 of the act, in substance, that the district shall include those lands, and only those lands, which are "already irrigated or susceptible of irrigation from a common source and by the same system of storage and irrigation works," and it provided for a hearing before the state engineer upon this question, after notice, at which each property owner affected might appear and present his claim to be either excluded from or included in the proposed district. This amounts to a legislative declaration that all the lands of the described character will be uniformly benefited to the extent of the necessary cost of the organization and investigation work of such a district. Such legislative determination is conclusive, "unless the state's action has been palpably arbitrary or grossly unequal in its application to the persons concerned." Miller & Lux Drainage Dist., supra. The claim here made that the act is grossly unequal in its application to the landowner who now has a perfected and adequate water right is the same which was there made with respect to the landowner whose land had already been fully reclaimed. As it was pointed out there that such an owner might be benefited by works resulting in the lowering of the flood plane and thereby decreasing the general danger of destructive floods, so it is apparent here that the owner who now has an adequate water right may nevertheless be benefited by conservation and storage works which serve to increase the total available supply of water within the district. The provisions for preliminary assessments, being thus predicated upon a valid legislative determination as to benefits, do not constitute a taking of property without due process. The case of Redman v. Kyle, 76 Fla. 79, 80 South. 300, is in direct conflict with Miller & Lux v. Drainage Dist., supra, and therefore is not to be followed here.

[25-27] As to the provisions of section 19, providing for the levy of what may be called the main assessment, the contentions of respondents that the act does not provide for a hearing as to benefits and does not specify the rules by which the board is to proceed in modifying or amending the assessment are substantially the same as those which were raised and disposed of in Fallbrook Irr. Dist. v. Bradley, supra. It is not necessary that the notice of hearing shall expressly state that the assessment roll has been filed in the office of the state engineer. The law requires that it must be so filed before the notice is given. It may be unfortunate that the act does not require copies of the assessment roll to be filed in each county within the district, but the absence of such requirement does not constitute failure of due process. The failure of the act to specify the length of notice which must be given the property owners of a proposed increased assessment is not fatal.

> "In the absence of a controlling statute fixing the time of notice the property owner must be given time to have and must have a full and fair hearing." Huntley v. Board of Trustees, 165 Cal. 298, 304, 131 Pac. 859, 862.

It is not here necessary to determine the validity of the provisions of sections 22 and 23 for the levying of additional assessments.

[28] We do not understand that the act contemplates the sale of water or hydroelectric power to others than the inhabitants of the district, to whose uses it is dedicated (except as to a possible surplus thereof), and it does not appear, therefore, to provide for a taking of private property for a private use.

[29] The act is not violative of sections 12 or 13 of article 11 of the Constitution, because, as we have seen, the attempt to confer upon the engineer the power to issue warrants which should automatically result in the levy of assessments is nugatory. The adjustment board is given no power under the act to levy assessments, but merely to apportion them.

The act does not violate section 24 of article 1 or section 1 of article 2, in that it denies to any but landowners the right to vote at district elections. It is true that this court, in the case of In re Madera Irr. Dist., 92 Cal. 296, 321, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106, used language strongly intimating that such a provision would be unconstitutional as applied to an irrigation district. It is interesting to note that the court was there considering the claim that the Wright Act was unconstitutional because it did not limit the voting right to the landowners. However, it is now clear, in the light of the later decisions, that those provisions of the Constitution "refer to the qualification of electors entitling them to vote at the ordinary elections, local and general, held in the course of the usual functions of civil government." Wheeler v. Herbert, 152 Cal. 224, 232, 92 Pac. 353, 357. See, also, Martinelli v. Morrow, 172 Cal. 472, 156 Pac. 1017; Board of Directors v. Peterson, 64 Or. 46, 128 Pac. 837, 129 Pac. 123.

> "By this and like provisions, the Legislature is not dealing with elections, with suffrage, or with the ballot, within the meaning of the Constitution and the election laws of the state. The formation of this and similar districts is a function pertaining purely to the legislative branch of the government. * * * Wherefore, it may do so by giving such persons as it may think best an opportunity to be heard." Potter v. Santa Barbara, 160 Cal. 349, 355, 116 Pac. 1101, 1103.

The decisions of the Idaho court to the contrary, based upon the view that these districts are political subdivisions of the state, are out of harmony with the decisions of this state. This disposes also of the contention that the act violates section 5, art. 2, of the Constitution, providing for the secrecy of the ballot.

The claims that the act confers judicial powers upon the state engineer, that in the adjustment board it has attempted to create a court, and that this board is called upon to exercise judicial powers, are well answered by what was said by this court in People v. Sacramento Drainage Dist., 155 Cal. at pages 387, 388, 103 Pac. 207. It is of interest to note that nearly all of the objections presented by respondents were urged against the constitutionality of the Wright Act in Re Madera Irrigation District, 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106, and in Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369.

[30] We do not find the act here in question to be unconstitutional in any of the provisions essential to its practical operation, and it remains only to consider the question of misjoinder of parties, raised by the special demurrer. Respondents contend that the department of public works and A. B. Fletcher, as director of public works, should be dismissed as parties herein for the reason that neither of them has any duties to perform in this connection, and that the state engineer is given original, complete, and final authority under the terms of this act. The state department of public works was reorganized by the 1921 Legislature (chapters 602 and 607), the office of state engineer, as it theretofore existed was thereby abolished and merged in the department of public works, and a new office of state engineer was thereby created as chief of the division of engineering and irrigation of the department of public works. Respondents contend that, inasmuch as the reorganization acts, chapters 602 and 607, went into effect three days before the Water Storage Act, the references in the latter to the "state engineer" must be held to refer to the office newly created by the former acts, and not to the pre-existing office, the powers and duties of which had been transferred to the department of public works. We are not inclined to this view. Chapter 607 provided that—

> "Whenever by the provisions of any statute or law now in force *or that may hereafter be enacted* a duty or jurisdiction is imposed or authority conferred upon any of said bodies, offices, officers, deputies or employees, or upon any other person by any statute, the enforcement of which is transferred to the department, such duty, jurisdiction and authority are hereby imposed upon and transferred to the department of public works and the appropriate officers thereof, with the same force and effect *as though the title of said department * * * had been specifically set forth and named therein.*" Section 363e. (Italics ours.)

A similar provision is found in chapter 602. Although these two chapters actually went into effect three days before the Water Storage Act, they were all pending in the Legislature at the same time, and all went to the Governor on the same day. No one in the Legislature, or out, could foretell which of them might be signed first. It is thus apparent that the italicized provisions above quoted were probably inserted to cover just such a situation as here arose, and that the words "state engineer" wherever they appear in the Water Storage Act should be held to refer to the "department of public works and the appropriate officers thereof." This conclusion harmonizes with the evident policy of that Legislature to consolidate and co-ordinate the various administrative departments of the state government and to centralize the authority and responsibility therein.

Respondents' demurrer is overruled, and it is ordered that a peremptory writ of mandate issue herein as prayed.

We concur: WILBUR, C. J.; KERRIGAN, J.; LENNON, J.; WASTE, J.; LAWLOR, J.; SEAWELL, J.

190 Cal. 619

RISSMAN et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (L. A. 7330.)

(Supreme Court of California. March 16, 1923.)

1. Master and servant ⚷405(2)—Evidence held to show casual employment within Compensation Act.

Evidence of a workman's employment, not in the course of employer's business, *held* to show that he was to do only carpentry work on buildings repaired, and that his work as an employee, excluding that done as independent contractor, would not take 10 days, the period required by Workmen's Compensation Act, § 8 (c), to take his employment out of the casual class and bring him within the protection of the act.

2. Master and servant ⚷362—Employment held "casual" within Compensation Act, limiting time for completing "work contemplated."

The words "work contemplated," as used in Workmen's Compensation Act, § 8(c), providing that the term "casual" shall be taken to refer only to employments where the work contemplated is to be completed in not exceeding 10 working days, without regard to the number of men employed, and where the total labor cost of such work is less than $100, are used in direct connection with the previous word "employment," and mean the work contemplated as the object of the employment; and where one employed to do only carpentry work on a building repaired under employment, not in the course of employers' business, and it would take him less than 10 days to do the work, his employment was casual, though all the work by different craftsmen, would take more than 10 days, and entail a labor cost exceeding $100.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Casual.]

In Bank.

Petition by George Rissman and another, for a writ of review, to consider an award made by the Industrial Accident Commission of California to George O. Smith. Award annulled.

Hass & Dunnigan, of Los Angeles, for petitioners.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

KERRIGAN, J. This is an application for a writ of review, to consider an award made by the Industrial Accident Commission to George O. Smith, who was injured while engaged in certain work for George Rissman and Henry J. Rissman, the petitioners. The injury was the result of an accidental fall from a ladder while Smith was constructing a beaver board ceiling in a house owned by petitioners, and consisted in a fracture of the left hip.

The petitioners desired to renovate for the purpose of sale two houses situated upon one lot in Los Angeles. The work in contemplation included plumbing and painting. With these, however, the applicant, Smith, had no concern, his employment embracing the carpentry work only. This work consisted of three separate matters: (1) Certain repairs to the roof of the front house, to do which he entered into a contract at an agreed price of $53.50, this figure covering the cost of both labor and material; (2) certain repairs to the roof of the rear house, at an agreed price of $20 for the labor, the owners to furnish the materials; (3) certain miscellaneous repairs, to both houses not included in the work aforementioned, at an agreed wage of $5 a day.

It was contended at the hearing before the board that the employment of the applicant was casual, and that accordingly he was not entitled to compensation for his injury. The board held against this contention, and, in support of the award, counsel for the respondent claim that, in construing section 8 (c) of the Workmen's Compensation Act (Stats. 1917, p. 835), the phrase "work contemplated" employed in said section refers to the entire piece of work in connection with which a given person is employed, although it may consist of different sorts and be parceled out under different contracts, and notwithstanding that the participation of said person is confined to one branch only of said work; and that, as the work which the petitioners were having done upon said buildings occupied more than 10 days in its performance and necessitated the expenditure of more than $100, the employment of the applicant was not casual; and they further contend that, even excluding all parts of the work in the performance of which the applicant was not personally concerned, the remainder which was to be done by him required more than 10 days for its doing, thus bringing him within the protection of the act.

The petitioners, on the other hand, claim that the applicant was to do only certain carpentry work, which was given to him under several independent contracts, in the performance of which he, as an independent contractor, would not come within the protection of the act, and that, if it be held that any part of his work was not embraced in such a definite contract, such part did not require for its execution more than 10 working days and did not involve a labor cost of $100; that the applicant's employment upon work not included in a definite contract was therefore casual, and as such not covered by the compensatory provisions of the act in case of injury.

The relevant portions of the act read as follows:

> Section 8 (a). "* * * But excluding any person whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer. * * *"
> Section 8 (b). "Any person rendering service for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employee within the meaning of this act. * * *"
> Section 8 (c). "The term 'casual' as used in this section shall be taken to refer only to employments where the work contemplated is to be completed in not exceeding ten working days, without regard to the number of men employed, and where the total labor cost of such work is less than one hundred dollars. * * *"

The finding of the Commission, after referring in detail to the work which the petitioners were causing to be done, refers to the applicant's connection with it in the following terms.

> "Such work as contemplated was of a character which required, and in performance actually consumed, more than 10 working days and a total labor cost exceeding $100; it was contemplated that applicant's labor should be concerned in all of such work; applicant performed the work upon the front roof in the capacity of independent contractor, but the remainder of the aforesaid work was, or was expected to be, performed by him in the capacity of defendant's employee; the work upon the rear roof covered 2 working days, the miscellaneous carpentry work 2 working days; and the plumbing work in connection with the bathtubs 8 working days; the portion of said total work not performed by applicant by reason of said injury was performed by other workmen in approximately the time which would have been consumed by applicant and his assistants had he continued working, and consisted for the most part of such plumbing. Therefore, said applicant's employment was not casual, though not in the course of defendant's business."

The defense of casual employment is not available unless the employment was not only casual as defined by the act, but also not in the trade, business, profession, or occupation of the employer. If either of these conditions be present, the employee comes within the provisions of the act. The Commission having found, and it being conceded, that the employment was not in the petitioners' business, trade, etc., we are concerned only with the factor of casual employment.

The Commission correctly found that the labor performed on the replacement of the roof of the front house was done by the applicant in the capacity of an independent contractor, so the time consumed in doing that work was properly excluded from the computation of the number of days that it took or would take to do the carpentry work as an employee.

[1] Accepting the view that the remainder of the work to be done by applicant was in the capacity of an employee, it clearly appears from the findings of the Commission and the evidence in the case that such work would not and did not consume 10 working days. According to those findings, the work on the roof of the rear house took 2 days, the miscellaneous carpentry work 2 days, and the balance of the work not performed by the applicant by reason of his injury but performed by other persons took 8 days, but consisted for the most part of plumbing work. The evidence is clear, and the applicant himself admits that his employment did not include the plumbing. The unfinished work to be completed by the applicant at the time of his injury and the plumbing were subsequently done by the same man, and his uncontradicted testimony is that the plumbing took 6½ days, which would leave, as he testified, 1½ days to finish the work contemplated, from which it results that the work to be done by the applicant, excluding that under contract, was completed in 5½ days. As above noted, the Commission found that the unfinished work to be performed by the applicant consisted for the most part of plumbing. The conclusion of the Commission that the work contemplated in the employment of the applicant occupied more than 10 days is only arrived at by including in the unfinished work the plumbing. The Commission lumped this with the unfinished carpentry work and found that the two together occupied 8 days, most of it consisting of the plumbing. The time, therefore, occupied in completing the unfinished carpenter work, even according to the finding of the Commission, was less than 4 days. That period, added to the 4 days worked by the applicant before his injury, gives a total of but 8 days, i. e., less than the period required to take the employment of the applicant out of the casual class. It is not contended that the work in which the applicant was concerned as an employee would or did exceed a total labor value of $100.

[2] There is no merit in the contention of counsel for the respondents that the expression "work contemplated" found in section 8 (c), above quoted, refers to the total work done by any and all persons, whether under contract or not, upon a particular undertaking. While the award by the Commission was not made upon such a construction of the statute, still as it is sustainable thereby it is necessary to consider it.

The language contained in this section is:

> "The term 'casual' as used in this section shall be taken to refer only to employments where the work contemplated is to be completed in not exceeding ten working days," etc.

We think it plain that the words "work contemplated" are used in direct connection with the previous word "employment," and mean the work contemplated as the object of the employment. Counsel's argument to the effect that this construction would lead persons undertaking a large piece of work to divide it into small parcels for the purpose of avoiding employers' liability refutes itself, since to do so would entail upon them more trouble and expense than the payment of the insurance premium. Here the applicant was employed to do only the carpentry work, and the circumstance that all the work of different sorts, and performed by persons of different crafts, done or contemplated upon the two houses would take more than 10 days and entail a labor cost of more than $100 would not affect the question of whether or not the applicant's employment was casual. Such employment, as we have seen, was not in the course of the petitioner's trade, business, or profession; and, as it would take less than 10 days to do the work in which the applicant was concerned, he does not come within the benefits of the Workmen's Compensation Act.

The award must therefore be and it is hereby annulled.

We concur: WILBUR, C. J.; MYERS, J.; LENNON, J.; WASTE, J.; SEAWELL, J.; LAWLOR, J.

---

190 Cal. 522

MORGAN v. MORGAN. (L. A. 7441.)

(Supreme Court of California. March 2, 1923.)

1. Limitation of actions 🔑39(1)—Statute of limitations held inapplicable to divorce suits.

Code Civ. Proc. § 343, as to four-year limitation for actions not otherwise provided for, is inapplicable to divorce suits, in view of Civ. Code, § 127.

2. Divorce 🔑69—Suit for divorce for intemperance held not barred.

Under Civ. Code, §§ 124–126, action for divorce for habitual intemperance was not barred by unreasonable lapse of time, where, although the cause of action arose nine years prior to suit, defendant was for nearly six years of such time in the custody and under the control of an institution for insanity, suffering from alcoholism.

3. Divorce 🔑69—Presumption, arising from delay in suing, may be rebutted without showing defendant's disability.

Under Civ. Code, §§ 124, 125, 126, as to unreasonable lapse of time before suing for divorce, and presumption arising from lapse of time, it is not necessary, to rebut the presumption of connivance, collusion, or condonation arising from long delay in suing, that a showing of defendant's legal disability be made, but evidence showing the delay was reasonable is sufficient.

4. Divorce 🔑11—Not encouraged.

It is not the policy of the law to encourage divorces.

In Bank.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Georgia Morgan against Richard Morgan. From judgment for plaintiff defendant appeals. Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

Willis Oliver Tyler, of Los Angeles, and W. M. Austin, for respondent.

LENNON, J. This is an appeal from a judgment granting to respondent herein a decree of divorce from her husband on the ground of habitual intemperance, and incidentally thereto adjudicating certain property rights. Plaintiff's alleged cause of action for divorce on the ground of habitual intemperance had accrued prior to October, 1912, at which time plaintiff and defendant separated, and have ever since lived separate and apart. The complaint alleged that—

> "Said defendant used intoxicating liquors for more than one year prior to the 22d day of October, 1912, to such an extent that he was wholly incapacitated from attending to any labor, work or business."

In December of 1912, the same year, defendant was apprehended on a complaint charging him with insanity, and was found to be suffering from alcoholism. He was committed to the state hospital for the insane at Patton, and remained there until June, 1913, at which time he was paroled. He immediately resumed the use of intoxicating liquors, and was recommitted to the institution in August, 1913, where he remained until the spring of 1917, when he was again paroled. In February, 1918, he was finally discharged.

The sole point presented in support of the appeal which comes here on the judgment roll alone is that plaintiff's cause of action was barred by section 124 of the Civil Code and section 343 of the Code of Civil Procedure.

[1] Section 343 of the Code of Civil Procedure, which provides that all actions other than those specified in the preceding sections of that Code relating to the time for the commencement of actions must be commenced within four years from and after the time of the accrual of the cause of action, has no application to divorce actions, for the reason that section 127 of the Civil Code, dealing specifically with actions for divorce, provides that there shall be no limitation of time for the commencement of actions for divorce except such as are contained in section 124 of the Civil Code.

[2] Section 124 of the Civil Code provides

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

that a divorce must be denied: (1) When the cause is adultery and the action is not commenced within two years after the commission of the act of adultery or after its discovery by the injured party; (2) when the cause of action is conviction of a felony, and the action is not commenced before the expiration of two years after a pardon or the termination of the period of sentence; and (3) in all other cases when there is an unreasonable lapse of time before the commencement of the action. It is upon the latter provision of course, that the appeal of defendant is based.

An unreasonable lapse of time is defined by section 125 of the same Code as "such a delay in commencing the action as establishes the presumption that there has been connivance, collusion, or condonation of the offense, or full acquiescence in the same, with intent to continue the marriage relations notwithstanding the commission of such offense." Section 126 provides that the presumption arising from lapse of time "may be rebutted by showing reasonable grounds for the delay in commencing the action."

[3] Having in mind the ground for divorce, habitual intemperance, and the fact of the incarceration of defendant in an institution for the insane for practically the entire period after the accrual of the action for divorce until the spring of 1918, there has not been, in our opinion, such an unreasonable lapse of time as makes it imperative upon the court to deny the decree of divorce. This is so notwithstanding the fact that plaintiff might, perhaps, have commenced suit against the defendant after he was committed to the institution and while he was still an inmate. Harrigan v. Harrigan, 135 Cal. 397, 67 Pac. 506, 87 Am. St. Rep. 118. It is not necessary, in order to rebut the presumption of connivance, collusion, or condonation that a showing of legal disability be made. If the evidence adduced tends to show that the delay, which in the absence of explanation would seen unreasonable, was in fact, under all of the circumstances, reasonable, that is sufficient.

Had there been merely an allegation of the accrual of a cause of action in October, 1912, the lapse of nine years unexplained would have raised the presumption of connivance, collusion, condonation, or acquiescence in the wrong. But in the case at bar this lapse of time is fully explained by circumstances which show reasonable grounds for the delay in commencing the action, and thus overcomes such a presumption.

[4] It is not the policy of the law to encourage divorces. Pereira v. Pereira, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107. To hold that the aggrieved party cannot hope for reformation and exhaust all means for accomplishing it before attempting to break, judicially, the marriage bonds under penalty of forfeiting the right to a divorce if all efforts fail, is to place a premium upon undue haste to dissolve the marriage tie and to discourage that tolerance, patience, and forbearance which may lead to a permanent reconciliation and the preservation of the integrity of the marriage relation. To so hold would be contrary to the well-recognized interest of the state in the permanency of the relation of marriage. So, therefore, it may be said that the admitted fact that the defendant was for nearly six years in the custody and under the control of an institution for insanity, suffering from alcoholism, and that during that period he was actually incarcerated therein for nearly five years, adequately explains the delay occurring during that period in commencing the action. The inference deducible from that delay is not that there was connivance or collusion, but that there was simply a withholding by the plaintiff of either condonation or condemnation.

With reference to the remaining three years during which time the plaintiff might have instituted her action, it will suffice to say that the trial court found that there was no unreasonable delay in the bringing of the action. At least this is the finding to be implied from the findings in favor of the plaintiff, and which formed the basis of the decree of divorce. And in the absence of a record showing the evidence, the presumption is that there was evidence offered and received in the case fully supporting the findings of the trial court.

Judgment affirmed.

We concur: WILBUR, C. J.; SEAWELL, J.; KERRIGAN, J.; LAWLOR, J; WASTE, J.

MEMORANDUM DECISIONS

60 Cal. App. 409

PEOPLE v. TROPEA et al. (Cr. 671.) (District Court of Appeal, Third District, California. Jan. 11, 1923.) Appeal from Superior Court; San Joaquin County; D. M. Young, Judge. Sam Tropea was convicted of murder in the first degree, and John Trotta was convicted of murder in the second degree, and they appeal. Affirmed. Walter F. Lynch, of Stockton, for appellants. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendants were jointly indicted and tried on a charge of murder, alleged to have been committed on the 2d day of June, 1922. Tropea was convicted of murder of the first degree and the jury fixed his punishment at imprisonment in the state prison for life. Trotta was convicted of murder of the second degree. This appeal is from the judgment of conviction and from the order denying defendants' motion for a new trial. The transcript on appeal was filed November 15, 1922. Appellants have filed no briefs in support of their appeal. The cause came on regularly for argument on the 4th day of January, 1923. No appearance was made for appellants and on motion of the Attorney General the appeal was submitted on the record. Notwithstanding the apparent abandonment of the appeal, in view of the serious consequences of the conviction, a careful examination of the record has been made. From such examination it appears that the defendants were ably represented at the trial and that their rights were scrupulously protected by the trial court. The evidence against them is so overwhelming that it is difficult to conceive of a rational theory upon which the jury could have based a verdict of acquittal. The judgment and order are affirmed.

We concur: **BURNETT, J.; HART, J.**

---

60 Cal. App. 411

PEOPLE v. ZMAK. (Cr. 650.) (District Court of Appeal, Third District, California. Jan. 11, 1923.) Appeal from Superior Court, Mendocino County; H. L. Preston, Judge. Antone Zmak was convicted of maintaining a place where alcoholic liquor is kept for sale and distribution, and he appeals. Affirmed. M. H. Iversen and Will Van Dyke, both of Ukiah, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. This appeal is from a judgment of conviction of the crime of "maintaining a place where alcoholic liquor is kept for sale and distribution" in no-license territory. The transcript on appeal was filed July 15, 1922. No brief has been filed on behalf of appellant. The appeal came on regularly for oral argument on the 3d day of January, 1923. No appearance was made for appellant. An examination of the transcript shows that the appellant was fairly tried and convicted on evidence which was conclusive of guilt. The judgment is affirmed.

We concur: **BURNETT, J.; HART, J.**

CALIFORNIA REPORTER

214 PACIFIC REPORTER

190 Cal. 665

W. H. BLODGETT CO. v. BEBE CO. et al.

(S. F. 10175.)

(Supreme Court of California. March 23, 1923.)

1. Contracts ⚷127(2)—Rule as to validity of agreements to arbitrate stated.

An agreement to arbitrate all disputes thereafter to arise under a contract is invalid and unenforceable, as constituting an attempt to oust legally constituted courts of jurisdiction and to set up private tribunals, but, if the matter to be submitted was the mere finding of facts, the determination of which is essential to the accrual of the cause of action itself, such arbitration or finding becomes a condition precedent to the right to sue, and is not within the rule.

2. Action ⚷10—Where cause of action not complete until establishment of fact by prescribed mode, such fact is condition precedent to right.

Where a cause of action is not complete until the establishment in a prescribed mode of a given fact, such fact is necessarily a condition precedent to the right of action.

3. Contracts ⚷127(2)—Arbitration agreement held not binding.

Provision of sale contract providing that any dispute arising thereunder should be immediately submitted to arbitration, the decision to be final and binding, being one covering all disputes thereafter to arise, and not being confined to the ascertainment of a fact essential to the existence of the cause of action, was invalid as an attempt to oust the courts of jurisdiction.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by the W. H. Blodgett Company against the Bebe Company and others. Judgment of nonsuit, and plaintiff appeals. Reversed.

Willard P. Smith, of San Francisco, for appellant.

Maurice E. Harrison, of San Francisco, for respondents.

KERRIGAN, J. The plaintiff brought this action to recover damages from the defendants for breach of contract, which was one for the sale and purchase of personal property. At the conclusion of the plaintiff's evidence the defendants moved for a nonsuit upon the ground that the contract relied upon by the plaintiff provided that, should any dispute arise thereunder, it should be submitted to arbitration, and that the plaintiff's evidence failed to show that such arbitration had been had or that plaintiff had offered to arbitrate. The trial court granted the motion upon that ground, and the plaintiff appeals from the judgment entered thereon.

The question involved upon the appeal is whether the plaintiff was bound by its agreement for arbitration.

The provision of the contract concerning this question, so far as pertinent here, is in the following language:

> "Any dispute arising under this contract shall be immediately submitted to arbitration. * * * The decision shall be final and binding on both parties. * * * Each party hereby agrees that, in the event of his failure to comply with the award of the arbitrations within ten (10) days of date of such award, an action in court shall lie against him based upon such award."

The arbitration clause also designated the arbitrators, the place where the proceeding should he held, and a method of procedure, but it is not necessary here to refer to those matters in detail.

[1] It was early settled in the jurisprudence of this state, in conformity with that of practically all the states, that an agreement between parties to a contract to arbitrate all disputes thereafter to arise thereunder is invalid and unenforceable, as constituting an attempt to oust the legally constituted courts of their jurisdiction and to set up private tribunals, but that, if the matter to be submitted to the arbitrators was the mere finding of a fact or facts the determination of which is essential to the accrual of the cause of action itself, such arbitration or finding becomes a condition precedent to the right to sue, and is therefore not within the general rule. Judges and commentators have ascribed the origin of the rule to the jealousy of courts in the matter of their power and jurisdiction and have been somewhat inclined to criticize it on that ground. Another and better ground assigned for it is that citizens ought not to be permitted or encouraged to deprive themselves of the protection of the courts by referring to the arbitrament of private persons or tribunals, in no way qualified by training or experience to pass upon them, questions affecting their legal rights. Whatever may be the true origin of the rule, it is very generally established, and there can be no doubt that it prevails in California.

The question early arose and was considered at length in the case of Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54, where the general rule was recognized, although the facts of that case brought it within the exception above noted. That action was based upon a claim for extra work under a building contract, which provided that should any dispute arise as to the amount to be paid for extra work it should be referred to two competent persons, and, if they could not agree, the services of an umpire were to be invoked. It was contended that this was a general agreement for arbitration, and therefore not enforceable. In the opinion the court said:

> "Was it competent for the parties to make such a stipulation? It has been frequently decided, and now seems to be the settled law, that an agreement to refer a case to arbitration will not be regarded by the courts, and they will take jurisdiction and determine a dispute between parties, notwithstanding such an agreement. But that is not this case. Here the parties simply agreed that the amount or value of certain extra work should be fixed in a certain manner, and was there any right of action in this case for and on account of said extra work until the value thereof was fixed according to the terms and conditions of the contract? In other words, was it not a condition precedent to any right of action that the value of the extra work should be determined in the mode provided by the contract? This question was very elaborately considered by the Court of Appeals of New York in the recent case of President, etc., v. Pennsylvania Coal Company, 50 N. Y. 250. The court there says: 'The distinction between the two classes of cases is marked and well defined. In one case the parties undertake by an independent covenant or agreement to provide for an adjustment and settlement of all disputes and differences by arbitration, to the exclusion of the courts; and in the other they merely, by the same agreement which creates the liability and gives the right, qualify the right, by providing that, before any right of action shall accrue, certain facts shall be determined, or amounts and values ascertained; and this is made a condition precedent, either in terms or by necessary implication. This condition being lawful, the courts have never hesitated to give full effect to it. * * *' 'When, as here, the agreement is that the covenantor shall pay such sum and only such sum as shall be determined by arbitrators, the procuring an award is as clearly a condition precedent to an action as if the parties had added, "and no action shall be maintainable until after the award of the arbitrators."'"

The rule thus announced has been uniformly followed in this state. See Loup v. Cal.

S. R. R. Co., 63 Cal. 97, 101; Old Saucelito L. & D. D. Co. v. Commercial Union Ass'n Co., 66 Cal. 253, 5 Pac. 232; Adams v. Ins. Co., 70 Cal. 198, 11 Pac. 627; Farnum v. Phœnix Ins. Co., 83 Cal. 246, 23 Pac. 869; M. E. Church v. Seitz, 74 Cal. 287, 15 Pac. 839; Davisson v. East Whittier Land, etc., Co., 153 Cal. 81, 96 Pac. 88; North American Co. v. Outer Harbor Co., 178 Cal. 406, 173 Pac. 756; Oakdale Irr. Dist. v. Beard et al., 47 Cal. App. 66, 190 Pac. 224.

It is also the general rule throughout the country, and is stated in 5 Corpus Juris, p. 20, in the following language:

> "Parties will not be permitted, by agreements to submit to arbitration, to oust the jurisdiction of the courts, whether the agreement relates to existing differences or to those which may arise in the future. In other words, the courts may disregard such agreements, assume jurisdiction, and determine the matters in dispute which constitute the subject-matter of the agreements, on the principle that the parties cannot deprive themselves of the right to resort to the proper legal tribunals for the submission of their controversies. The general principle that courts favor arbitrations and will indulge every reasonable presumption to uphold arbitration proceedings is strictly limited to proceedings which have resulted in an award, in consequence of which submissions to arbitration cannot be specifically enforced, and the parties to the submission may revoke it at any time before the award is made."

And the exception to the rule is stated in the following terms:

> "Where a contract contains a stipulation, not that all questions arising thereunder, whether as to the validity or effect of such contract or otherwise, shall be submitted to arbitration, but that the decision of arbitrators on a certain question or questions, such as the quantity, quality, or price of materials or workmanship, the value of work, the amount of loss or damage, or the like, shall be a condition precedent to the right of action on the contract itself, no fixed sum being stated in the contract, such stipulation will be enforced, because the parties to a contract have a right to adopt whatever method they see fit for determining such questions, and until the method adopted has been pursued, or some sufficient reason given for not pursuing it, no action can be brought on the contract. * * *" 5 Corpus Juris, p. 43.

And, in a note to Williams v. Branning Mfg. Co., 47 L. R. A. (N. S.) 356, the general rule is referred to in the following terms:

> "Although the cases respecting insurance policies with agreements to arbitrate outnumber those concerned with other contracts, the latter are in full accord with the former as to the prevalence and application of the doctrine above stated. They all hold it to be settled law that agreements to arbitrate everything in dispute, and taking away from the courts jurisdiction over any controversy, are nullities"—citing cases.

It has indeed been doubted whether the cases coming within the exception to the general rule are true arbitrations, and not mere appraisements. Thus, in 3 Cal. Jur. § 15, p. 49, it is said:

> "It will, of course, be noted that many of the cases holding that the determination of value, loss, damage, etc., is a condition precedent to suit, deal in fact with appraisements, and not with true arbitrations. Indeed, the distinguishing feature which makes a statutory arbitration possible, namely, the existence of a controversy which may be made the subject of a civil action, operates in the main equally well to define those cases in which the court, ignoring an agreement to arbitrate, will take jurisdiction of the cause."

We have seen that the arbitrationn provision in the case at bar is very broad in its terms, requiring all disputes arising under the contract to be arbitrated, and is thus one which was not binding upon the parties; but the respondents seek to withdraw it from the application of the established rule by arguing that, reading the entire provision relating to arbitration, it is apparent that it was the intention of the parties that a resort to arbitration should be a condition precedent to the bringing of suit; and they thus endeavor to bring the case within the exception to the general rule, or, rather, within the terms of a very broad statement of the exception which is found occasionally in the cases, viz. that the general rule as to the invalidity of agreements to arbitrate all disputes does not apply where such arbitration is by the contract expressly or impliedly made a condition precedent to the bringing of suit.

This broad statement of the rule purports to be based upon that class of cases already referred to in which some fact is to be ascertained without which the cause of action is not complete. In such cases it has been said that arbitration is a condition precedent to the bringing of suit implied from the agreement itself; and if in such a case arbitration is also expressly made such condition, the added provision in no way changes the situation. But, if an attempt be made expressly to make arbitration of a dispute a condition precedent to the bringing of suit irrespective of whether from the nature of the fact to be found or arbitrated it is such condition precedent, it is apparent that we at once run counter to the general rule itself, and, by the mere addition of a phrase which in no manner changes the relative situation of the parties, endeavor to accomplish a result which, according to that rule, is not permitted, viz. oust the courts of jurisdiction.

[2] It is apparent that, where the cause of action is not complete until the establishment in a prescribed mode of a given fact, such fact is necessarily a condition precedent to the right of action; but, where the right of action is complete, the bringing of

suit thereon is, of course, not impliedly subject to the condition that arbitration first be had, nor can it be expressly made so unless we are prepared to abandon the established rule. This is, we think, obvious from a consideration of the general rule itself, and the consequences necessarily flowing from its application. The rule is that an agreement for the arbitration of any dispute thereafter to arise under a given contract will not be enforced by the courts. But such an agreement is itself an attempt to make arbitration a condition precedent to the bringing of suit, and its effect is no different from that of an express stipulation that arbitration shall be such condition precedent. Assume that the latter is binding; what would be the course pursued under it? A dispute arises and arbitration is had. An award being made, can a party to the stipulation say:

> "I have submitted the question in dispute to arbitration and thus complied with the condition precedent. Now I will bring my suit upon my original claim and ignore the award."

Evidently not, for, if so, the arbitration would be an idle proceeding. His only right now is to enforce the award. But is not this precisely the effect of the bare agreement to arbitrate unaccompanied by the express provision that arbitration shall be a condition precedent? The answer to this question must be in the affirmative, for, if arbitration be had under such agreement, the rights and remedies of the parties thereunder are identical with those above indicated as arising from an arbitration had in pursuance of a stipulation that it shall be a condition precedent to the bringing of suit. In either case any suit thereafter brought must be upon the award.

> "It is the general rule that a valid award operates to merge and extinguish all claims embraced in the submission. Thereafter the submission and award furnish the only basis by which the rights of the parties can be determined, and constitute a bar to any action on the original demand, unless both parties have repudiated it." 5 Corpus Juris, p. 163.

We have considered this phase of the question somewhat at length for the reason that the respondents in support of the judgment —and upon, we think, the erroneous assumption that their contention is sound that the present agreement in effect provides that arbitration shall be a condition precedent to the bringing of suit—cited the case of Garcia & Maggini Co. v. Colvin (Cal. App.) 199 Pac. 1113, which, it must be admitted, upholds their contention that arbitration must first be had in any case where the parties have so agreed. In that case no question was raised as to the validity of the arbitration clause. Both parties to that action assumed its validity. The claim there made by appellant was to the effect that defendant, having repudiated the contract, was estopped to invoke the arbitration clause therein.

The arbitration clause in the case cited reads:

> "Any controversy arising under this contract shall be settled by arbitration, and the submission of such controversy to arbitration in accordance herewith by each party shall be a condition precedent to the right of such party to enforce this agreement."

Suit having been brought without such submission, a judgment of nonsuit granted upon the ground of such failure to arbitrate was upheld by the District Court of Appeal. in an opinion citing no authorities and containing no argument, the point being disposed of by the statement.

> "As arbitration or an attempt to effect arbitration was a condition precedent to the commencement of the action, the failure to allege and prove that such course had been followed, or that the plaintiff was excused from doing so was fatal to its cause of action, and the nonsuit on that ground was properly granted. * * *"

As the submission to arbitration in that case covered all disputes that might possibly arise, and was not confined to the establishment or ascertainment of a fact essential to the existence of the cause of action, thus making a resort to arbitration an implied condition precedent to the bringing of suit, it came within the general rule under which compliance with the agreement to arbitrate was not binding upon either party, notwithstanding the express attempt of the parties to make it so, and was therefore, in our opinion, incorrectly decided.

[3] The provision for arbitration in the case at bar, being one covering all disputes thereafter to arise under the contract, and not being confined to the ascertainment of a fact essential to the existence of the cause of action itself, comes clearly within the general rule that it is not binding upon either party to it. The plaintiff therefore, in the establishment of his case, was not called upon to prove that he had submitted his claim to the method of arbitration provided in the contract between the parties, and the trial court erred in granting the defendants' motion for nonsuit based upon plaintiff's noncompliance with such provision.

The judgment should therefore be reversed; and it so ordered.

We concur: WILBUR, C. J.; LENNON, J.; MYERS, J.; LAWLOR, J.; WASTE, J.; SEAWELL, J.

190 Cal. 684

BUELKE v. LEVENSTADT et al. (L. A. 7309.)

(Supreme Court of California. March 23, 1923.)

1. Highways 🔑183—Negligent driving of auto by minor imputed to person signing his application for license.

Under Motor Vehicle Act, § 24, as amended by St. 1919, p. 223, § 14, declaring it unlawful for one to permit his child, ward, or employee to drive his auto on the highway without first obtaining a license for him, that application of a minor shall not be granted unless his parent or guardian sign it, and that negligent driving of a minor so licensed shall be imputed to the person signing his application, the minor's negligence is so imputed, though the one signing as "parent" merely stood in the relation of in loco parentis to the minor, and employed him to drive his machine.

2. Statutes 🔑121(1)—Terms and conditions of licensing minors to drive in Motor Vehicle Act germane to subject in title.

Provision of Motor Vehicle Act, § 24, as amended by St. 1919, p. 223, § 14, declaring the terms and conditions on which minors may be licensed to drive, *held* germane to the subject, within Const. art. 4, § 24, as to subject and title of acts.

3. Statutes 🔑72—Motor Vehicle Act's provision as to negligence of minor drivers of uniform application.

Provision of Motor Vehicle Act, § 24, as amended by St. 1919, p. 223, § 14, that negligence of a minor in driving shall be imputed to the parent or guardian signing his application for license, does not violate Const. art. 1, § 11, requiring general laws to have uniform application.

4. Constitutional law 🔑205(2)—No granting of special privileges by provision of Motor Vehicles Act as to negligence of minor drivers.

Const. art. 1, § 21, forbidding a grant of special privilege to one citizen or class of citizens not given on the same terms to all, is not violated by Motor Vehicle Act, § 24, as amended by St. 1919, p. 223, § 14, providing that negligence of a minor in driving shall be imputed to the parent or guardian signing his application for license.

In Bank.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Augusta E. Buelke, special administratrix of August E. Buelke, deceased, against Nat Levenstadt and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Jennings & Belcher, of Los Angeles, for appellants.

Duke Stone and Perry F. Backus, both of Los Angeles, for respondent.

WASTE, J. The plaintiff, as administratrix of the estate of her deceased husband, brought this action to recover for injuries resulting in the death of the decedent and caused by the negligent operation of a motor vehicle by defendant Nat Levenstadt, a minor. The automobile was owned by defendant Morris Levenstadt, uncle of Nat, whose relation to the boy was that of in loco parentis, and who, in order that Nat might procure a license to operate a motor vehicle, had signed the required application therefor. At the time of the accident the uncle was not present, and the boy was engaged upon an independent mission of his own. Special issues were submitted to the jury upon the answers to which the court entered judgment in plaintiff's favor, and against both defendants, who have appealed.

It is admitted at the outset of the presentation of the appeal that, as to the defendant Nat Levenstadt, the evidence of negligence was conflicting and that as to him there is no just ground for reversal. We shall therefore disregard him in the discussion of the case, and shall refer to the defendant Morris Levenstadt as the appellant. He was held liable solely by reason of the provisons of section 24 of the Motor Vehicle Act of 1915 (St. 1915, p. 411), as amended by St. 1919, p. 223, § 14, which provides for the licensing of persons operating motor vehicles, and imputes the negligence of a minor in the operation of an autombile upon the public highway to the person who shall have signed the application of such minor for such license. The section provides in brief that it shall be unlawful for any person to operate or drive such vehicle upon the public highways unless licensed by the motor vehicle department of the state. The concluding portion, the part germane to this discussion, is as follows:

> "Provided, that it shall be unlawful for any person to cause or knowingly to permit his or her child, ward or employee to operate or drive a motor vehicle upon the public highway, whether as a chauffeur or operator, without having first obtained such license as is hereinbefore specified; provided, that the application to the department of a minor to operate or drive a motor vehicle, whether as chauffeur or operator, shall not be granted by the department unless the parent or parents having the custody of such applicant or the guardian of such applicant shall have joined in said application by signing the same; and provided, further, that any negligence of a minor, so licensed, in operating or driving a motor vehicle upon the public highway, whether as chauffeur or operator, shall be imputed to the person or persons who shall have signed the application of such minor for said license, which person or persons shall be jointly and severally liable with such minor for any damages caused by such negligence."

[1] Appellant's first contention is that, as he is neither the parent nor guardian of Nat Levenstadt, he is not one of the persons required by the statute to sign a minor's application, and is therefore a mere volunteer, who cannot be held liable under the provisons of the act. To sustain such contention would be to countenance a fraud upon the people of the state. In order to procure a license for his minor nephew, appellant joined in the application of the boy to the motor vehicle department of California, in which he gave his relationship to the minor as "father." Upon the faith of this guaranty the license to the minor was issued. The evidence shows that Nat's parents died when he was 12 years of age. His sister and he then went to live with their uncle, this appellant, who had no children of his own, and the record conclusively establishes that from that time on appellant stood in the relation of in loco parentis to both children. He conducted a grocery store and owned a delivery truck for use in his business. Nat drove this truck for him. He testified that "no one else had anything to do with the driving of the truck except Nat." For these services appellant paid the boy, who was about 19 years of age, $8 a week and his board. Had appellant permitted Nat, regarded either as a son or as an employee, to operate or drive a motor vehicle upon the public highway without first having obtained a license as required by the act, he would have been guilty of a misdemeanor. In order to avail himself of Nat's services, he was compelled by law to join with the minor in the application to the department for the proper license. He did so, misrepresenting his relationship to the applicant. It is quite apparent why he did so, and we are not constrained to assist him in evading the liability he assumed over his own signature by any nicety of construction or regard for technical use of words.

But, aside from this attitude, it is the well-settled law that one standing in loco parentis to those held out as members of his family is entitled to all the rights of a parent. Whitaker v. Warren, 60 N. H. 20, 49 Am. Rep. 302. He also incurs the same liability with respect to them that he is under to his own children. Starkie v. Perry, 71 Cal. 495, 497, 12 Pac. 508; Larsen v. Hansen, 74 Cal. 320, 322, 16 Pac. 5. The relation being established the reciprocal rights, duties and obligations pertaining to it arise between them the same as if he was their natural father. Eickhoff v. Sedalia, etc., Ry. Co., 106 Mo. App. 541, 544, 80 S. W. 966; 1 Schouler's Domestic Relations (6th Ed.) §§ 686, 687. We see no reason, therefore, why one standing in such relation may not voluntarily assume the liability imposed by the statute in the same manner and with like effect as though he were a natural father.

[2] It is next contended that the portion of section 24 of the Motor Vehicle Act under consideration is violative of section 24 of article 4 of the state Constitution, which provides that "every act, shall embrace but one subject, which subject shall be expressed in its title." All that is required in that connection is that the subject must be in some way indicated by the title of the act, or be logically germane to it, and included within its scope. Pratt v. Browne, 135 Cal. 649, 653, 67 Pac. 1082. As said in another case, there must be a reasonably intelligent reference to the subject to which the legislation of the act is addressed. Estate of McPhee, 154 Cal. 385, 389, 97 Pac. 878. Numerous provisions having one general object, fairly indicated by the title of the act, may be united. The general purpose of the statute being declared the details provided for its accomplishment will be regarded as necessary incidents. Ex parte Liddell, 93 Cal. 633, 637, 29 Pac. 251. The title of the Motor Vehicle Act declares that it is one enacted (among other things) "to regulate the use and operation of vehicles upon the public highways and elsewhere; * * * to provide for the licensing of persons operating motor vehicles; to prohibit certain persons from operating vehicles upon the public highways." The mere statement of appellant's objection is sufficient to refute it. While the provision declaring upon what terms and conditions minors may be licensed to operate motor vehicles is not carried in the title, the subject is germane to the general subject there expressed, and forms a part of the comprehensive scheme provided. It is an appropriate method of effecting one of the main objects of the law. Robinson v. Kerrigan, 151 Cal. 40, 50, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829; Pritchard v. Whitney Estate Co., 164 Cal. 564, 567, 129 Pac. 989.

[3, 4] Appellant's final contention is that the provision of the act is unconstitutional, because it is unreasonable and discriminatory, and is not uniform and general in its application. The application of the law to minors in a class by themselves is not unreasonable or arbitrary. The argument that the law attempts to put into a class by themselves all minors, irrespective of their age, experience, ability to drive, or their financial responsibility, is one that should be presented to the legislative department and not to the courts. In re Stork, 167 Cal. 294, 296, 139 Pac. 684. While some minors are more apt at learning to run motor vehicles than others—possibly more apt than many adults—the fact remains that they are minors. They are in position to be, and in a vast number of cases are, intrusted with the control and operation of motor vehicles upon the public highways. While an automobile is not, in and of itself, a dangerous machine, it may become such in the hands of a careless and indiscreet person. The statute prohibiting the operation of motor vehicles upon the public highways by minors, without their first having obtained

licenses which can only be procured upon an assumption of liability for their negligence by parent or guardian, is in effect a determination by the Legislature that minors have not that discretion and judgment which entitles them to unrestrained permission to operate such vehicles upon the public thoroughfares, freed from all parental liability for their negligence except in those cases where it can be established that they are acting as the agent or servant of the owner of the car causing an injury. Daily v. Maxwell, 152 Mo. App. 415, 425, 133 S. W. 351. The Legislature no doubt had in mind the fact that the authorities are in accord in holding that, as a general rule, in an action based on the negligent running of an automobile, the owner of the car who was not present at the infliction of the injury cannot be held liable, except it be shown that the person in charge not only was the agent or servant of the owner, but also was engaged at the time in the business of his service. Daily v. Maxwell, supra; Bryant v. Pacific Elec. Ry. Co., 174 Cal. 737, 742, 164 Pac. 385. In this state it is now firmly established, also, that in the absence of a statute creating a liability, the rule applies when the driver is a minor child, and the father is the owner of the car, and all courts recognize the general rule that a parent is not liable for the torts of his child. Spence v. Fisher, 184 Cal. 209, 211, 212, 193 Pac. 255, 14 A. L. R. 1083.

We may assume, also, that the law-making body was fully cognizant of another rule of law relating to the torts of minors which is somewhat in the nature of an exception, and that is that a parent may become liable for an injury caused by the child, where the parent's negligence made it possible for the child to cause the injury complained of, and probable that it would do so. Schultz v. Morrison, 91 Misc. Rep. 248, 154 N. Y. Supp. 257, 258; Hoverson v. Noker, 60 Wis. 511, 514, 19 N. W. 382, 50 Am. Rep. 381; Chaddock v. Plummer, 88 Mich. 225, 50 N. W. 135, 14 L. R. A. 675, 26 Am. St. Rep. 283. This liability is based upon the rules of negligence rather than on the relation of parent and child (Doran v. Thomsen, 76 N. J. Law, 754, 760, 71 Atl. 296, 19 L. R. A. [N. S.] 335, 131 Am. St. Rep. 677) and finds support in the direct relation of cause and effect. Elmendorf v. Clark, 143 La. 971, 79 South. 557, L. R. A. 1918F, 802. In the case of an injury by an automobile, the liability rests, not alone upon the fact of ownership, but upon the combined negligence of the driver in the operation of the automobile, and of the owner in intrusting the machine to an incompetent driver. Berry on Automobiles (2d Ed.) § 603; Parker v. Wilson, 179 Ala. 361, 371, 60 South. 150, 43 L. R. A. (N. S.) 87.

The Legislature has now declared that under a given state of facts a liability exists where none existed before. The right of action here provided for is, in effect, a modification of the common-law rule exempting a parent from liability for the torts of his minor child, joined with the other rule that a parent may become liable for an injury caused by the child, and made possible, and probable, through the parent's negligence. Its creation does no violence to the provision of the Constitution (article 1, § 11) requiring general laws to have uniform operation, nor that (article 1, § 21) forbidding a grant of special privileges to one citizen, or class of citizens, which are not given on the same terms to all. Pritchard v. Whitney, supra, 164 Cal. 568, 129 Pac. 989.

The objection that the law attempts to create a liability on the part of a parent or guardian signing a minor's application, without regard to any inherent liability of such parent or guardian, and without regard to their negligence or fault, is answered by what we have already said. The statute involved in Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L. R. A. (N. S.) 699, Ann. Cas. 1915A, 1163, so strongly relied upon by the appellant, is not the same as the one here. The court there had under review an act of the Legislature which made the owner of an automobile liable for any injury caused by the negligent operation of his car by any person who might obtain possession of it, even though it be without his consent or knowledge. In declaring such provision repugnant to the Constitution, the court said it was not then dealing with "the question of the responsibility, be it moral or otherwise, of the owner of an automobile who has placed it in the hands of an irresponsible person to use." 174 Mich. 379, 140 N. W. 618, 45 L. R. A. (N. S.) 699, Ann. Cas. 1915A, 1163.

The judgment is affirmed.

We concur: WILBUR, C. J.; LENNON, J.; KERRIGAN, J.; LAWLOR, J.; SEAWELL, J.; MYERS, J.

190 Cal. 661

LOGAN v. SHIELDS, County Auditor. (S. F. 10528.)

(Supreme Court of California. March 21, 1923.)

Counties ⚷61—County board of supervisors held not authorized to appoint or pay traffic officers; "public officer."

A traffic officer, whose duty it is to regulate traffic on the public streets of a county, is to that extent exercising a part of the sovereign power of the state, and is a "public officer," as distinguished from a mere employee, and the county board of supervisors has no authority to create such an office, nor to pay his salary; the power to create such office being exclusively vested in the Legislature by Const. art. 11, § 5.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Officer.]

In Bank.

Application by James B. Logan for a writ of mandate prayed to be directed to J. J. Shields, as County Auditor of the County of San Mateo, requiring him to audit petitioner's demand as traffic officer. Writ denied.

Ross & Ross, of Redwood City, for petitioner.

Franklin Swart and John H. Machado, both of Redwood City, for respondent.

WILBUR, C. J. This is an original proceeding in mandamus. The petitioner has been employed as a traffic officer or employee by the board of supervisors of San Mateo county at a salary of $150 per month. A claim for that amount for the months of November and December, 1922, was audited and approved by the board of supervisors and was presented by the petitioner to the respondent auditor for his warrant. The auditor having refused to issue his warrant, petitioner brought this proceeding to compel the issuance of the warrant. It appears from the return herein that for a period of about 10 years the board of supervisors of San Mateo has, by resolution and by appointment thereunder, employed and paid a number of persons known in the resolution and in the report as traffic officers or "traffic cops." The petitioner was appointed or employed under such resolution, and by virtue thereof seeks by this proceeding to secure his compensation.

If the petitioner is an officer within the meaning of article 11, § 5, of the Constitution, it is clear under decisions rendered shortly after the adoption of the Constitution that the Legislature of the state alone has power to create such an office, and that the board of supervisors of the county can neither provide for such officers or their compensation under the police power granted directly by the Constitution to the counties in article 11, § 11, nor by authority expressly granted by the Legislature. The rule was thus stated in County of El Dorado v. Meiss, 100 Cal. 268, 274, 34 Pac. 716, 717:

> "The duty of providing for the election or appointment of the particular officers named in section 5 of article 11 of the Constitution, 'and such other county officers * * * as public convenience may require,' and to prescribe their duties and fix their terms of office, is by this section vested exclusively in the Legislature of the state, and can be exercised by no other body. The Legislature cannot divest itself of this duty by any delegation of the power. 'This provision of the Constitution,' said this court in Welsh v. Bramlet, 98 Cal. 219, 'is mandatory, and must be construed, not only as giving to the Legislature the exclusive authority to provide for the officers in the several counties, fix their terms of office, and prescribe their duties, but also as declaring that such provision must be made "by general and uniform laws," and that any law which the Legislature may enact upon these subjects must be uniformly applicable to all the counties in the state.'"

It was therefore held in that case that an ordinance creating the office of license tax collector was void in so far as it attempted to create such office, because of want of power in the board of supervisors to create such an office. In the case of People v. Wheeler, 136 Cal. 652, 69 Pac. 435, this court held that a county physician was not an officer within the meaning of the constitutional provision above quoted. With reference to the question as to whether or not an office was created by the appointment of the county physician it was said:

> "It may be added that if the act could be thus construed, it would be clearly unconstitutional. For the effect of the act would then be to delegate to the board of supervisors the power to create an indefinite number of public officers, with varying duties and compensation; which cannot be regarded as within the constitutional powers of the Legislature. 'The Legislature cannot commit to the discretion of others the important function of creating public offices in unlimited or indefinite number.' Ford v. Harbor Commissioners, 81 Cal. 37; Farrell v. Board of Trustees, 85 Cal. 415. Still more obviously would this be the case if the supposed office be regarded as a county office, as, 'if an office at all,' it should be. People v. Harrington, 63 Cal. 260. For with relation to county offices, it is the constitutional duty of the Legislature not only to provide for the election of the officers, but also to fix their terms of office, to prescribe their duties, and to regulate their salaries or compensation; and this duty could not be delegated to the board of supervisors or others. (Const. art. 2, § 5; Ventura v. Clay, 112 Cal. 70; County of El Dorado v. Meiss, 100 Cal. 274; Farrell v. Board of Trustees, 85 Cal. 415–416; County of Los Angeles v. Lopez, 104 Cal. 258; People v. Johnson, 95 Cal. 471; Dougherty v. Austin, 94 Cal. 601; Dwyer v. Parker, 115 Cal. 544."

In the statute considered in Coulter v. Pool, 187 Cal. 181, 201 Pac. 120, the Legislature attempted to delegate to the board of supervisors the power to employ a county engineer. Although such officer was designated as an employee in the statute it was held that he was in fact an officer and that the attempted delegation of power was void. The court there said:

> "* * * 'The label placed by the Legislature upon its work cannot be permitted to give it a meaning not fairly contemplated within its terms.' In other words, a legislative declaration, whether contained in the title or in the body of a statute, that the statute was intended to promote a certain purpose is not conclusive on the courts, and they may and must inquire into the real, as distinguished from the ostensible, purpose of the statute, and determine the fact whether, after all has been said and done by the Legislature, the statute, in its scope and effect, departs from the declared legislative design and contravenes the fundamental and supreme law of the state. Matter of Jacobs, 98 N. Y. 98, 110 [50 Am. Rep. 636]; State v. Redmon, 134 Wis. 89, 107 [126 Am. St. Rep. 1003; 15 Ann. Cas. 408, 14 L. R. A. (N. S.) 229, 114 N. W. 137]; Mugler v. Kansas, 123 U. S. 623 [31 L. Ed. 205, 8 Sup. Ct. Rep. 273. See, also, Rose's U. S. Notes]. * * *"

The court then said:

> "Its definition and application depend not upon what the particular office in question may be called, nor upon what a statute may call it, but upon the power granted and wielded, the duties and functions performed and other circumstances which manifest the true character of the position and make and mark it a public office, irrespective of its formal designation. Knox v. Los Angeles County, 58 Cal. 59; Mechem on Public Offices, § 4; Hartigan v. Board, 49 W. Va. 14 [38 S. E. 698]. * * *"

In determining whether or not the county engineer was a public officer, one of the rules for the determination of that question is thus stated in Coulter v. Pool, supra:

> "A public officer is a public agent, and as such acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the act performed by the officer the authority and power of a public act or law. The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and entrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting. * * *"

As we said in Ex parte Daniels, 183 Cal. 636, 639, 192 Pac. 442, 444 (21 A. L. R. 1172):

> "The streets of a city belong to the people of the state, and every citizen of the state has a right to the use thereof, subject to legislative control. People v. County of Marin, 103 Cal. 223, 232 [26 L. R. A. 659, 37 Pac. 203]; Elliott on Roads and Streets (3d Ed.) §§ 25, 505, 543, 544, 1112, 1115; 3 Dillon on Municipal Corporations (5th Ed.) § 1122. The right of control over street traffic is an exercise of a part of the sovereign power of the state. Elliott on Roads and Streets, sections cited supra. * * *"

It clearly follows that as the duty of the petitioner herein was to regulate traffic upon the public streets of the county of San Mateo, he was to that extent exercising a part of the sovereign power of the state, and for that reason was a public officer, as distinguished from a mere employee, such as a street sweeper or laborers upon the highway. It is clear, then, that the supervisors had no authority to pay or authorize the payment of the petitioner's salary and for that reason the petition must be denied. It is unnecessary to determine whether or not the petitioner was acting as a peace officer, and thus performing the duties of a constable or sheriff, and for that reason his employment was unauthorized, because it would be of assistance to the sheriff or constable, and thus an increase of compensation to such sheriff or constable. We express no opinion upon that point, basing our judgment upon the proposition that the petitioner was an officer and that the supervisors were without power to create such office.

Petition denied.

We concur: LENNON, J.; KERRIGAN, J.; MYERS, J.; LAWLOR, J.; SEAWELL, J.; WASTE, J.

190 Cal. 626

HELLMAN COMMERCIAL TRUST & SAVINGS BANK v. SOUTHERN PAC. CO. et al. STOREY v. SAME. IJAMS et al. v. SAME. (L. A. 6890–6892.)

(Supreme Court of California. March 20, 1923.)

1. Appeal and error 🔑837(6)—Instructions must be considered in light of evidence.

In determining whether the instructions correctly state the law applicable to the case, the facts as presented in the evidence must be borne in mind, and the assailed instructions must be considered in the light of the evidence.

2. Waters and water courses 🔑49—Instructions as to when water courses exist held correct when construed with the evidence.

Instructions as to what constitutes a natural water course, and stating that a channel possessing the elements of a water course may be a natural water course, even though of comparatively recent formation, and even though formed by the change of course of an older stream from natural causes, *held* not erroneous as permitting the jury to find that a natural water course may exist merely through the fact that a stream, through the action of its storm waters, has cut a new channel, when considered with the evidence which showed practically without dispute that the channel in question had been in existence for a long period of time.

3. Waters and water courses ⚷78—Owner cannot divert flood waters from established natural water course.

If a wash has become a permanent and established natural water course, no one has the right to divert either the usual or torrential, or even the exceptional and unprecedented, flow of the waters in such channel.

4. Waters and water courses ⚷38—Uninterrupted flow for period of prescription is unnecessary to establish water course.

Though a landowner has a right to dam a new channel washed by flood waters across his land before such channel has become an established water course, it is not necessary that the water shall have flowed uninterruptedly through such channel for the full period of prescription, five years, before it becomes an established water course.

5. Waters and water courses ⚷171(2)—Unprecedented flood no defense to liability for damming natural water course.

Where defendants dammed a natural water course through which the flood waters of a stream were accustomed to run, and thereby caused such water to flow through another channel upon plaintiff's land, it is no defense to defendants' liability that the storm causing the flood was unprecedented so as to be an act of God.

6. Waters and water courses ⚷171(3)—Party assisting in construction of dam does not escape liability by conveying property before flood.

A land company which agreed with a railroad company that the latter should construct a dam across an established water course, and that the land company should pay a percentage of its cost, is not relieved from liability for injuries resulting from flood waters thereby diverted into another channel because it had sold its lands prior to the time the actual damage was caused by the flood.

In Bank.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Three separate actions by the Hellman Commercial Trust & Savings Bank, by Thomas H. Storey, and by Isaac C. Ijams and others, against the Southern Pacific Company and others. Judgment for plaintiffs in each case, and defendants appeal. Affirmed.

Henry T. Gage, W. I. Gilbert, and Anderson & Anderson, all of Los Angeles, for appellants.

George H. Moore, C. Elliott Miller, and Tobias R. Archer, all of Los Angeles, for respondents.

LENNON, J. A rehearing of the three above-entitled causes after decision by this court, sitting in bank, in one of said causes (L. A. 6890) was granted primarily because, in the petitions for rehearing, it was insisted that the opinion, delivered in the first instance by Mr. Justice Richards, of the First District Court of Appeal, sitting in this court pro tem., failed to definitely deal with and directly dispose of appellants' contention that certain instructions were erroneous and grievously prejudicial in this, that they permitted the jury to find that a new natural water course might in certain circumstances be created "ipso facto, eo instanti"—that is to say, that such a water course might be created overnight. This contention seemed at first blush to be possessed of much merit, and it was so plausibly and earnestly presented that we were constrained, out of abundance of caution, to grant the rehearing prayed for. However, a further and more minute consideration of the case had immediately following the close of intensive and illuminating oral reargument, pro and con, of the phase of the case immediately in discussion, satisfies us that the opinion rendered in the first instance by Mr. Justice Richards, which is herein and hereby adopted as the opinion of the court, adequately deals with, definitely determines, and correctly decides every contention made by the appellants. The opinion of Mr. Justice Richards is as follows:

"This action was instituted for the recovery of damages for the alleged diversion of flood waters from one of the alleged natural channels of a certain stream known as the Tejunga river to another channel thereof, with the resultant overflow of the plaintiff's land, and also for injunctive relief against such diversion. The Tejunga river takes its rise in two branches, known as the Big and Little Tejunga, in the mountains lying to the eastward of the San Fernando valley in the county of Los Angeles; these have their confluence near the mouths of their respective canyons, and thereafter the Tejunga river flows out across the San Fernando valley and into the Los Angeles river; in so doing there have been created in previous years three separate washes or channels, through one or all of which the waters of the Tejunga river were accustomed to flow in times of high water on their way across the valley. The line of the Southern Pacific Railroad into that region was surveyed in about the year 1873, and work upon the construction thereof commenced, which resulted in its completion and in the inception of its operation in about the year 1876. In its general southerly course it crossed the Tejunga river, for which it made provision by means of trestle bridges of various lengths, depending upon the width of these several washes or channels at the point of its passage; these have been changed, rebuilt, or improved from time to time, and have been supplemented by dikes and dams and embankments having for their purpose the protection of the railroad line and trestles from the storm flow of the Tejunga river.

"The complaint herein alleges that for many years prior to January, 1914, and at all times since, there were three natural channels or water courses of the said Tejunga river at or near and also below the point of passage of the railroad, and which are designated in said complaint as wash No. 1, wash No. 2, wash No. 3, and which carry off the rain and storm waters of said stream; that of these wash No. 1 carried off the major portion of said rain and storm waters, conveying them to the southward of plaintiff's lands and premises, while said wash No. 2 carried off a minor portion of the rain and storm waters of said stream, conveying them to the northwest of plaintiff's lands and premises and those of its assignors; that during the year 1912 defendants constructed and caused to be erected certain dikes and embankments of earth, rock, and cement across the mouth of said wash No. 1, which were intended to divert the rain and storm waters of said stream which had been wont to flow down said wash No. 1 into wash No. 2, and which had the effect of such diversion during the winter season of 1914, when the rain and storm waters of said stream, which would otherwise have mainly flowed down the channel of wash No. 1, and would thus have passed a mile or more to the eastward of plaintiff's said lands, and without any damage thereto, were forced to and did flow down and along wash No. 2, and were precipitated upon the westerly portion of plaintiff's said lands, depositing large quantities of boulders, sand, gravel, and other detritus thereon, and washing away a considerable portion thereof, thus destroying and rendering unfit for cultivation or sale the portions of plaintiff's lands thus invaded, to their great damage; wherefore the plaintiff prayed for injunctive relief preventing the defendants from maintaining or reconstructing the dikes and other obstructions across said wash No. 1. The plaintiff also prayed for a mandatory order requiring the defendants to rebuild and repair dikes Nos. 2 and 3 so as to effectually prevent the rain and storm waters of said stream from entering the channel cut by it into wash No. 2, to and crossing plaintiff's land. The plaintiff also prayed for damages in a large sum for injury to the several tracts of land damaged by the said diversion, and for general relief.

"The defendants in their answer denied most of the material allegations of plaintiff's complaint; they particularly denied, for want of information and belief, the averments of plaintiff's complaint that the wash or channel designated therein as wash No. 1 ever was a natural water course of said stream, or that it ever collected or carried off large quantities of the rain and storm waters thereof, or that prior to the erection of the defendants' dams and dikes, described in said complaint, said wash No. 1 carried off the major portion of the rain and storm waters thereof, or that said wash No. 2 carried off a minor portion of said rain and storm waters. They deny that whatever dams and dikes they had caused to be constructed along or across said stream were erected for the purpose of diverting said waters down or along said wash No. 2, or that thereby said waters were forced to flow down wash No. 2, as they would not otherwise have done; they denied that said waters were caused thus to flow through any faulty or negligent construction of said defendants' dikes, dams, or embankments, or that any damage was caused to said plaintiff thereby. They allege affirmatively that the rainfall in 1914, with its consequent torrential outflow of said stream, was unprecedented, and was an act of God for which the defendants were not to be held liable. Wherefore the defendants prayed that the plaintiff take nothing by its said action. The cause proceeded to trial upon the issues as thus framed, before a jury. No special issues were framed or submitted to the jury, but upon submission thereof the court expressly confined their deliberations to the sole issue of damages. The jury returned a verdict in the plaintiff's favor fixing the damages at the sum of $10,000. Upon the return of this verdict the trial court ordered that judgment be not entered thereon at the time, but thereafter took additional evidence as to the right of the plaintiff to injunctive relief, after which it filed its findings of fact and conclusions of law adopting the verdict of the jury, but also making full and detailed findings upon all of the issues and facts involved in the case, and thereupon rendered its judgment awarding the plaintiff damages in the sum of $10,000 as found by the jury, and further granting plaintiff injunctive and mandatory relief substantially as prayed for in its complaint. It is from such judgment that this appeal has been taken.

[1, 2] "The several contentions which the appellants urged upon this appeal relate to the instructions given or refused by the trial court to the jury. The first of these contentions is that the court erred in its instructions to the jury as to what constituted a natural water course. The body of the court's instructions in this regard had several references to the east wash, or wash No. 1, the main issue before the jury being as to whether that particular wash, prior to the construction of the defendants' dikes, dams, and embankments, had during the past history of the outflow of the Tejunga river become such a natural water course thereof that the defendants could not lawfully obstruct or divert the flow of the waters of said stream therein to the plaintiff's damage. In determining whether the instructions of the trial court state correctly the law applicable to a particular case, the facts of the case as presented in the evidence to the jury must be borne in mind, and the assailed instruction must be borne in mind, and the assailed instruction must be considered in the light of the evidence in the case. Essanay Film Co. v. Lerche (C. C. A.) 267 Fed. 353; Hale Bros. v. Milliken, 5 Cal. App. 344, 90 Pac. 365. In the case before us the instructions of the trial court were very full and exhaustive, particularly in their bearing upon the question as to what would constitute a natural water course. The appellants, in criticising these instructions, have selected certain excerpts therefrom which, taken alone and apart from the general body of the court's instructions, would seem to be subject to the criticism which the appellants aim at them. That criticism is that the court has thereby instructed the jury that a natural water course may be created and may exist merely through the fact that a stream through the action of its storm waters has cut a new channel through which its waters, if unprevent-

ed, would either continually or intermittently flow. This, of course, is not the law, and, if the whole body of the court's instructions, when taken together, were found to be subject to this interpretation, they would undoubtedly be so prejudicially erroneous as to compel a reversal of this case. It is inconvenient to reproduce the entire body of the court's instructions for the purpose of showing that the appellants' foregoing criticism is unsound, but a few excerpts therefrom may serve to show that it is so.

"The court begins its instructions upon this subject with the following words: 'To constitute a natural water course, there must be a stream usually or periodically flowing in a particular direction. It must flow in a definite channel having a bed, sides, or banks, and usually discharges itself into some other stream or body of water.'

"Again the court says: 'If a stream has a permanent or at a least a periodical source of supply, and runs in a definite channel along a considerable distance, it may then break up into numerous small channels, or percolate into the soil, and sink away and still be, in legal contemplation, a natural water course for the distance that it flows from its source of supply to the point where it breaks up or percolates away or sinks away. If the conformation of the country is such that water flows in large quantities after heavy rains or when the snow melts, at regular seasons, through a well-defined channel which the force of the water has made for itself, and which is the accustomed channel through which it flows periodically, or would so flow when not interfered with by artificial dikes or dams, such channel is to be considered as a natural water course. In determining whether any channel or stream is a natural water course, its size is not a controlling element, either in respect to the volume of water carried or the length of its course, and, while the element of permanence is necessary, great age is not an essential attribute of a water course. If a channel has defined banks, with such characteristics as cause the water to flow in a definite direction or course, and has a stream bed which manifests the continued action of flowing waters, such channel may be a natural water course, even though of comparatively recent formation, and even though formed by an older stream changing its course in whole or in part, provided such change of course occurs from natural, as distinguished from artificial causes, and is of a permanent character.

"The court further instructed the jury that 'If you find that the wash named on the trial of this action as the east wash of the Tejunga, or channel and wash No. 1, did at the time of the making of the dams and dikes by the defendants in 1911 and 1912, mentioned in the complaint of the plaintiff, exist, and now exists, in its natural course, marked or defined on the ground by definite bed, channel, or wash, from the confluence or union of the Little and Big Tejunga across San Fernando valley, east of Lankershim and down to the Los Angeles river, and that without human interference, dams, or dikes some part of the waters of said Little or Big Tejunga naturally and recurrently have flowed into, along, and down said east wash, and thereby reached the Los Angeles river, then the east wash constitutes a natural water course.'

"The foregoing instructions, when considered in the light of the evidence in the case, could not be otherwise understood by the jury than as having particular reference to the east wash, or wash No. 1, of the Tejunga river. This wash, according to the great weight of the evidence in the case, was not a wash or channel of this river which had been created overnight, or within even a short period of time prior to the defendants' construction of the dams, dikes, and embankments which diverted the waters of said stream from pursuing their regular course along said wash during periods of torrential flow. There was some evidence in the case that wash No. 1 had existed as one of the channels of this stream in times of high water as early as the year 1858, long before the railroad entered that region. There was much evidence from old residents of the region, and apparently of an unimpeachable character, that large quantities of water had flowed down this wash during the winter seasons of 1876, 1884, 1887, 1889, and every year thereafter during high water up to the year 1901, when the defendants began the construction of their works for the prevention of such flow, and the diversion of such waters to the other existing channel of such stream known as wash No. 2. There is some evidence that the defendants made sporadic efforts during these later years to prevent the flow of storm waters down channel or wash No. 1, but that these efforts were unsuccessful. If it was such a water course as is shown by the great weight of evidence in this case, it would be quite immaterial that the defendants had at various times prior to their activities in 1911 and 1912 made unsuccessful attempts at the obstruction of said water course and the diversion of such water; such efforts could only have significance in their application to newly created washes or channels, against which the owners of lands thus freshly invaded would have the right to protect themselves by dams, dikes, embankments, levees, and other obstructions having for their object the return of the stream to its former and natural channel. This, however, is not such a case, and it is impossible to conceive, in the light of the evidence freshly in the minds of the jury, that they could have misinterpreted the foregoing instructions of the court as having reference to any other sort of water course than one which had become, through many years of recurring flow, a definite and permanent channel for the outflow of the torrential waters of the Tejunga river.

[3] "The next contention of the appellants is that the trial court erred in its instruction to the jury as to the rights of the defendants to dike off the torrential waters of said river from said east wash, or wash No. 1, thereof. This, however, is but a repetition in another form of its former objection, since, if the east wash had become a permanent and established water course of said river, it would follow as a matter of logical consequence that neither the defendants nor any one else would have the right to divert either the usual or the torrential, or even the exceptional and unprecedented flow of these waters from their natural and

accustomed channels to another of the courses or channels of said river, if such diversion would result in precipitating upon the lands of the plaintiff an outflow of said stream which, but for such diversion, would in the main have pursued its way down the east wash or channel thereof at a distance from and without injury to plaintiff's land. The cases of Horton v. Goodenough, 184 Cal. 451, 194 Pac. 34, and Weinberg Co. v. Bixby, 185 Cal. 87, 196 Pac. 25, decided since the trial of this cause, contain nothing in their statement of the law respecting water courses which is at variance with the instructions of the trial court in this case, when viewed in the light of the evidence before it. In each of these cases the main question was that of the right of a lower owner to protect himself against the flood waters of a stream which had newly escaped from its former or natural channel, even though in the exercise of his right so to do his reasonable effort in that direction might have the effect of causing damage to be inflicted upon the owners of other land.

[4] "The appellants' next contention is that the trial court erred in refusing to give to the jury the following instruction: 'If you should find from the evidence that the so-called east or rock crusher wash was formed by the rainstorm or flood of 1889, or any other storm within the memory of man, and that such rainstorm or flood so forming the same was an unprecedented flood, or act of God, as defined by these instructions, then you are further instructed that any channel so cut by such storm would not be or become a natural channel as defined by these instructions, unless permitted to remain without obstruction to its flow for the full period of prescription, to wit, five uninterrupted years.'

"No authority is cited by the appellants to justify this instruction to the effect that the changed channel of a stream could not take on the character of a natural channel thereof without an uninterrupted flow of the waters of the stream therein for the period of five years, or, in other words, for the full period of prescription. Clearly, such is not the law. On the other hand, the instruction which the trial court gave upon this subject, and which is above quoted, embodies, I think, a correct statement of the law upon the subject. In addition thereto the trial court further safeguarded this subject in the minds of the jury by the following instruction: 'Every riparian owner has the right to protect his land from encroachment by overflow or change in the natural channel of any stream or wash flowing through his said land, and when any such encroachments have occurred, and the current of any such stream or wash has turned over upon his land, he has the right to restore it to its original channel and to do such matters and things as are necessary to retain its flow in its original channel; provided, however, that, if it has formed a new natural water course, as defined in these instructions, then he has thereafter no right to restore it to its original channel to the detriment of another.

[5] "These instructions are, as we have heretofore stated, to be read in the light of the evidence in the case, which, practically without contradiction, shows that this wash or channel No. 1 was not of recent origin, and was not caused by any single or extraordinary or unprecedented flood, but that the same had existed in practically the same condition in which it was in the year 1911, when the defendants began the construction of their obstructing dikes and dams, for many years before that time. The trial court was therefore correct in its instruction to the jury that 'The question of an extraordinary flood, or an unprecedented flood, or the act of God, as it is variously termed in law, has nothing whatever to do with the question of the liability or nonliability of the defendants by reason of the erection and maintenance of the dike which has been referred to as L1, in this case. With respect to the erection and maintenance of the dike L1 (the obstructing dike), if the so-called east wash or wash No. 1 was a natural water course at the time of the erection of said dike in 1911 and 1912, then the defendants had no right to dam off the same or divert the waters therefrom, regardless of whether the flood of 1914 was an ordinary flood or an extraordinary flood. On the other hand, if said east wash, so called, or wash No. 1, was not a natural water course at that time, then said defendants did have a right to erect a dam across the same for the protection of their lands, equally regardless of whether the storm or flood of February, 1914, was ordinary or extraordinary.' These instructions in our opinion fully cover the propositions put forth by the defendants in the body of their requested instructions which the court refused to give.

[6] "The appellants make the final contention that the trial court was in error in instructing the jury that the nonownership by the defendant Los Angeles Land & Water Company of the land upon which the dikes, dams, and embankments complained of were constructed, at the time when the flood which caused the damage occurred, did not absolve that particular defendant from liability for such damage. There is no merit in this contention, since the undisputed evidence shows that said defendant had made an agreement with its codefendant, the Southern Pacific Company, that said dams, dikes, and embankments should be constructed by the latter, and that the former would pay 15 per cent. of the cost of their construction and maintenance. This being so, if the construction of said barriers to the flow of the waters of the Tejunga River in one of its natural and accustomed water courses was an actionable wrong, the said defendant Los Angeles Land & Water Company could not relieve itself from liability therefor in damages by a subsequent transfer of its title, even though such transfer occurred prior to the time when the actual damage caused by the creation of such unlawful obstruction arose. The trial court so correctly charged the jury."

For the reasons stated in the foregoing opinion, the judgment in each case is affirmed.

We concur: WILBUR, C. J.; WASTE, J.; KERRIGAN, J.; SEAWELL, J.; LAWLOR, J.

Justice MYERS, deeming himself disqualified, does not participate in the foregoing.

190 Cal. 637

NICOLETTI v. BANK OF LOS BANOS.
(S. F. 9947.)

(Supreme Court of California. March 20, 1923.)

Banks and banking 🔑188½—Remitting bank held not liable for payment of funds by correspondent bank to wrong person.

Where a bank agreed with a depositor to "remit" a certain sum of money, duly exchanged in foreign currency to plaintiff's mother, "Rosa Nicoletti fu Innocenzo, then residing in Chiatri, Italy," through the ordinary banking channels, the agreement was fully complied with on the part of the bank when it exercised due care in the selection of subagents to which the money was transmitted in the ordinary course of banking business, and although the Italian bank mailed a postal card to Rosa Nicoletti at Chiatri, Italy, by addressing it to Rosa Nicoletti at San Filippo, Italy, when there were three other persons by that name besides the intended payee who received their mail at such point, in consequence of which payment was made to the wrong person, the bank was not liable; the agreement not being to "deliver" but to "remit."

Lawlor and Seawell, JJ., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Ascanio Nicoletti against the Bank of Los Banos for money had and received. Judgment for plaintiff, and defendant appeals. Reversed.

Edward F. Treadwell, of San Francisco (Forrest A. Cobb, of San Francisco, of counsel), for appellant.

Clay A. Pedrazzini, of San Francisco, for respondent.

WILBUR, C. J. The plaintiff alleges in his complaint that he delivered $550 to the defendant bank on February 15, 1915, whereupon the defendant "agreed, in writing, and for a valuable consideration, then and there paid, to remit said money, duly exchanged in foreign currency, to plaintiff's mother, Rosa Nicoletti fu Innocenzo, then residing in Chiatri, Italy." It is alleged that the defendant did not remit said money or any part of it to the plaintiff's mother, Rosa Nicoletti fu Innocenzo, then residing at Chiatri, Italy, and that the money had not been paid to her. The defendant by its answer admitted the receipt of the money and that plaintiff "requested the said defendant to transmit $550 in gold coin of the United States, duly exchanged in foreign money, to Rosa Nicoletti, at Chiatri, Italy, and the said defendant then agreed to transmit the same in accordance with banking customs, and through ordinary banking channels for transmission of money to foreign countries, and the said plaintiff then and there delivered said sum of money to the defendant for that purpose," and alleges in detail the manner of the performance of its contract. It will be observed that the plaintiff alleged an agreement to "remit" the money and the defendant an agreement to "transmit" the money to Rosa Nicoletti at Chiatri, Italy; the difference between the allegations of the complaint and the admissions of the answer being in the allegation in the complaint that the words "fu Innocenzo" were added to the name Rosa Nicoletti, these words being omitted in the answer.

Upon the trial it was stipulated that—

> On February 15, 1915, plaintiff delivered to the defendant $550 "for transmission *through its ordinary banking channels to Chiatri, Italy;* that plaintiff herein claims that he instructed defendant herein to cause the same, or its equivalent, to be delivered to Rosa Nicoletti *fu Innocenzo,* who is his mother, at that place, and that defendant herein claims that he instructed it to deliver the said money, or its equivalent, to Rosa Nicoletti of Chiatri, Italy; that plaintiff's instructions to defendant, as aforesaid, are a matter in dispute, and the right is expressly reserved to both parties to introduce evidence thereupon." (Italics ours.)

It was also stipulated that San Filippo is a post office near Chiatri, Italy, and that there is no post office at the latter place; that there are three persons living in San Filippo named Rosa Nicoletti. Thus at least four persons named Rosa Nicoletti had their post office address at San Filippo. The bank in Milan, Italy, to which the money was transmitted by defendant, mailed a postal card to Rosa Nicoletti at Chiatri, Italy, by addressing it to Rosa Nicoletti at San Filippo, Italy. It was received by Rosa Nicoletti del fu Carlo Ridondelly, and upon her reply the Milan bank forwarded the money through the post office to the latter person, who received and receipted for and spent the same.

The trial court found that the plaintiff paid the defendant $550 in gold coin and that—

> The defendant "then and there agreed in writing, and for a valuable consideration then and there paid, to remit said money duly exchanged in foreign currency, to Rosa Nicoletti, at Chiatri, Kingdom of Italy. That the said agreement is evidenced by a certain writing, delivered by defendant to plaintiff herein at the time of the said transaction, which writing is in words and figures following:
>
> "'(No. 106314—place and date, Los Banos, California, February 15, 1915.)
>
> "'Received of A. Nicoletti 550 dollars for payment of 2870 lire (foreign currency) to be *remitted* to Rosa Nicoletti in Chiatri, Italia. [Signature] P. J. Daly, Teller.' That the same is the only written evidence of the said agreement." (Italics ours.)

Upon the controverted fact as to the person to whom the money was to be transmitted, it is thus found by the court that the agreement was to transmit the money to "Rosa Nicoletti, at Chiatri, Italy." It was also found by the court that the money was transmitted through the Mechanics & Metals National Bank of New York City, which bank was the correspondent of the defendant and through which it customarily transmitted money to foreign countries, and that such bank "was a proper channel through which to transmit the same in accordance with established banking practices." The court found that the Italian Bank at Milan, Italy, was negligent in its delivery of the money to Rosa Nicoletti at San Filippo instead of at Chiatri, and that the bank in Milan, Italy, "was the agent of defendant herein in the said transaction." Judgment followed for the amount claimed, and defendant appealed and filed a bill of exceptions specifying that the evidence was insufficient to justify the finding that the defendant agreed to remit the money to Rosa Nicoletti, "but, on the contrary, the evidence shows that the said defendant agreed to transmit the same to the said Rosa Nicoletti *through its ordinary banking channels*," and, second, that "the evidence is insufficient to justify the finding that the Societa Bancaria Italiana at Milan, Italy, was the agent of the defendant herein in the said transaction." (Italics ours.)

If there had been an express agreement to deliver the money to Rosa Nicoletti at Chiatri, Italy, there is no doubt that the plaintiff would be entitled to recover for the failure to do so. But the agreement alleged in the complaint, admitted in the answer, stipulated to by the parties, and found by the court, was an agreement to *remit* the money to Rosa Nicoletti, at Chiatri, Italy. An agreement to "remit" or "transmit" money is an agreement to send and not an agreement to deliver. The distinction is important because it fixes the status of the subagencies through which the money is to be transmitted and the consequent responsibility for the negligence of such subagencies.

The decisions upon the effect of a contract to remit money are few and recent, and the one most nearly in point is the case of Katcher v. American Express Co., 94 N. J. Law, 165, 109 Atl. 741, decided March 19, 1920. In that case the Court of Errors and Appeals of New Jersey had under consideration a contract in the form of a receipt issued by the American Express Company, which states as follows: "Received," etc., "For remittance to Tese Kacjur. At Bereznier, Luckiy, Wolynck." In discussing the effect of such an agreement where the money had not been delivered, the court said:

> "But, in view of the importance of the case as typical of a great number of similar transactions, we are not disposed to rest our decision on a mere question of pleading. The fundamental issue is as to the duty of the defendant under its contract. Plaintiff claims that defendant agreed to deliver the money, dollars or rubles, to Tese Kaczier at the place named. We are unable to read any such agreement from the written contract even as supplemented by parol evidence. It uses the word 'remittance' twice, and the word 'forward' (as a verb) once. Without doubt the two words are used synonymously. As we have said, the word 'deliver' is not used at all. The definitions of the word 'remit' in standard authorities do not involve the idea of delivery:
>
> "'Remit. (2) To transmit or send, as money, bills, or other things in payment for goods received. [Quoting from Goldsmith:] I have received the money which was remitted here in order to release me from captivity." Century Dictionary.
>
> "'To transmit or send, especially to a distance, as money in payment of a demand, account, draft,' etc. New International Dictionary.
>
> "See, also, 24 Enc. Law (2d Ed.) 461, and Comber v. Leyland, [1898] A. C. 530.
>
> "So the word 'forward' is defined in both these authorities as:
>
> "'To send forward; to send toward the place of destination; to transmit.'
>
> "See Buell v. Chapin, 99 Mass. 596, 97 Am. Dec. 58.
>
> "The proper interpretation of the contract before us is this: That the express company was to convert the plaintiff's money, after deducting its own charges, by cable into rubles in Russia; that plaintiff had paid in sufficient to obtain these 1,000 rubles after paying charges; that this sum of 1,000 rubles was to be forwarded, or remitted, which amounts to the same thing, to Tese Kaczier at the given address by the usual course of the Russian mail. This was the extent of appellant's primary duty under the contract. * * *"

The principle controlling the duty of a bank receiving commercial paper collection at a distant point would seem to be equally applicable to an agreement to transmit money to such a point. We are not lacking an authority upon that question in California, although the decisions are not agreed upon that matter.

In the case of Davis v. First National Bank of Fresno, 118 Cal. 600, 50 Pac. 666, this court, in dealing with the question of the liability of a bank which had taken a draft for collection, held that its duty was complete when it sent the draft through ordinary banking channels to another bank for collection, and this was true even though the plaintiff did not know that such was the custom of the bank. In that regard the opinion states as follows:

> "In making the collection the bank was acting as the agent of the plaintiff, and from the nature of the transaction was required to employ a subagent, and, as the agent of the plaintiff, was bound to exercise reasonable care and diligence, as well in the employ of its subagent as in the discharge of any other of the duties assumed by it. If in making the collection it followed the course usually taken by banks under similar circumstances it cannot be held to have been negligent. (Dorchester Bank v. New England Bank, 1 Cush. 177; Indig v. National City Bank, 80 N. Y. 105.)"

The decision of the Supreme Court of Massachusetts thus cited by this court as authority for the decision (Dorchester Bank v. New England Bank, 1 Cush. 117) contains the following:

"The bills undoubtedly were intended to be transmitted to Washington for collection, and if the defendants employed suitable subagents for that purpose, in good faith, they are not liable for the neglect or default of the subagents. This was so decided in Fabens v. Mercantile Bank, 23 Pick. 330. The chief justice, in delivering the opinion of the court, says 'It is well settled, that when a note is deposited with a bank for collection, which is payable at another place, the whole duty of the bank so receiving the note, in the first instance, is seasonably to transmit the same to a suitable bank or other agent at the place of payment. And as a part of the same doctrine, it is well settled, that if the acceptor of a bill or promisor of a note has his residence in another place, it shall be presumed to have been intended and understood between the depositor for collection and the bank, that it was to be transmitted to the place of the residence of the promisor.' This decision of the court on both points is, we think, well founded in principle, and supported by a decided weight of authority. * * *

"If the bank in that case acted in good faith, in selecting a suitable subagent, where the bills were payable, there seems to be no principle of justice, or public policy, by which the bank should be made liable for the neglect or misfeasance of the subagent. And it is admitted, by Mr. Senator Verplanck, who states the grounds of the reversal of the judgment, that the bank would not have been liable, if there had been an understanding or agreement, express or implied, that the bills were to be transmitted to another bank for collection. Now, we think, in that case, as in this, there was manifestly such an understanding. There is another view of that case, taken by the learned senator, in which we cannot concur. He makes no distinction between the neglect of the officers of the bank where the bills were deposited, and that of the bank to which they were transmitted for collection. We think the distinction is obvious. We agree, however, with the learned senator, that the decisive question in such cases is, what was the understanding of the parties, as to the duties the collecting bank undertook to perform. And as to this, we have no doubt of the understanding of the parties in the present case. That was, we think, that the defendants were to transmit the bills, or to cause them to be transmitted, to some suitable bank or other agent in Washington, for collection; and the questions are, whether, in employing the Commonwealth Bank to transmit the bills, the defendants acted in good faith; and if so, whether they are responsible for the failure of that bank. * * *"

This court in Davis v. First National Bank of Fresno, supra, held that the usage of the bank to send its commercial paper to its correspondent banks for collection was binding upon the customer, even if he was ignorant of the usage and made no inquiries in reference thereto. In that regard the opinion states as follows:

"The court should also have permitted the defendant to show by the witnesses, which it called for that purpose, the usage of banks in regard to the collection of paper presented by persons who were unknown to them, and that the defendant conformed to that usage. (Warren Bank v. Suffolk Bank, 10 Cush. 582.) If such usage was reasonable and did not contravene any principles of law, the fact that the defendant followed it would tend to show that it exercised reasonable care in seeking to collect the draft. One who gives a draft to a bank to collect is held to have an implied knowledge of its usage in collecting drafts, so far as such usage does not contravene any rule of law. (Morse on Banking, § 9; Bank of Washington v. Triplett, 1 Pet. 25.) 'The fact that one deals with the bank without taking the trouble to inquire as to its system will raise the implication that he already knows and is satisfied with that system. It is clear that if a person hands over a note to a bank for collection, without any species of remark as to the course to be pursued, the bank is not bound to thrust upon him a statement of its intended course and to retain him until the whole theory has been expounded to him, when his conduct unmistakably shows that either he already knows it, or else he does not desire to know it. Either he knows and approves it, or he voluntarily trusts to the wisdom of the bank at his own deliberately assumed risk of its sufficiency. In such a case the bank not only has a right to assume, but it is even positively bound to assume, that his desire is that the ordinary and established usage be pursued.'"

See, also, San Francisco National Bank v. American National Bank, 5 Cal. App. 408, 190 Pac. 558.

It follows then that an agreement by a bank to remit money implies an agreement to transmit the same through the ordinary banking channels, and that such agreement is fully complied with when the bank has exercised due care in the selection of the subagents to which the money is transmitted in the ordinary course of banking business.

The implied agreement between the parties was that plaintiff's money should be remitted by the defendant through the ordinary banking channels. It was stipulated that such was the actual agreement and the court found as a fact that the money was so transmitted.

The complaint, answer, stipulation of facts, and findings of fact, construed together, are to the effect that defendant's agreement was to remit through the ordinary banking channels. Such agreement would be implied from the written receipt given by the defendant to the plaintiff and set out in the findings.

In the findings of fact is a statement that the bank at Milan, Italy, was the agent of the defendant. In view of the fact that the court had already found the facts concerning the relationship between the plaintiff and the defendant and that it followed as a conclusion of law from such facts that the bank at

Milan, Italy, was not the agent of the defendant, the statement in the findings that the bank at Milan, Italy, was the agent of the defendant is an erroneous conclusion of law which must be disregarded. The trial court also found that the bank at Milan, Italy, was negligent; but, as we have already seen, the defendant was not responsible for such negligence if it had exercised due care in the selection of the subagents who were to transmit the money to the plaintiff's mother at Chiatri, Italy.

Judgment reversed.

We concur: LENNON, J.; MYERS, J.; TYLER, Justice pro tem.; St. SURE, Justice pro tem.

LAWLOR, J. I dissent. There is a conflict in the authorities on the question whether the original bank is liable for the negligence of the subagents. Exchange National Bank of Pittsburgh v. Third National Bank of New York, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722, was a case involving the collection of a draft in which it was held that the original bank was liable for the negligent act of the subagent. I quote:

> "The bank is not merely appointed an attorney, authorized to select other agents to collect the paper. Its undertaking is to do the thing, and not merely to procure it to be done. In such case, the bank is held to agree to answer for any default in the performance of its contract; and, whether the paper is to be collected in the place where the bank is situated, or at a distance, the contract is to use the proper means to collect the paper, and the bank, by employing subagents to perform a part of what it has contracted to do, becomes responsible to its customer. * * *
>
> "Whether a draft is payable in the place where the bank receiving it for collection is situated, or in another place, the holder is aware that the collection must be made by a competent agent. In either case there is an implied contract of the bank that the proper measures shall be used to collect the draft, and a right, on the part of its owner, to presume that proper agents will be employed, he having no knowledge of the agents. There is, therefor, no reason for liability or exemption from liability in the one case which does not apply to the other. And, while the rule of law is thus general, the liability of the bank may be varied by consent, or the bank may refuse to undertake the collection. It may agree to receive the paper only for transmission to its correspondent, and thus make a different contract, and become responsible only for good faith and due discretion in the choice of an agent. If this is not done, or there is no implied understanding to that effect, the same responsibility is assumed in the undertaking to collect foreign paper and in that to collect paper payable at home. On any other rule, no principle contractor would be liable for the default of his own agent, where from the nature of the business, it was evident he must employ subagents."

The foregoing states the rule which prevails in New York, New Jersey, and some 14 other states. 7 C. J. 606. In Massachusetts and certain other jurisdictions the contrary has been held.

Katcher v. American Express Co., 94 N. J. Law, 165, 109 Atl. 741, relied on in the majority opinion, did not involve the liability of a forwarding bank for the negligence of its subagent. That action was brought to recover $194.50, the equivalent of 1,000 rubles, paid by plaintiff to the defendant express company for remittance to one Tese Kaczur in Russia. The money was undelivered, and the question was whether plaintiff was entitled to his $194.50 or the value of the 1,000 rubles; the rate of exchange having meanwhile fallen. It was held by a divided court that by the terms of the contract the duty of the defendant was to send the money to the consignee by the usual course of the Russian mail and that delivery to the consignee was not agreed upon. An instruction was held proper wherein it was said:

> "If the defendant's Russian correspondent * * * purchased a money order for said 1,000 rubles at the Russian post office, inclosed the same in an envelope with postage prepaid, addressed to Tese Kaczur at the address given, this constituted a remittance of the money in the manner contemplated by the contract, whether or not Tese Kaczur ever received the money order."

But it was not there held that if the Russian correspondent negligently misdirected the envelope containing the money order the contract would have been fulfilled and the defendant not be liable, which in principle is held in the prevailing opinion in the case at bar.

Indig v. National City Bank, 80 N. Y. 100, cited as authority in Davis v. First National Bank of Fresno, 118 Cal. 600, 50 Pac. 666, is not authority on the question presented here. In that case the plaintiff in New York placed in the hands of the defendant bank for collection a note payable at the Bank of Lowville, of which the maker was a customer. Instead of sending the note to an agent for presentment, the defendant bank sent it directly to the Bank of Lowville. The latter sent its draft in payment, but subsequently failed, which resulted in nonpayment of the draft. It was held there was no negligence on the part of the defendant bank in the method of collecting the draft, inasmuch as it followed the custom approved in such cases. There was no question of subagency involved, as the note was presented directly to the Bank of Lowville. This was clearly pointed out in Briggs v. Central Nat. Bank of N. Y., 89 N. Y. 183, 42 Am. Rep. 285.

Dorchester Bank v. New England Bank, 1 Cush. 177, follows the Massachusetts rule.

In my opinion the rule laid down in Exchange National Bank of Pittsburgh v. Third National Bank of New York, supra, is more in consonance with justice and fair commercial dealing than the one followed in the majority opinion. It does not seem to me that the customer is afforded adequate protection unless the bank with which he dealt and in which he presumably had confidence should be responsible for the safe transmission of the money to the consignee. What the customer here undertook to bargain for was the payment of the money to his mother. Under the main opinion practically the only service rendered to him by the original bank was to select another bank to assume the responsibility. In this case the customer has lost his money, and his only remedy is to proceed against the subagent or the party who actually received it. The prevailing opinion lays stress on the use of the terms "remit" and "transmit," but in view of the nature of the service to be performed the technical language employed should not be given a controlling effect. A much larger question is involved.

No hardship will result if, in the absence of an express agreement, the original bank is held liable, for transferring money is a part of its business, and it can limit its liability by appropriate provisions in the contract. In the absence of such an agreement, it is not fair to hold the public to a refined understanding of banking customs. Davis v. First National Bank of Fresno, supra, and the later cases of Gonyer v. Williams, 168 Cal. 452, 143 Pac. 736, and San Francisco National Bank v. American National Bank of Los Angeles, 5 Cal. App. 408, 90 Pac. 558, to the extent they are at variance with the views herein expressed, should be disapproved. Particularly is this true of the latter case, which holds that (syl.)—

> "A reasonable custom of all the banks of a place that none of them shall be liable for commercial paper deposited with any one of them for collection elsewhere, until the proceeds thereof in actual money shall come to their possession, must be conclusively deemed known by the depositor, and to be binding upon him as an implied condition of the contract of agency, without reference to his knowledge or want of knowledge of the custom."

While evidence of the approved course of banking business might be relevant on the question whether a bank has been negligent, it should not be held that a group of banks could by agreement or custom alter their liability under the law of agency.

The judgment should be affirmed.

SEAWELL, J. I dissent. Under the facts as stated in the main opinion I am of the view that the defendant is liable for the failure of its subagent to carry out the trust which the initial bank accepted. There is a conflict of authority, as stated by Mr. Justice LAWLOR, on the question of the liability of initial banks. The United States Supreme Court, New York, and a number of other states, hold with the elementary principle of the law of contracts which is to the effect that the original principal may look to the original contractor with himself and is not obliged to look to inferior or distant undercontractors or subagents, when defaults occur injurious to his interests. See McGee on Banks and Banking (3d Ed.) 501. This doctrine is known as the New York rule. California, by the three decisions cited, Massachusetts, and other states, support the doctrine announced in the main opinion of this court, which is known as the Massachusetts rule. The California cases have to do with drafts sent from one bank to another for collection. So do practically all of the cases cited. The question here, in my judgment, involves a duty cast upon defendant to deliver money to a designated person in Italy. Certain words were stipulated into the case which brings it within the Massachusetts rule. I have no doubt but that the plaintiff understood that the defendant undertook to do the thing which he desired to have done, to wit, the delivery of $500 to his mother. There can be no doubt but that he felt secure in his transaction, otherwise he would not have sought the services of a bank. He could and doubtless would have assumed the risk himself if he had known the bank furnished him practically no protection.

The word "remit" in its primary sense means to send in return, as money in payment of goods. "Transmit" is to send through or across; to act as a medium of passage. The word "remit" as applied to the facts of the case at bar is not an apt term. But fine shades of meaning should not be resorted to in a transaction such as this. Plaintiff's purpose was simple and easily understood. It is very evident that he delivered his money to defendant with a sense of assurance that the bank was responsible to him for the delivery of the money which he desired to send. This is a natural, common sense view of a very simple transaction. There can be no doubt but that the business public generally, including a vast majority of those experienced in commercial transactions, hold the belief that when money is delivered to a bank to be sent by it to a person in a foreign country, as in this case, the initial bank accepts the trust with the understanding that should the money be lost or paid by a subagent to a person not entitled to receive it the initial bank is liable in the first instance to the principal. This is a reasonable rule and does not impute to the public a knowledge of the customs that may prevail in banking circles but which are actually unknown to the public. No hardship will fall to any one. Banks accepting moneys to be sent abroad will doubtless charge a fee or carriage charge commensurate with the risk assumed, if this is not already the practice. Surely a person would much prefer to pay a reasonable charge for the privilege of enjoying the protection which the law of agency supposedly affords than to be left to the dubious remedy of proceeding against an agency not of his choosing. A departure from the doctrine laid down in the three California cases, if the rule there adopted extends to this case, will not unsettle business conditions nor disturb vested rights.

Inasmuch as the question involves in a measure our relations and dealings with foreign countries, it would seem as a matter of policy and convenience that the several states should follow so far as possible the rule adopted by the Supreme Court of the United States.

The judgment of the trial court, in my opinion, should be affirmed.

---

190 Cal. 650

WINES v. GARRISON, County Auditor.
(S. F. 10513.)

(Supreme Court of California. March 21, 1923.)

1. Statutes 🔑174, 175—Construed in light of constitutional restrictions.

Every statute must be construed in the light of the constitutional restrictions on the power of the Legislature.

2. Officers 🔑100(1)—Appointment of additional deputies to be paid out of county treasury violative of constitutional inhibition against "increase of officer's salary."

The allowance of additional deputies, to be paid by the county, to an officer required by the provisions of Pol. Code, § 4290, to pay from his salary all deputies and assistants, is unconstitutional as increasing the salary of a county officer during his term of office, in violation of Const. art. 11, § 9.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Increase.]

3. Statutes 🔑102(2)—Requirement that additional deputies be paid by officer applicable to all counties.

Pol. Code, § 4290, providing that salaries and fees of officers shall be in full compensation for all services of officers, deputies, and assistants unless otherwise provided, and that all deputies and assistants shall be paid by their principals out of salaries provided in this title, unless in the title otherwise provided, applies not only to counties in which no deputies are paid by the county, but also to counties in which certain deputies are allowed by law to be paid from the county treasury, in such counties the principal being required to pay any deputies and assistants required in addition to those paid by the county; and as so construed the act is not violative of Const. art. 11, § 4, requiring uniformity of county government.

4. Officers 🔑100(1)—Appointment of additional deputies to be paid out of county treasury violative of constitutional inhibition against "increase of officer's salary."

Where the statute provides a fixed salary for an officer and fixed salaries for deputies, all assistants and deputies not specifically provided for by an award of compensation in the statute are to be paid by the officer himself, and to pay them from the county treasury would be an increase of compensation in violation of Const. art. 11, § 9, where such allowance is made during his term of office.

5. Counties 🔑74(6)—Right of deputies of officers to compensation statutory.

A person who accepts an office, the compensation of which is fixed by law, is bound to perform his duties for the compensation stipulated, and salaries and compensation of public officers must be kept within the statutory limits, and, unless the payment of deputies of county officers is expressly authorized from the county treasury, they cannot be so paid.

In Bank.

Application for writ of mandate by Charles L. Wines against E. F. Garrison, as Auditor of Alameda County, requiring him to audit demand of petitioner as deputy superintendent of schools. Writ denied.

Fitzgerald, Abbott & Beardsley, of Oakland, for petitioner.

Ezra W. Decoto and Frank Mitchell, Jr., both of Oakland, for respondent.

WILBUR, C. J. This is an original application for a writ of mandamus. Charles L. Wines, the petitioner, is a deputy in the office of the superintendent of schools of Alameda county. When the superintendent of schools began his term on January 6, 1919, he was allowed an assistant, a chief deputy, and an additional deputy, but in 1921 the Legislature allowed the superintendent of schools an additional deputy. The petitioner fills the position thus created for the first time by the Legislature of 1921. His petition, he says, "involves the right of the Legislature to increase the number of deputies allowed to a county officer, who at the commencement of his term has a fixed salary and deputies paid by the county."

This question was determined adversely to the contention of the petitioner in the recent case of Forward v. County of San Diego (Cal. App.) 209 Pac. 993. The decision was by the court in bank, and a petition for rehearing was denied, after due consideration. The petitioner seeks to have us overrule this decision, claiming that we have therein given an erroneous construction to section 4290 of the Political Code. He also contends that the matter is of very great importance to counties and county officers, and for that reason prays a careful reconsideration of the matter. We have therefore again considered the question which is presented by the petitioner. The respondent makes no argument and presents no brief.

We will not undertake to follow the argument of the petitioner in detail. Suffice it to say that the petitioner contends that the question involved here is not one of constitutional law, but primarily one of statutory interpretation, and that section 4290 of the Political Code, in the light of its legislative history, beginning with the enactment of the first County Government Act in 1883 (St. 1883, p. 299), down to date, shows that the provisions of section 4290, Political Code, do not apply to Alameda county, wherein the Legislature has provided for deputies to be paid directly from the county treasury. This legislation originally was in the form of a separate act known as the County Government Act, and in 1907 was for the first time incorporated in Political Code, §§ 4000 to 4235, inclusive (Stats. 1907, pp. 354–558). We will therefore use the expression "County Government Act" and "Political Code" indifferently throughout this opinion in referring to the provisions of the statute controlling the salaries of county officers. The first clause of section 4290, Political Code, reads as follows:

> "The salaries and fees provided in this title shall be in full compensation for all services of every kind and description rendered by the officers named in this title either as officers or ex officio officers, their deputies and assistants, unless in this title otherwise provided, and all deputies employed shall be paid by their principals out of the salaries provided in this title, unless in this title otherwise provided. * * *"

As we construed this section in Forward v. County of San Diego, supra, the phrase "unless in this title otherwise provided" referred to the provisions made for the payment of deputies in the County Government Act, and we held that, where assistants were appointed who were not specifically provided for in the County Government Act, they could not be paid from the county treasury, but must be paid by the officer, if paid at all. Consequently it followed under numerous prior decisions of this court that, where the Legislature relieved the officer of that necessity by making the salary of the deputy payable by the county, it to that extent ipso facto increased his salary.

The argument now advanced to support a different conclusion is substantially as follows: The phrase "unless in this title otherwise provided" in section 4290, Political Code, in the light of the history of the section, applies to those counties such as Alameda county, wherein provision is made for the payment of deputies by the county instead of by the county officers. Consequently it is urged that, where under the Code a county officer is allowed any deputy payable from the county treasury, in his case it is "otherwise provided" in the title, and consequently the requirement in the section that the officer must pay such deputy does not apply, and therefore the Legislature may provide for an additional deputy who may also be paid from the county treasury without increasing the compensation of the officer.

[1] It is true in one sense that this is a question of statutory construction, but it is also true that every statute must be construed in the light of the constitutional restrictions upon the power of the Legislature, so that it is necessary to consider those constitutional provisions in arriving at the proper interpretation of the statute. Petitioner's argument proceeds somewhat in this fashion. Section 164 of the County Government Act of 1883 (Stats. 1883, p. 361) provided as follows:

> "The salaries and fees provided for in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, their deputies, and assistants; and all deputies employed shall be paid by their principals, out of the salaries hereinbefore provided. * * *"

Section 163, subd. 15, of this act (page 339), in providing for salaries of the seventh class, provided that a limited number of deputies should be paid salaries from the county. It is pointed out that this provision in section 164 is inconsistent with the one providing for the payment of deputies by the county itself, and therefore the argument is that section 164 was intended to apply only to counties in which a lump sum was fixed as the salary of the officer, and not to counties where the county pays the deputies directly.

The petitioner's argument proceeds upon the theory that there are two classes of counties in the County Government Act, one in which the county officers are paid a lump sum, and the other in which the deputies are paid directly by the county, and presumptively the amount allowed to the county officer is for his own personal services. This position cannot be maintained under the previous decisions of this court. The County Government Act never has used the phrase "a lump sum," and this nomenclature was introduced into our legal literature in connection with the alleged unconstitutionality of the County Government Act in providing in some counties for deputies to be paid by the county and in others that all deputies should be paid by the principal, it being contended that this differentiation destroyed the uniformity of county government required by the Constitution. Tulare County v. May, 118 Cal. 303, 50 Pac. 427.

The question involved in the case at bar was decided against the petitioner, in principle, at least, in 1892, in the case of Dougherty v. Austin, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161.

Section 164 of the County Government Act of 1883 (Stats. 1883, p. 361) was renumbered as section 211 (Stats. 1885, p. 194), and was amended in 1887 (Stats. 1887, p. 207). By this amendment a proviso was inserted after the above-quoted language as follows:

> "And provided further, that whenever, in the opinion of the board of supervisors, the salary of any county officer in the third, fourth, fifth, twelfth, thirteenth, fifteenth, twentieth, twenty-second, twenty-third, twenty-fourth, twenty-sixth, twenty-ninth, thirty-second, thirty-third, thirty-fourth, thirty-sixth, thirty-seventh, thirty-eighth, thirty-ninth and forty-first classes, as fixed and provided in this act, is insufficient to pay a reasonable compensation for the services required to be performed, the said board shall allow such officer a deputy, or such number of deputies, as in their judgment may be required to do the business of such office, in connection with the principal, at a salary not to exceed one hundred dollars per month, to be paid at the times and in the manner that said principal is paid. * * *"

The effect of these provisions was considered in the case of Dougherty v. Austin, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161, decided in May, 1892. Upon the original hearing it was held that this provision of the law violated article 11, § 9, of the Constitution prohibiting an increase of salary during the term of office. Owing to the importance of the matter a rehearing was granted, the same was carefully considered, and the court reaffirmed its original conclusion. In the original opinion it was said (94 Cal. 611, 29 Pac. 1095, 16 L. R. A. 161):

> "The sum allowed to any given officer being a lump sum out of which he must pay for the services of all deputies and assistants necessary for the prompt and faithful discharge of all the duties of the office, it is evident that his own compensation consists of the residue remaining after payment of such deputies and assistants; and it is equally evident that just so far as the county assumes the payment of such deputies and assistants, such residue is enlarged and the compensation increased."

[2] It was thus early established that the allowance of additional deputies to be paid by the county to an officer who was receiving a lump sum under the County Government Act, and who was by the provisions of section 211 of the County Government Act required to pay all deputies and assistants from such salary, was unconstitutional because it increased the salary of the officer. This view has ever since been consistently adhered to by this court, and in the late case of County of Santa Barbara v. Janssens, 177 Cal. 114, 169 Pac. 1025, L. R. A. 1918C, 558, decided December 31, 1917, although the Legislature by enacting a new section of the Penal Code (section 1616, as added by St. 1911, p. 924, amended by St. 1917, p. 240) required the sheriff of every county to appoint a matron for the women's department of the county jail, it was held that the sheriff was required to pay such matron. Humiston v. Shaffer, 145 Cal. 195, 78 Pac. 651.

In Welsh v. Bramlet, 98 Cal. 219, 33 Pac. 66, it was held that an allowance of an assistant district attorney to the district attorney of Fresno county after his election to office was unconstitutional as being a violation of article 11, § 9, prohibiting an increase of salary to an officer during his term of office. It was also held that the provision of the statute authorizing the district attorney to appoint an assistant to be paid by Fresno county, when the district attorneys of other counties could not do so, was a violation of the constitutional provision requiring uniformity in county governments. The decision on this latter point was followed in Walser v. Austin, 104 Cal. 128, 37 Pac. 869 (decided September, 1894), and in Farnum v. Warner, 104 Cal. 677, 38 Pac. 421.

The serious consequences of these last three decisions resulted from the fact that, if the law was not uniform, the entire County Government Act, at least as to salaries, was void. Indeed, it was claimed to be void in Tulare County v. May, 118 Cal. 303, 50 Pac. 427 (decided September, 1897). The court there declined to follow and overruled the prior decisions in Welsh v. Bramlet, supra, and Walser v. Austin, supra, and also the decision in Farnum v. Warner, supra, to the effect that there were two systems provided for in the County Government Act for the payment of deputies, and that it was therefore void for lack of uniformity. The court there held that a scheme of county government by which in some counties or classes of counties the deputies were paid directly from the county treasury, where in others they were not so paid, was nevertheless a uniform system of county government, and for that reason did not violate the provisions of article 1, § 11, of article 4, § 25, subd. 28, of the Constitution, requiring such uniformity.

It is important to the point under consideration, however, to recognize the basis upon which the court overruled Welsh v. Bramlet, supra, Walser v. Austin, supra, Farnum v. Warner, supra, and held that the County Government Act with these two distinct systems of paying deputies was a uniform system, and complied with article 11, §§ 4 and 5, of the Constitution with reference to the duty of the Legislature in the establishment of county governments. In order to appreciate the force of this decision it will be necessary to quote from it extensively:

> "To allow county officers to appoint deputies whose fixed salaries are to be paid out of the county treasury is, of course, unobjectionable so far as the mere power to appoint deputies is concerned, for by section 61 (Stats. 1893, p. 367) these same officers are authorized to appoint as many deputies as a prompt discharge of the duties of their respective offices may require, and this general authorization embraces all of the special authority conferred by the

clauses of section 173 above quoted. [Section 173 is the section fixing the compensation of officers in counties of the eleventh class and allowing certain deputies to be paid from the county treasury.] That is to say, these officers may, under section 61, appoint the same deputies that they are allowed to appoint under section 173, and they are not obliged under either section to appoint any more deputies than a prompt discharge of the duties of the office may require. These sections do not destroy the uniformity of the law, nor do they introduce any special regulation in counties of the eleventh class. So far as the power to appoint deputies is concerned the rule is general and uniform throughout the state, and that rule is that such county officers as are allowed to act by deputy may everywhere appoint as many deputies as a prompt discharge of their official duties demands. But this, as I am fully aware, does not meet the objection of appellant, which is that in this instance the officers are allowed to appoint deputies whose salaries are to be paid out of the county treasury. This objection would be more serious, it seems to me, if the law contemplated the payment of salaries of deputies from any other source. But it does not.

"There are two rules for the compensation of deputies in the different counties of the state. In most of the classes a lump sum is allowed to the principal, out of which he is required to pay his deputies; in a smaller number of classes—including the eleventh—the principal is allowed a fixed salary, and certain deputies are allowed fixed salaries, but in both cases the salaries of all are by the express terms of the statute to be paid out of the county treasury. The whole question, therefore, resolves itself into this: Can the Legislature establish one rule of compensation of deputies in one class of counties, and a different rule in another class of counties? I can see no constitutional objection to such an exercise of power. Under either rule a compensation proportionate to duties may be secured; and for the purpose of securing such compensation a division of counties into classes is expressly authorized, and, when a statute or a provision of a statute has no other object or effect than to regulate compensation of officers, the provision or statute is uniform and general if it applies equally to all the counties of any class, no matter which of the two rules above referred to is followed."

The argument of the court in sustaining the uniformity of the County Government Act is substantially this: In all counties all deputies are in effect paid from the county treasury. It does not destroy the uniformity of the County Government Act to pay some of these deputies directly from the county treasury, while in other counties the money passes through the hands of the officer to the deputy. It is obvious that this argument leads to the conclusion that in both counties additional deputies are to be paid by the officer from his own compensation. Otherwise we at once have the uniformity of the system destroyed because we have two different classes of counties; in one the Legislature may from time to time give additional deputies to the officers without violating the constitutional inhibition and without increase of compensation, while in others it cannot. We called attention to this situation in Forward v. County of San Diego, supra.

In San Francisco v. Broderick, 125 Cal. 188, 57 Pac. 887, the Supreme Court had under consideration the question of the payment of deputies by the county clerk of the city and county of San Francisco. It was contended that certain deputies appointed by the county clerk should be paid under the provisions of certain acts of the Legislature applicable to the county of San Francisco alone. In that case the court pointed out the fact that there are two plans or schemes provided in the County Government Act for the payment of the deputies. It cited section 216 (Stats. 1893, p. 507; Stats. 1897, p. 572), which corresponds to section 164 of the County Government Act of 1883, and section 211 of the amendments of 1897, and section 4290 of the Political Code. In answer to the contention that the county clerk of the city and county of San Francisco could appoint deputies whose salaries would be a charge upon the county government under the provisions of the act of 1880 (Stats. 1880, p. 5, and Stats. 1891, p. 5) the court said:

"The county clerk of the city and county of San Francisco by the act of February 13, 1880 (Stats. 1880, p. 5) is given a fixed salary, and is allowed a fixed number of deputies and assistants, whose compensation is a charge upon the treasury. He has the power under section 61 of the County Government Act to appoint additional deputies and assistants if the needs of his office so require, but in the present condition of the law the compensation of these extra assistants and deputies must be paid for by himself."

[3] As we understand this decision it holds that, notwithstanding the fact that the city and county of San Francisco was of a class in which the principal officer was allowed certain deputies, he was required under the provisions of section 216 of the County Government Act of 1893 to pay any additional deputies and assistants himself. This is a complete answer to the contention of the petitioner that section 216 or its successor (Pol. Code, § 4290) does not apply to counties of the class in which a county officer is allowed paid deputies. If in such counties the county officer was required to pay all deputies in addition to those provided by law, it follows that any statutory scheme by which he is relieved of that responsibility is to that extent an increase of his salary within the meaning of the Constitution. This squarely brings such counties within the rule announced in Welsh v. Bramlet, supra, and Dougherty v. Austin, supra.

[4] In County of Calaveras v. Poe, 167 Cal. 519, 140 Pac. 23, it was held to be the fixed and settled law of this state that the allowance of a deputy to an officer who had there-

tofore received a gross sum to cover his compensation and the expenses of his office was a violation of the Constitution if made during his term of office, citing Dougherty v. Austin, supra; Humiston v. Shaffer, 145 Cal. 195, 78 Pac. 651; Elder v. Garey, 19 Cal. App. 776, 127 Pac. 826; Hanson v. Underhill, 12 Cal. App. 546, 107 Pac. 1016; Applestill v. Gary, 18 Cal. App. 387, 123 Pac. 228. This was the only point involved in the case, for in that instance the officer was allowed a gross sum. The court proceeded, however, to say:

> "Where the statute provides a fixed salary for an officer and fixed salaries for deputies, all payable out of the county treasury, a subsequent law increasing the compensation of the deputies or their number will take effect at once. Tulare County v. May, 118 Cal. 304, 50 Pac. 427; Newman v. Lester, 11 Cal. App. 577, 105 Pac. 785."

This statement was obiter dicta, and is not supported by Tulare County v. May, supra, and is clearly incorrect for the reasons we have hereinbefore stated, namely, that in every county all assistants and deputies not specifically provided for by an award of compensation in the statute are to be paid by the officer himself, and therefore to pay them from the county treasury would be an increase of compensation in violation of the Constitution where such allowance is made during his term of office.

[5] We have thus far dealt with the proposition advanced by the petitioner that section 4290 of the Political Code did not justify the conclusion that its language was applicable to counties in which deputies were provided and authorized to be paid directly from the treasury by the County Government Act. But other considerations lead to the same conclusion. In order that public funds may be expended it is essential that such expenditure be authorized by law. As was said by this court in Irwin v. County of Yuba, 119 Cal. 686, 690, 52 Pac. 35, 37:

> "* * * Whenever the courts have been appealed to in these cases, they have uniformly held to the only safe rule—that public officers and municipal boards must keep within the limits of their power as prescribed by law. * * * Nothing is better settled than that a person who accepts an office with compensation fixed by law is bound to perform the duties for the compensation. Mr. Dillon in his Municipal Corporations, § 233, speaking of this rule, says: 'The rule is of importance to the public. To allow changes and additions in the duties properly belonging or which may properly be attached to an office to lay the foundation for extra compensation, would soon introduce intolerable mischief. The rule, too, should be very rigidly enforced. The statutes of the Legislature and the ordinances of our municipal corporations seldom prescribe with much detail and particularly the duties annexed to public offices; and it requires but little ingenuity to run nice distinctions between what duties may, and what may not, be considered strictly official; and if these distinctions are much favored by the courts of justice it may lead to great abuse.' Again, the same author says (section 234): 'Not only has an officer, under such circumstances no legal claim for extra compensation, but a promise to pay him an extra fee or sum, beyond that fixed by law, is not binding, though he renders services and exercises a degree of diligence greater than could legally have been expected of him.' "

Hence, unless the statute expressly authorizes the payment of deputies from the county treasury they cannot be so paid. By section 59 of the County Government Act (1897), above quoted, and the corresponding section of the Political Code (section 4024), the officer has the authority to appoint as many deputies and assistants as may be necessary to enable him to perform the duties of his office. This would be the rule without any statutory authority. Taylor v. Brown, 4 Cal. 188, 60 Am. Dec. 604; Jobson v. Fennell, 35 Cal. 711. These deputies, however, cannot be paid from the public treasury unless some express provision is made for such payment.

If it is conceded, as it must be under the authorities above quoted, that to prevent the inevitable decrease of the officer's salary due to payments necessary to be made by such officer to a necessary deputy by authorizing the county to pay such deputy is an increase of the salary of the officer within the meaning of the constitutional inhibition against increasing the salary of an officer during his term of office, then it must follow that, without the express statutory declaration in section 4290 of the Political Code, requiring the officer to pay all additional deputies not otherwise provided for, a statute passed during his term of office authorizing the payment of such additional deputy from the county treasury is an increase of salary within the meaning of the constitutional provision, no matter whether the officer was originally paid a lump sum, or was, in addition to his own compensation, allowed a certain number of deputies paid by the county. If there is an error in this process of reasoning it arises from the conclusion long ago arrived at by this court that to prevent an inevitable decrease of salary is an increase of compensation within the meaning of the Constitution. This question has been too long settled in this state to justify its reconsideration.

The petition is denied.

We concur: LENNON, J.; KERRIGAN, J.; MYERS, J.; LAWLOR, J.; WASTE, J.

60 Cal. App. 602

NEW YORK LIFE INS. CO. v. BANK OF ITALY et al. (Civ. 4246.)

(District Court of Appeal, First District, Division 1, California. Jan. 26, 1923. Rehearing Denied Feb. 23, 1923. Hearing Denied by Supreme Court March 26, 1923.)

1. Husband and wife 🔑249, 265—Insured's wife succeeds on his death to half proceeds of policy issued during marriage as against beneficiary designated without her consent; "gift of community property."

Where policy on husband's life payable to his estate and reserving right to change beneficiary was issued after his marriage and the premiums were paid from community funds, the policy was a community asset, and where insured shortly before his death, without his wife's knowledge or consent, substituted, as beneficiary in place of his estate, his brother, who paid no consideration for such substitution, the designation of the brother was a gift of the policy and its proceeds, and therefore, as respects the widow's share or one-half the policy proceeds, was invalid, under Civ. Code, § 172, restricting gifts of community property without wife's written consent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gift.]

On Petition for Rehearing.

2. Appeal and error 🔑843(2)—Insurer's right to make payment to beneficiary prior to notice of adverse claims not considered on appeal from judgment for one claimant as against another in interpleader proceedings by insurer.

On appeal from a judgment awarding half the proceeds of a life insurance policy to insured's wife on his death as against the designated beneficiary, in interpleader proceedings by insurer, which paid the proceeds into court, insurer's right to make payment to the beneficiary prior to any notice of adverse claims will not be considered, not being before the court nor affected by the decision.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by the New York Life Insurance Company against the Bank of Italy, as executor of the will of Charles J. Newman, deceased, Ella Newman and Layo Newman, to determine conflicting claims to the benefits of a life insurance policy. Judgment for defendant Ella Newman, and defendant Layo Newman appeals. Affirmed.

Theodore L. Breslauer, of San Francisco (Alfred F. Breslauer, of San Francisco, of counsel), for appellant.

Sapiro & Levy, of San Francisco, for respondent.

TYLER, P. J. This action is one to determine conflicting claims to the benefits of a life insurance policy. The facts giving rise to the controversy are as follows:

On the 11th day of July, 1905, the plaintiff, New York Life Insurance Company, issued a 20-year tontine endowment policy on the life of one Charles J. Newman. By its terms the policy was made payable to the estate of the insured, but it expressly provided that the beneficiary named therein might be changed upon application to the company. Accordingly, in the year 1907, this privilege was exercised by Newman, and Hattie Vogel, his sister, was substituted as beneficiary. Eight years later a change was again made, the beneficiary substituted on this occasion being one Jennie Lehman, who thereafter died. After her death, on September 24, 1920, the insured designated his brother, Layo Newman, as beneficiary, and shortly thereafter died, to wit, on December 11, 1920. One of the privileges provided for under the policy permitted loans to be had thereon, and the insured exercised this privilege on October 4, 1920, by borrowing the sum of $7,300 upon its security.

At the date the policy was issued the insured and the defendant Ella Newman were husband and wife, their marriage having occurred on the 25th day of August, 1891. At this time the husband was not possessed of any separate property, and the premiums upon the policy amounted to the sum of $527.80 annually, and they were paid entirely from community funds, and the total amount paid thereon aggregated $8,440.80. The wife, Ella Newman, never gave her consent to the designation of Layo Newman or the other beneficiaries preceding him, and in fact she knew nothing of the existence of the policy until after the death of her husband, and no consideration was paid by the brother, Layo, for his substitution as such beneficiary. At the date of the death of Charles J. Newman there was due and payable on the policy in excess of the loan to him the sum of $2,912. During the course of the administration of his estate the policy came into the possession of the executor, the Bank of Italy. Conflicting claims having been made upon the insurance company for the amount due under the policy it impleaded all the claimants in this action, and deposited the balance due, less certain expenses, into court, and the company was thereupon dismissed as a party, and the action thereafter proceeded upon the issues joined between the widow and the brother of the deceased.

It was claimed below on behalf of the widow that the designation of the brother as the beneficiary operated as a gift of the policy and its proceeds, and was therefore in violation of section 172 of the Civil Code, restricting gifts of community property without the written consent of the wife. The trial court concluded that, as to one-half of the proceeds of the policy, this contention was sound, and judgment went in favor of Ella Newman, the widow, for her portion thereof, and Layo Newman, the brother, appeals.

It is the contention of the appellant that there was no gift to him within the meaning of the law; that, the proceeds of the insurance policy not having become payable until the death of the insured, they never became community assets, but belonged to him as the beneficiary named in the policy. It is further claimed that, if the transaction partakes at all of the character of a gift of community funds, such gift is to be limited strictly to the amount of annual premiums for which the marital community had not already been reimbursed before the policy became payable.

It is conceded that appellant, Layo Newman, is entitled to one-half of the benefits of the policy, and that such amount is the sum of $1,399.25. The question thus presented involves the extent and nature of the wife's interest in the common property of the spouses. The community property system, which has been adopted in some of the southwestern and Pacific states, has suffered many changes, chiefly in the enlargement of the wife's power and her interest in the community assets, and the courts of the various states where the system prevails are widely apart in the conclusions reached as to the rights of the spouses in the various characters of gains accruing to the marital relation. According to the rule which prevails in Texas an insurance policy issued on the life of the husband, although the premiums are paid from the community estate, unless so paid with intent to defraud the wife, is considered his separate property. Martin v. McAllister, 94 Tex. 567, 63 S. W. 624, 56 L. R. A. 585. While the decisions of this state are not in complete harmony upon the subject, it must be conceded that the case last cited is declaratory of the rule accepted in that state. The statutes of Texas vest the husband with the absolute power of control of the common property. Hence there the rights of the wife are said to be passive, and the husband's active. His control is absolute unless tainted by fraud against the wife. He may sell, barter, or give it away.

In the state of Louisiana, where the community system also prevails, the same question has arisen, and it is there held that the proceeds or avails of insurance policies on the life of one of the spouses are either common property or separate property of the estate of the assured, depending upon whether such assured was married or single when the insurance contract was made, and not upon the marital status at the time of death. Succession of Budding, 108 La. 406, 32 South. 361; Succession of Le Blanc, 142 La. 27, 76 South. 223, L. R. A. 1917F, 1137; Succession of Veneuille, 120 La. 605, 45 South. 520. But in that state the community is entitled to have payments of premiums reimbursed from such separate estate (In re Moseman's Estate, 38 La. Ann. 219); and in so far as any restrictions are imposed on gifts by the husband, those restrictions apply to insurance policies the same as other classes of personal property. N. Y. Life Ins. Co. v. Neal, 114 La. 652, 38 South. 485.

[1] In our own state a husband's testamentary and dispository powers over the community property are limited and restricted. Under section 172 of the Civil Code, where a gift is made by him of such property without the written consent of the wife, the transaction is a nullity as to her. Accordingly, it has been held that, where a testator after marriage took out an insurance policy, on which he paid his premiums from his earnings, the insurance money was common property, to one-half of which the wife was entitled as survivor. In re Stans' Estate, Myr. Prob. 5. To the same effect is the case of In re Webb, Myr. Prob. 93, which lays down the doctrine that, where a decedent has paid the first third of the amount of premiums on the policy of insurance out of his earnings before marriage, and the remainder from those made subsequent thereto, one-third of the proceeds of the policy belong to his separate estate and the remainder to the common property.

Counsel for the appellant seeks to distinguish the rule established in these cases from the instant one upon the ground that in both of them the court was dealing with and concerned only with a situation where the beneficiaries were fixed at the time the policies were issued, it being said that in such a case the community estate, being the exclusive beneficiary, is clearly possessed of a chose in action, and therefore the proceeds of the policy are community property. We fail to see how or in what manner the fact that the insured had the right to change the beneficiary can possibly alter the character of the proceeds of the policy in question. It is true that, under a policy reserving to the assured the right to change the beneficiary, the interest of the designated person prior to the death of the insured is a mere expectancy in an inchoate or uncompleted gift, which is subject to revocation at the willl of the insured, and that the power of revocation which would defeat it might be exercised up to the moment of his death. When, therefore, the deceased substituted the different enumerated persons in the place of his estate as beneficiaries, he initiated a gift which, in the case of appellant, became complete by the death of the insured without revocation. And this is so notwithstanding that the premiums were paid from community funds. McEwen v. N. Y. Life, 23 Cal. App. 694, 139 Pac. 242; Shoudy v. Shoudy (Cal. App.) 203 Pac. 437. But this in no manner affects the wife's right to her share in this property. The chose in action represented by the policy belonged to the community because of the fact that community funds had been paid as the consideration for its acquisition. The insured owned the property as a community asset by reason of the fact that it was purchased with community funds. Respondent is not here claiming upon any right which she might have acquired through the act of the insured in making his estate the original beneficiary. Her rights are here predicated and bottomed upon the fact that the policy was a community asset of equal dignity with those of a tangible nature, and the quantum of the proceeds which the assured could bestow upon others in such a case was his half, and his half only. The question, therefore, as to what rights or what interests a beneficiary acquires in a policy of insurance prior to the death of an insured, and at what moment his expectancy ripens into a vested interest, is one with which we are not here concerned.

The appellant has cited us to the case of Shoudy v. Shoudy, supra, as being opposed to this contention. We do not so consider it; but on the contrary we are of the opinion that the doctrine there announced is in full harmony with the views herein expressed. In that case the divorced wife of the deceased was a former beneficiary under the terms of an insurance policy. Her claim was there based upon that fact. There was no proof that the premiums were paid from community funds or that the husband held the policy as a community asset. Her community rights had been settled and terminated by a divorce proceeding, and she relied for her claim solely upon her status as a former beneficiary under the policy. As above pointed out, respondent makes no such contention. On the contrary, she does contend that the policy was the property of her husband, that it was a community asset, and that as such she succeeded to one-half thereof upon his death, a right which the husband could not impair by any secret and gratuitous action on his part.

What we have said disposes of the contention that, in order to be classed as community property, the proceeds of the insurance must actually have become property of the spouses during their joint lives. The interest of the wife eo instanti ripened and was payable at the instant of the husband's death. Castle v. Castle (C. C. A.) 267 Fed. 521; Burdett v. Burdett, 26 Okl. 416, 109 Pac. 922, 35 L. R. A. (N. S.) 964; Walker v. Peters, 139 Mo. App. 681, 124 S. W. 35; Petty v. Wilson, 4 L. R. Ch. App. 574.

To recapitulate, the gift to appellant was incomplete and revocable up to the time of Charles Newman's death. At that time his rights as beneficiary became fixed, and at the same moment the community interest of the wife vested in her. So far, therefore, as the husband's interest was concerned, the gift was binding upon him to the extent thereof, but, the wife not having given her consent thereto in the manner indicated by the statute, the transaction as to her was a nullity.

For the reasons given, the judgment is affirmed.

I concur: RICHARDS, J.

On Petition for Rehearing.

PER CURIAM. [2] Certain insurance companies, amici curiæ, have filed a petition for a rehearing, wherein it is conceded that, while the decision of the court is correct in so far as it concerns the rights of the parties before it, certain language used therein is susceptible of inferences which might create confusion in actions in which the rights of insurance companies as between themselves and their beneficiaries come in question. It is therefore suggested that the court should discuss the right of the insurer to make payment to the beneficiary, whatever other claims may be made, provided such payment is made prior to any notice of adverse claims. No such question was here involved, as the insurance company had impleaded the parties and paid the proceeds of the policy into court. Whatever our views might be on the subject, the expression thereof would be purely dicta and of no value. We are not disposed therefore, to comply with the request. Whatever questions other than the ones decided might possibly arise between the different parties to the contract of insurance, they were not before us, and are in no manner affected by the decision.

Rehearing denied.

190 Cal. 732

SER-VIS v. VICTOR VALLEY IRR. DIST. et al. (WEIK, Intervener). (L. A. 7302.)

(Supreme Court of California. April 5, 1923.)

1. Waters and water courses 🔑228—"Purposes of organization" of irrigation district for which indebtedness may be incurred.

In view of Gen. Laws, Act 1726, §§ 1, 2, as amended by St. 1919, pp. 714, 715, as to proposal of organization of irrigation district and petition therefor, and section 10, as to when organization shall be complete, no services prior to the filing of the petition, but only services from and including such filing to the filing of the return of the election, are services "for the purposes of organization," for which, under the exception in section 61, power is given the board of directors to incur a limited amount of indebtedness without compliance with financial provisions.

2. Waters and water courses 🔑228—Services before organization held for purposes of irrigation district act, relative to incurring indebtedness.

Services in securing options on necessary water rights, etc., prior to organization of an irrigation district, are "for the purposes of this act," for which by exception in Gen. Laws, Act 1726, § 61, power is given the board of directors to incur a limited amount of indebtedness without compliance with financial provisions.

3. Waters and water courses 🔑230(2)—Warrants issued by irrigation district board on a single demand, partly improper, wholly void.

Warrants for a lump sum issued by board of directors of an irrigation district based on a single demand, only a part of which they were authorized by Gen. Laws, Act 1726, § 61, to allow, are totally void.

4. Waters and water courses 🔑230(5)—Void warrants issued by irrigation district board, though in form negotiable, subject to defense in hands of purchaser.

Warrants issued by the board of directors of an irrigation district, and void because based on a single demand only part of which they were authorized by Gen. Laws, Act 1726, § 61, to allow, are subject to the defense of invalidity in the hands of a purchaser from the original holder; they, though negotiable in form, being issued by a statutory board as a convenient method of ordering payment from the district's treasury, and not being negotiable in the sense of the law merchant.

In Bank.

Appeal from Superior Court, Los Angeles County; Bertin A. Weyl, Judge.

Action by W. E. Ser-Vis against the Victor Valley Irrigation District and others; Edward O. Weik intervening. From an adverse judgment, plaintiff appeals. Reversed.

Charles J. Kelly, of Los Angeles, for appellant.

H. G. Redwine, G. A. McElroy, Roy V. Reppy, B. F. Woodard, and S. V. O. Prichard, all of Los Angeles, for respondents.

KERRIGAN, J. This is an action brought by a landowner in the Victor Valley irrigation district to have canceled by decree of court certain warrants issued by the board of directors of said district, on the ground that the said board had no authority to issue the warrants, and that they are therefore void. Judgment went for the defendants and intervener, declaring that the warrants thus sought to be canceled were legal and valid and subsisting obligations of the district. From this judgment plaintiff appeals.

F. M. Walton, one of the defendants, had been employed by an unincorporated association to perform certain services looking to the organization of a regularly, legally constituted irrigation district. In his capacity as an officer and agent of the unincorporated association, covering a period of four years, he rendered services and made disbursements, which services and disbursements, it is claimed, come within the purview of the exception to section 61 of Act 1726, General Laws. Whether they do or not presents the question we are required to decide.

The section reads:

> "The board of directors or other officers of the district shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this act; and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void, except that for the purposes of organization, or for any of the purposes of this act, the board of directors may, before the collection of the first assessment, incur indebtedness in such

sum or sums as shall amount to two thousand dollars, or, if the district shall contain more than four thousand acres, to one-half as many dollars as there are acres of land in the district, and may cause warrants of the district to be issued therefor. * * *"

Before its amendment in the year 1891 (St. 1891, p. 147, § 8) this section did not contain the final provision as it now stands, commencing with the words "except that for the purposes of organization," etc., so that only such liabilities as were expressly provided for in the act could be incurred by the board of directors, and any liability incurred in excess of such provision was and remained absolutely void.

In construing this section of the act the Supreme Court, in Mitchell v. Patterson, 120 Cal. 286, 293, 52 Pac. 589, 591, said:

> "The amendment purports to save or except from the operation of the original act certain liabilities which by it were made void. The use of the word 'except' implies that; and the first specification thereunder, 'for the purposes of organization,' confirms the implication. * * *
>
> "The words immediately following, viz. 'or for any of the purposes of this act,' must be held also to relate to indebtedness which under the original section would have been void. * * *"

The case was submitted upon an agreed statement of facts. They are as follows: The defendant Victor Valley irrigation district was organized October 22, 1917, under Act 1726, General Laws of the State of California. Prior to the organization of the defendant irrigation district the various landowners within its boundaries formed an organization under the name Victor Valley Mutual Water Power District Association, an unincorporated organization, which had for its object the making of arrangements preparatory to the organization of an irrigation district whereby the land embraced in the Victor Valley irrigation district could be put under irrigation and cultivated. Of this former organization the defendant F. M. Walton was one of the active members and acted as the agent for all of those who belonged thereto, and for the period of four years, from October, 1913, to October, 1917, just preceding the organization of the defendant Victor Valley irrigation district, rendered certain services and expended certain sums of money on behalf of the original organization and its members.

On December 4, 1919, shortly after the organization of the defendant Victor Valley irrigation district, at a regular monthly meeting of its board of directors, the defendant F. M. Walton presented to the board of directors a detailed verbal statement of his expenditures made on behalf of the former organization, and also of a balance due him on account of his salary as agent of the former organization at the rate of $125 per month, the expenditures and services totaling a sum of $12,000, which was compromised between F. M. Walton and the board of directors, and warrants were issued in his name in the sum of $6,635. Of the warrants so issued, approximately $3,875 have been paid; the remainder, in the sum of approximately $3,375, are now outstanding and unpaid. Of the warrants so remaining unpaid $600 is still held by defendant F. M. Walton, and $1,500, represented by two warrants, is held by the intervener, Edwin O. Weik, having been indorsed to him by F. M. Walton for good and valuable consideration. The remaining unpaid warrants are held by persons not parties to this action. The district contains approximately 73,000 acres of land.

The expenditures were made and the services performed prior to the organization of the irrigation district, and the services and advances were rendered and made for the purpose of securing data and perfecting plans and arrangements whereby an irrigation system could be organized and perfected. During the period for which defendant Walton received salary he spent some four months in securing signatures to the petition necessary to be filed with the board of supervisors of the county of San Bernardino in order to propose and bring about the organization of said irrigation district. He also, a short time before the organization of the district, spent considerable time and effort in securing valuable options on water rights, reservoir sites, land, and other property, which options were taken in the name of a third person, and, as intended and arranged, they were subsequently transferred and conveyed to the Victor Valley irrigation district. The property covered by said options was indispensably necessary to enable such irrigation district to construct an irrigation system and to put the land embraced within the district under cultivation and irrigation.

The act under consideration contains various provisions for raising funds for the district—e. g., section 30 provides for the issuance of bonds to meet the expenses of construction of the irrigation works and for otherwise carrying out the provisions of the act; section 34 authorizes the levy of assessments to complete the construction of the irrigation works; and section 59 deals with special assessments. In order that the district may avail itself of any of these provisions, either a certain contingency must have arisen or certain prescribed steps must be followed, and the funds thus raised are destined to meet specified expenditures; they are "earmarked," to to speak, before they are collected by the district; and section 61, before the enactment of the amendment referred to, declared to be void any indebtedness incurred except under the conditions and in the manner prescribed by the various sections of the act dealing with the collection of funds. By the amendment the board of directors was given power to incur a limited amount of indebtedness without compliance with those provisions, such indebtedness to be either "for the purpose of organization" or "for any of the purposes of this act."

[1] Considering first the proposition of whether or not the services rendered and the expenditures incurred were for the purposes of organization, the warrants were issued for services and expenditures rendered and made by F. M. Walton as a promoter prior to the taking of any definite action looking to the immediate organization of the Victor Valley irrigation district. The language of the agreed statement of facts itself indicates that the services and advances were not, strictly speaking, rendered and made for the purposes of organization, for the stipulation speaks of the work as "preparatory to the organization of an irrigation district"; again, that "the services were prior to the organization of the present irrigation district." They were preorganization services.

Section 1 of Act 1726, as amended in 1919 (St. 1919, p. 714), provides that:

> "A majority in number of the holders of title or evidence of title to lands susceptible of irrigation from a common source and by the same system of works * * * may propose the organization of an irrigation district, under the provisions of this act."

Section 2 of the act, as amended in 1919 (page 715), provides that:

> "In order to propose the organization of an irrigation district, a petition signed by the requisite majority of holders of title or evidence of title to lands within the proposed district, or by at least five hundred petitioners, as provided in section one of this act, shall be presented to the board of supervisors of the county in which the lands within the proposed district, or the greater portion thereof, are situated. * * * The petition * * * must be accompanied with a good and sufficient undertaking, to be approved by the board of supervisors, in double the amount of the probable cost of organizing such district, conditioned that the sureties shall pay all of said costs in case said organization shall not be effected. * * *"

Section 10 provides when the organization shall be deemed complete. From the language of sections 1 and 2 it would appear that no services rendered prior to the time of the filing of the petition with the board of supervisors proposing the organization of the irrigation district could be deemed or considered services rendered for the purpose of organization as that phrase is employed in section 61 of the act. Any services rendered from and including the filing of the petition with the board of supervisors to the time of filing the return of the election as provided in section 10 would, we think, fall within the organization period. In the case of Biggart v. Lewis, 183 Cal. 660, 670, 192 Pac. 437, the court, in construing the act of 1913 (Stats. 1913, p. 785), providing for the formation, and so forth, of county irrigation districts, held that certain legal services rendered by an attorney at law in preliminary promotion work of the district, not being services for which the board of supervisors under the act was empowered to contract for and to pay, could not be made a legal charge against the district. There the court also, in construing certain language of the act, viz. "the cost of forming the district" (which, we take it, is synonymous with "the cost of organizing the district," 29 Cyc. 1527), held that it was intended to cover and control such costs "as would be necessarily and naturally incurred in putting in motion the procedure requisite for the formation of the district after the preliminary step of filing the petition has been taken."

As we have seen, section 2 in part requires that the petition for the formation of the district be accompanied by an undertaking in double the amount of the probable cost of the organization of the district, obligating the sureties thereon to pay such costs in case the formation of such district shall not be effected. If the proposed formation of the defendant district had been defeated at the election, and this action had been against the sureties on the bond, could it be said that the expenses of the attempted organization would embrace the outlay here sought to be recovered? We think not. Yet such a case and the instant case are alike in respect of what would constitute expenses of organization. Where the proposed formation or organization of an irrigation district is defeated at an election, the burden of the cost thereof is placed on the promoter through the medium of the required undertaking. Prior to the amendment of section 61 adding the exception, if the election of the proposed district carried, the promoter was still required to carry the burden of the cost of the formation or organization of the district; and the purpose of the amendment under discussion was doubtless to remedy this defect in the law and to enable the irrigation district to pay the cost of organization, which would be the same cost which the sureties would have to pay if the project was defeated, and would include, as we have seen, the costs incurred from and including the filing of the petition to the time when, after the canvass of the vote cast at the election, the board of supervisors shall declare the result thereof.

[2] We are of the opinion, however, that certain of the services enumerated in the stipulation of facts as having been rendered by Walton are of such a character as to bring them within the second of the two classes for which the board of directors could expend the funds of the district, or incur indebtedness, without prior compliance with the several financial provisions of the act touched

upon, namely, an indebtedness created "for any of the purposes of this act." We refer to the services of Walton in "securing certain valuable options on water rights, reservoir sites, land, and other property * * * taken in the name of a third person, who was to hold and did hold the title until said irrigation district was organized, and then transferred and conveyed them to said district," said options having been secured for the express purpose of being afterwards conveyed to said district, and the property covered by said options and the water rights included therein being of such a nature that said irrigation district could not have secured water from any other source, and without which said district could not construct an irrigation system, and could not put the land in said district in cultivation or under irrigation. Clearly the acquisition of rights of this nature, so essential for the successful prosecution of an irrigation enterprise, comes within the purposes of the act.

[3] Had the warrants here in question been issued in payment of these services only, we would have no doubt as to their validity; but the statement of facts and the findings of the court plainly show that these services, although evidently very valuable, constituted but a small part of the claim of Walton, and no specific part of the sum allowed him was allocated to those services. A lump sum was allowed him as compensation for all his services and disbursements. The warrants, therefore, issued in his favor, being based upon a single demand of which a substantial part was beyond the power of the board of directors to allow, must be held to be totally void.

[4] The appellant also urges that the intervener, Weik, in acquiring one or more of the warrants in question, took them subject to the defense of their invalidity, notwithstanding that he was a purchaser for value.

The point is well taken. The warrants here in question, although negotiable in form, were issued by a statutory body as a convenient method of ordering payment of money from the treasury of the district, and in this respect are precisely like county warrants issued upon the order of a board of supervisors. As to such warrants this court, in the case of Dana v. San Francisco, 19 Cal. 486, in holding them not to be negotiable instruments in the sense of the law merchant, said:

> "We think that the plaintiff, counting alone upon the county scrip or warrants, as negotiable instruments, evidencing of themselves an indebtedness on the part of the county cannot maintain his pretension. This seems to be decided in the case of People v. Supervisors of Eldorado County, 11 Cal. 170. The reason is that the auditor had no authority to draw a bill of exchange, but he can only, in certain cases, issue warrants upon the order of the supervisors, or the allowance by the board of an account, which is chargeable as a debt upon the county. The warrant is not intended to constitute a new debt, or evidence of a new debt, against the county, but is the prescribed means the law has devised for drawing money from the county treasury. * * * The question here is, not whether the county had the power to make a bill of exchange, but whether the auditor, when, under the statute, he issues a warrant, has the power to give it the form and qualities of such an instrument. We think he has not, and that the paper, as here presented, has no such effect, if indeed it was so designed."

We conclude, therefore, that the warrants here in question were void either in the hands of the original holder or his transferee, and consequently that the plaintiff was entitled to the relief prayed for.

The judgment is reversed.

We concur: WILBUR, C. J.; MYERS, J.; LAWLOR, J.; WASTE, J.; SEAWELL, J.; LENNON, J.

190 Cal. 697

COLBURN et al. v. BURLINGAME.
(L. A. 7282.)

(Supreme Court of California. March 30, 1923.)

1. Appeal and error 🔑854(3)—Ruling on demurrer without reasons not reversed, if sustainable on any ground.

Where there is nothing in the order of the court sustaining the demurrer which indicates the ground of the court's action, its ruling will not be disturbed on appeal, if sustainable on any ground.

2. Wills 🔑600(1), 610(2)—Gift to wife to use and consume, with remainder to others, is not absolute gift to wife.

A gift to testator's wife of all his property, to use the whole or any part for her own individual benefit and support, followed by a gift over of the property remaining at the death of the wife, gives the wife only a life interest in the property, with power to use and consume for purposes indicated, and not an absolute gift, which she could dispose of by will.

3. Pleading 🔑8(3)—Allegations of complaint as to purposes of defendant held demurrable conclusions.

In an action against a wife, to whom testator had given his property for life, with power to use for her support and benefit, brought by the donors of the remainder of interest, allegations that defendant is threatening or intends to devote the property to uses other than those contemplated by the will, or is using it for purposes not contemplated by the will, state demurrable conclusions.

4. Wills 🔑730—Widow held entitled to use estate to support second husband.

Where testator gave his property to his wife for her life, with power to use the whole or any part thereof in any manner as might in her own judgment seem best for her own individual benefit and support, without any hindrance on the part of any person, the use of the property by her for the support of her second husband, who left his employment when he married her, is a use which she might properly determine to be for her benefit, within the discretion given her by the will.

5. Life estates 🔑6—Requiring security of life holder of personal property rests in court's discretion.

Where testator has given the life tenant possession of the funds, the matter of exacting security is discretionary with the court, and if the testator has not required such security, the court will not require it, unless it is shown there is danger of loss because of the irresponsibility of the life tenant, his removal beyond the jurisdiction, or some other cause.

In Bank.

Appeal from Superior Court, Los Angeles County; Chas. S. Burnell, Judge.

Action by Charles B. Colburn and others against Leora W. Burlingame. Judgment for defendant, after demurrer to the complaint was sustained, and plaintiffs elected not to amend, and plaintiffs Colburn appeal. Affirmed.

Flint & Mackay, and William A. Bowen, all of Los Angeles, for appellants.

Collier & Labarere, of Los Angeles, for respondent.

KERRIGAN, J. This action was brought for the purpose of requiring defendant, Leora W. Burlingame, to render an account of property which had come into her possession under the will of her deceased husband; it being alleged in the complaint (indirectly, it is true) that her interest therein is a life estate limited to certain purposes, and that certain expenditures being made by her are not within those purposes. The relief asked also included an injunction to restrain said defendant permanently from selling, disposing of, or incumbering any of the corpus of said estate, which consists entirely of personal property, and a bond to protect the interest of the plaintiffs as remaindermen. A demurrer, both general and special, having been interposed to the complaint, it was sustained, without leave to amend; the plaintiffs declaring that they did not desire such leave. The plaintiffs other than Dora W. Macauley appeal from the judgment in favor of said defendant entered following such order.

It appears from the allegations of the complaint that the defendant is the widow of Leslie H. Colburn, having remarried since his decease, and the plaintiffs are his brothers and sister-in-law. Leslie H. Colburn was a resident of Pennsylvania and died in that state. He left a will, which was there admitted to probate, and in due course the entire estate was distributed to said defendant, without bond for the protection of the interest of any other person. The controversy between the parties arises upon the construction of certain provisions of this will, namely, the second and fourth paragraphs thereof, but principally the former. Said paragraph 2 reads as follows:

"I give, devise and bequeath to my beloved wife Leora I. Colburn the entire handling and control of any and all of my real estate and any and all my personal property of any and every name nature or kind—wheresoever situate—to have and to hold, occupy or use the whole or any part thereof in such manner as may in her judgment seem best for her own individual benefit and support without any hindrance on the part of any person or persons wholly confiding in and believing my beloved wife will not allow said property to depreciate or go to waste."

The third paragraph then gives the estate to the mother of the deceased and the mother of the defendant in the event of the latter's death. She, however, has survived them, which brings into operation the fourth paragraph of the will, which is as follows:

"It is my wish and will and I do so direct that in case of the decease of my mother Mrs. Eliza A. Colburn and the mother of my beloved wife Mrs. P. M. Westbrook and my beloved wife Leora I. Colburn shall yet be living, then and in such case I give, devise and bequeath any and all my real estate and any and all personal property of any and every name nature or kind wheresoever situate at the time of the decease of my beloved wife Leora I. Colburn. To my brothers then living and to my beloved wife's sister Mrs. Dora L. Nehrbass jointly and severally the remainder of my estate share and share alike."

As we have seen, the brothers so mentioned are the plaintiffs in the case.

[1] The appellants' first contention is that the will of the deceased, reading paragraphs 2 and 4 together, gives to the widow a life estate only, with remainder to the persons mentioned in said fourth paragraph, including themselves, and upon the distribution of the estate only such life estate was distributed to her, and their opening brief contains the statement that the demurrer to their complaint was sustained upon the ground that by said will the widow was bequeathed an absolute estate in all the property of the decedent, the result of which would be that their complaint failed to state a cause of action. There is nothing in the order of the court sustaining the demurrer which indicates that this was the ground of the court's action, and, of course, if sustainable upon any ground, it will not here be disturbed.

[2] The allegations of the complaint are very meager as to the terms of the decree of distribution; but it sufficiently appears there-

from that the interest distributed to the defendant was that directed by the decedent's last will and testament, reading together paragraphs 2 and 4 thereof hereinbefore set forth. That the provision made for the defendant by said will constituted a life estate, although with power to consume the principal of the estate, we have no doubt. By paragraph 2 the entire estate is given over to her to be used for her individual benefit and support, and at her death the remainder, that is, the part of the estate unconsumed by her, is, by paragraph 4, given to the testator's brothers and sister-in-law. The rule of construction here applicable is that stated in Hardy v. Mayhew, 158 Cal. 95, 110 Pac. 113, 139 Am. St. Rep. 73, where it is said:

> "It appears to be settled by the overwhelming weight of authority that the mere fact that the first taker is invested with the power to dispose of or consume the whole of the property for certain purposes does not invest him with the absolute ownership thereof and render the gift over void where taking the whole instrument together it is concluded that the intent was to give only an estate for life, with limited power of disposal or consumption."

And the rule thus announced was followed in Luscomb v. Fintzelberg, 162 Cal. 440, 123 Pac. 247. This is also the construction given to bequests and devises by the courts of Pennsylvania, where the will here under consideration was executed and the testator's estate distributed.

The case of Allen v. Hirlinger, 219 Pa. 56, 67 Atl. 907, 13 L. R. A. (N. S.) 458, 123 Am. St. Rep. 617, is quite similar in its facts to the present, and the questions here arising were there considered, and many of the cases cited in the briefs of appellants and respondent are there referred to. We cannot do better than quote from the opinion written by Mr. Chief Justice Mitchell:

> "The testator directed the payment of his debts and a small legacy to his daughter and then devised the residue of his estate to his wife for life or widowhood with permission to use and live therefrom and to have the full ownership, the same as he had himself during his life, and at her death whatever should remain to be given to his daughter. The class of wills to which this belongs present inherent difficulties in construction by their indication of an intent not accurately defined in the testator's own mind, if not of double and to some extent conflicting intents. The testator gives to the first taker the estate, or, what is practically the same thing, the power to consume the whole, and yet manifests his expectation at least, if not his intention, that it shall not all be consumed. These two purposes, manifestly present in his mind, but not accurately defined, and their possible conflict perhaps not perceived at all, at once raise the question, has the will limited the estate given, or has it attempted to deprive the estate given of some of its essential legal properties? The cases must be classified on this line of distinction. In Good v. Fichthorn, 144 Pa. 287, it was said: 'The true test of the effect of language apparently at variance with other parts of the devise, is whether the intent is to give a smaller estate than the meaning of the words of the gift standing alone would import, or to impose restraints upon the estate given. The former is always lawful and effective; the latter rarely, if ever; the first, because the testator's intention is the governing consideration in the construction and carrying out of a will; the second, because even a clear intention of the testator cannot be permitted to contravene the settled rules of law by depriving any estate of its essential legal attributes.' While similar language has been differently construed in different wills, yet the difference has been in the application, not in the guiding principle. The effort has uniformly been to discover the actual principal intent of the testator, and where that has been clear there is no case in which it has been departed from. * * * Taking up the present will in view of the foregoing principles it does not appear to leave any doubt as to the testator's actual and main intent. The words are:
>
> "'Third. All the balance, or whatever may remain then of my estate, real, personal and mixed, I give, devise and bequeath to my beloved wife Leora whom I desire to be the real owner thereof, and for her only proper use, benefit and behoof during her natural life, or so long as she remains my widow, with full permission to her to use and live therefrom as her necessities may require, and she to have the full ownership thereof, the same as I now have, and have had during my natural life.
>
> "'Fourth. When my beloved wife dies my will is whatever may then remain of my estate, real, personal or mixed, I desire that the same remaining portion, if any, be given to my beloved daughter Mary.'
>
> "The gift to the widow is of the estate, she to be 'the real owner thereof' and 'with full permission to her to use and live therefrom as her necessities may require.' And she is to have 'the full ownership thereof the same as I now have, and have had during my natural life.' It is plain that he meant her to have whatever her necessities should require, even to the extent of the entire estate, as he had himself undoubtedly had during his lifetime. * * * There was no limit put on her use. If she needed the whole, she was to have the whole. But it is plain that he did not think she would need the whole, and expected that there would be something left, and this residue, be it much or little, he gave to his daughter. * * * The appellant does not have a fee simple, for she could not make a valid devise of what may be left at her death as that would go under the testator's will to his daughter. But appellant has an unlimited power to consume and as said in the very analogous case of Kennedy v. P. & L. E. R. R. Co., 216 Pa. 575, the power to consume real estate necessarily includes the power to convey. Her deed therefore will convey a good title."

So, in the case at bar, the provisions of the fourth paragraph of the will, giving to the plaintiffs what is left of the estate upon the death of the defendant, make it quite clear that the testator intended to give to his wife only a life estate. It does not follow, however, that the plaintiffs are entitled to the relief here sought. As already noted, they seek to enjoin the defendant from disposing of the corpus of the estate, and that she shall be compelled to furnish a bond to protect their rights as remaindermen. The averments of the complaint upon which they ground this demand are the following:

> "IX. That plaintiffs and each of them are informed and believe, and therefore allege, that Merton S. Burlingame, husband of said defendant, shortly after his marriage to her in the year 1920, gave up his employment in Chicago and has not since been employed, and that since their marriage said Merton S. Burlingame and Leora W. Burlingame have been living together in Chicago and California, and that the said Merton S. Burlingame had and has no means of his own to support himself and/or his wife, and that during the period said Merton S. Burlingame gave up his employment and married said defendant, said defendant Leora W. Burlingame has and is contributing to the support and maintenance of said husband from the property of the said estate contrary to the last will and testament of Leslie H. Colburn, deceased, and to the detriment of the plaintiffs herein; that by so contributing to the support of her said husband, Merton S. Burlingame, said defendant is diverting the said life estate to a purpose other than that authorized and directed by the said will of Leslie H. Colburn, to the irreparable injury and damage of the remaindermen under said will, to wit, the plaintiffs herein."
>
> "XXI. That the plaintiffs are informed and believe that the defendant has threatened to, or intends to continue to divert the property of her life estate to uses other than those contemplated by the said will."
>
> "XXIII. That the defendant is selling off portions of said stock and using the same for purposes not contemplated by the will, and therefore is reducing the corpus of the life estate, to the irreparable injury and damage of the plaintiffs as remaindermen."

[3, 4] It is apparent that the last two paragraphs state demurrable conclusions of the pleader as to what uses or purposes are contemplated by the will, and that the point of the demurrer under this phase of it is directed to said paragraph IX, namely that the defendant is contributing to the support of her husband. It is the appellants' contention that she cannot lawfully use the property of the estate for this purpose, and it is based upon plaintiffs' construction of paragraph 2 of the will hereinbefore set out, as there is not elsewhere in said will (which is set out in hæc verba in the complaint) any restriction upon defendant's use of the property.

We are of the opinion that, in view of the very broad language in which the bequest to the defendant is couched, this contention is untenable. The life estate of the defendant is in the whole of the property of the estate—

> "to have and to hold or use the *whole or any part thereof in such manner as may in her judgment* seem best for her own individual benefit and support *without any hindrance on the part of any person or persons, wholly confiding in and believing my beloved wife will not allow said property to depreciate or go to waste.*"

It is seen that the right of the defendant to use the property is not confined to that necessary for her support; she may use it for her *benefit*—a term much broader than support; and she is made the judge of what is for her benefit; and she is to exercise that judgment *without any hindrance on the part of any person or persons*—a plain warning to these plaintiffs to keep hands off. For the preservation of the property the testator wholly confides in his wife. The defendant, it appears, has remarried, and for a time lived with her husband in Chicago. Having ample means—the value of the estate amounting to some $90,000—the not unnatural desire arises in her to remove to California, or at least to live there during a part of the year. Should she leave her husband toiling and moiling in Chicago? Presumably she gave this question full consideration and concluded that it would be for her benefit that he should accompany her West. We can readily perceive that it might be much to her advantage that he should do so; and if in her opinion her life is made pleasanter or more to her liking by the freedom of her husband from the irksome demands of business, we perceive no reason why, under the wide discretion she enjoys as to what expenditures are for her benefit, the expense of their common life may not be included under this head.

[5] We can imagine expenditures which would be neither for her support nor benefit, the indulgence in which would give to the remaindermen a right to protection by appropriate legal remedy; but until the defendant uses the funds of the estate for a purpose much more remotely connected with her individual benefit than contributing to the support of her husband the plaintiffs must be content to leave the defendant in the undisturbed enjoyment of the estate bequeathed to her by the testator. As is said in 17 R. C. L. § 17, p. 627:

> "Where the testator has directed that the life tenant have possession of the funds, the matter of exacting security is regarded as discretionary with the court; and if the testator has not seen fit to require such security the court will not require it, unless it is shown that there is danger of loss either because of the irresponsibility of the life tenant, his removal of the estate beyond the jurisdiction of the court, or some similar reason, since the requirement of security might impose upon the life tenant a burden which he could not discharge and thus the intention of the testator would be defeated. * * * If the instrument by which the life estate is created gives the power to encroach upon the principal at discretion no security will be exacted."

The same principle is laid down in 14 A. L. R. 1070, and is followed in our own state, where, in the case of In re Garrity, 108 Cal. 471, 38 Pac. 630, it is stated as follows:

> "The rule [as to the giving of security by the life tenant to the remainderman] is one of equity, established by the courts for the protection of the remainderman, in the absence of any direction in the will; but the rule thus established must yield to the terms of the will, and if it appears from a proper construction of the will that it was the intention of the testator that the property should be placed in possession of the life tenant without security, such intention will be carried out."

It appearing from the complaint in this case, as we have seen, that the life estate given to the defendant is coupled with power to consume the whole thereof for the purposes indicated, that the expenditures being made by the defendant from the funds of the estate have not so far transgressed those purposes, and that the testator expressly directed that the estate should be placed in the control of the defendant without bond or security, the plaintiffs have not stated a case entitling them to the relief sought or any relief. The trial court, therefore, properly sustained the demurrer.

The judgment is affirmed.

We concur: WILBUR, C. J.; LENNON, J.; SEAWELL, J.; MYERS, J.; LAWLOR, J.; WASTE, J.

190 Cal. 706

RIDDLE et al. v. HILLHOUSE, City Clerk. (S. F. 10621.)

(Supreme Court of California. April 3, 1923.)

Municipal Corporations ⚷159(1)—Nominating petition for recall election must designate officer which each nominee seeks to succeed.

Under St. 1911 (Ex. Sess.) p. 128, for the recall of elective officers of incorporated cities and towns, a nominating petition under Pol. Code, § 1188, by which three petitioners were nominated for terms as city trustees expiring in 1924, and two for terms expiring in 1926, must designate the particular individual which each nominee seeks to succeed, in the event of the recall of the incumbent.

In Bank.

Petition by John S. Riddle and others for a writ of mandate prayed to be directed to John W. Hillhouse, as City Clerk of the City of Healdsburg, to require him to place names of petitioners on ballot for recall election. Writ denied.

W. F. Cowan, of Santa Rosa, and A. W. Hollingsworth, of Healdsburg, for petitioners.

F. W. McConnell, of Healdsburg, and R. W. Harrison, of San Francisco, for respondent.

WILBUR, C. J. The petitioners pray for a writ of mandamus to compel the respondent city clerk of the city of Healdsburg, to place their names upon the ballot to be printed for a recall election to be held on April 12th next.

The recall election is directed to the recall of all the incumbent city trustees, two of whom are filling terms which expire in 1926, and three of whom are filling terms which expire in 1924. The petitioners filed nominating petitions under section 1188 of the Political Code, by which three of the petitioners were nominated for terms expiring in 1924 and two for terms expiring in 1926, but there was no designation in the petition of the particular individual which each nominee sought to succeed. The respondent contends that it was essential to the nominating petition and to the preparation of the ballot that each nominee should designate the particular trustee that he expected to succeed in the event of the recall of the incumbent.

The question arises under a statute enacted at the extra session in 1912 (Stats. 1911, Ex. Sess. p. 128) for the recall of elective officers of incorporated cities and towns.

We think it clear that the position of the respondent must be sustained, for it clearly appears from the statute that each officer sought to be recalled is considered as holding an office independent of any other person who may also be sought to be recalled at the same election, and that it is this office that is to be filled by the successful candidate in the event that the incumbent is recalled. This is clearly manifest from the following quotation from section 1 of the act providing for the recall:

> "There shall be printed on the recall ballot, as to every officer whose recall is to be voted on thereat, the following question: 'Shall (name of person against whom the recall petition is filed) be recalled from the office of (title of the office)?' following which question shall be the words 'Yes' and 'No' on separate lines, with a blank space at the right of each, in which the voter shall indicate by stamping a cross (X) his vote for or against such recall. On such ballots, under each such question, there shall also be printed the names of those persons who have been nominated as candidates to succeed the person recalled, in case he shall be removed from office by said recall election; but no votes shall be counted for any candidate for said office unless the voter also voted on said question of the recall of the person sought to be recalled from said office. The name of the person against whom the petition is filed shall not appear on the ballot as a candidate for the office. If a majority of those voting on said question of the recall of any incumbent from office shall vote 'No,' said incumbent shall continue in said office. If a majority shall vote 'Yes,' said incumbent shall thereupon be deemed removed from such office, upon the qualification of his successor. The canvassers shall canvas all votes for candidates for said office and declare the result in like manner as in a regular election. If the vote at any such recall election shall recall the officer, then the candidate who has received the highest number

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

of votes for the office shall be thereby declared elected for the remainder of the term. * * *"

The question here involved has not been heretofore decided by this court. In the case of Wilson v. Blake, 169 Cal. 449, 147 Pac. 129, Ann. Cas. 1916D, 205, a recall election was had involving two commissioners serving for different terms. It was held that the ballot should indicate for which term each candidate was a nominee. In Sturtevant v. Jordan, 183 Cal. 292, 191 Pac. 365, where two associate justices of Division 2 of the District Court of Appeal were to be elected, it was held that the ballot should be so printed—

> "that the ballot for the purposes of nomination and election should show the office of associate justice of division 2 of the District Court of Appeal of the First Appellate District as a single office, for which two persons are to be selected, with all candidates for the office appearing as candidates for that office, and not specially for either of the two associate justiceships to be filled at the election. * * *"

But it was also stated:

> "It should be noted that there is a plain distinction between the situation presented by this case and the situation where a vacancy in judicial office occurs and is filled by appointment to hold until the next general election, when the vacancy must be filled by the election of a justice or judge who shall hold the office 'for the remainder of the unexpired term.' In such a case, for all the purposes of election, every unexpired term is a separate and distinct office, to be separately designated on the ballot."

This latter observation would point to the conclusion that, where a nominee for office seeks an election for the unexpired term rendered vacant by recall of an incumbent, he is a candidate for that particular office. However that may be, we are satisfied from the language of the act of the Legislature providing for recall that the nominating petition must indicate the office sought to be filled.

Writ denied.

We concur: LAWLOR, J.; KERRIGAN, J.; SEAWELL, J.; LENNON, J.; MYERS, J.

---

190 Cal. 709

In re NEWHALL'S ESTATE. (S. F. 9654.)

(Supreme Court of California. April 4, 1923.)

1. Wills 🔑386—Finding on conflicting evidence that holographic will was written entirely by testatrix will not be disturbed on appeal.

A finding on conflicting evidence that a holographic will was written entirely by testatrix will not be disturbed on appeal.

2. Wills 🔑166(5) — Evidence insufficient to prove that will was result of undue influence.

In contest by an older daughter of a will by the mother in favor of other daughters living with the mother, evidence *held* insufficient to support inference that the will was the result of undue influence.

3. Wills 🔑155(1)—"Undue influence" defined.

"Undue influence" is the exercise of acts or conduct by one person toward another by means of which the mind of the latter is subjected to the will of the person seeking to control it, and, as applied to a will, refers to the means and methods resorted to and employed by a person for the purpose of affecting and overcoming, and which ultimately does affect and overcome, the free and unrestrained will of the testator.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Undue Influence.]

4. Wills 🔑159—Opportunity and derogatory false statements insufficient to prove undue influence without showing domination of testatrix.

That two younger sisters, chief beneficiaries under the mother's will, had opportunity to influence and did make false derogatory and defamatory statements concerning contestant, was insufficient without showing that the mind of the testatrix at the time of making the will was subjected to and dominated by desires of such daughters to the point of undue influence so as to represent their wishes rather than the wish of the testatrix.

5. Wills 🔑155(1) — "Undue influence" and "fraud" are not identical as grounds of contest of will.

"Undue influence" is not always the equivalent of fraud, though often used interchangeably, but as grounds of contest of a will they are not as matter of law identical, and where fraud alone is relied on as ground of contest, the theory is that testator, though acting of his own free will, was deceived by false data into doing what he would not have done had he not been fraudulently imposed upon.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fraud.]

6. Wills 🔑153—Fraud may invalidate will, though not amounting to undue influence.

False representations, though not used as pressure on the mind of testator as to constitute an element of undue influence, may yet constitute fraud sufficient to invalidate the will.

7. Wills 🔑153—Intent essential element of fraud invalidating will.

Intent is a necessary element of fraud inducing execution of a will.

8. Wills 🔑324(3)—Evidence of fraud inducing execution held sufficient for the jury.

Evidence of fraud inducing the execution of a will *held* sufficient for the jury.

9. Wills 🔑326—Rule requiring most favorable inferences from evidence on motion for nonsuit applies to will contest.

The rule that on motion for nonsuit every inference favorable to plaintiff's case deducible from the evidence, and every favorable presumption resulting fairly from the evidence, must be taken in favor of plaintiff's case, applies to contests of a will, and all the evidence in favor of contestant must be taken as true, and contradictory evidence disregarded, and, even if substantial evidence remains for contestant, the motion must be denied.

10. Wills ⚿166(12)—Evidence of fraud invalidating will must be largely circumstantial, and contestant need not prove every fact, but is entitled to legitimate inferences.

Proof of fraud invalidating a will must necessarily be largely or wholly circumstantial, and contestant is not required to prove every fact and conclusion of fact on which the issue depends, but legitimate and reasonable inferences may be drawn from every fact proved, and any inference fairly deducible is as much proved for the purpose of making out a prima facie case as if it had been directly proved.

11. Wills ⚿153—Evidence need not show that fraud was practiced at very time of making of will.

It is not necessary that there should be evidence that the fraud relied upon as invalidating the will was practiced at the very time of the making of the will, but, if belief in fraud previously practiced persisted at the execution, so that but for its persistence the will would not have been different, the fraud vitiates the will.

In Bank.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Proceedings for the probate of the will of Mary E. Newhall, deceased. From a decree finding in favor of the validity of the will, contestant Grace A. Ryder appeals. Reversed, and remanded for new trial.

H. A. Blanchard, of San Jose, for appellant.

S. L. Strother, Everts & Ewing, Gallaher, Simpson & Hays, and A. M. Drew, all of Fresno, for respondents.

LENNON, J. This is an appeal taken by contestant from an order admitting to probate the will of Mary E. Newhall, deceased. The will, holographic in form, was attacked upon four grounds, viz.: (1) That it was not entirely written, dated, and signed by the testatrix; (2) that the testatrix at the time of the execution thereof was of unsound mind; (3) that the will was procured by the undue influence of two of the contestees, the younger daughters of the testatrix and the principal beneficiaries under the will; and (4) that the will was procured by false and fraudulent representations made to the testatrix by such beneficiaries.

The case was tried with a jury. After the presentation of contestant's case a nonsuit was granted upon the last three grounds of contest, which were accordingly withdrawn from the jury's consideration, and the trial thereupon proceeded upon the first ground of contest and ultimately resulted in a finding in favor of the validity of the will.

[1] It is at once apparent from a superficial examination of the will that certain words had been changed by writing over the original words, and that certain interlineations had been made therein. These changes and alterations did not, however, change the sense or meaning of the will. For instance, the date which, according to the testimony of two handwriting experts, had originally been written "August twenty fourth nineteen hundred and nineteen" had been changed to "nineteen hundred and eighteen." This was done by changing the letter "n" of the word "nineteen" as used the second time in the original writing of the date to an "e," and in the same writing and the same word the letter "n" into the letter "g" and also the letter "e" into the letter "h." There is the testimony of a handwriting expert called by the contestant to the effect that the changes and alterations in question were made by Belle McKiernan, daughter of the testatrix. There is also testimony to the contrary by a handwriting expert, testifying for contestees, to the effect that the said alterations and interlineations were in the handwriting of the testatrix and had been made by her while the ink was still wet and before the body of the will was signed by the testatrix. There is also the testimony of Belle McKiernan that she had made no changes in the will. It will thus be seen that we have a substantial conflict in the evidence bearing upon that phase of the case which concerns the first ground of contest, and that in that conflict there is to be found evidence which will suffice to support the verdict finding the will to have been entirely written, dated, and signed in the handwriting of the testatrix. And, of course, in keeping with the familiar rule concerning the conflict of evidence, the judgment in that behalf cannot be disturbed upon appeal.

There was some evidence offered and received for the purpose of showing that at the time of the execution of the will the testatrix was of unsound mind. A fair sample of the evidence adduced in this behalf is to be found in the testimony of witnesses to the effect that the testatrix on one occasion when two of her daughters were engaged in a heated altercation threw up her hands and declared that she "would go crazy," and that on another occasion she appeared at the pumphouse on her ranch in Tulare county in very scant attire. Upon the whole the evidence adduced in support of this phase of the case was not in our judgment sufficient to warrant the inference that the deceased was not of sound mind at the time of the making of the will, and, therefore the motion for a nonsuit, in so far as it was grounded upon the alleged unsoundness of mind of the testatrix, was properly granted.

The facts of the contestant's case bearing upon the issues of fraud and undue influence, substantially stated, are these:

The decedent died in Fresno, January 15, 1920, at about the age of 80 years. She had been twice married, and left as her heirs four daughters, Grace A. Ryder, contestant herein, and Bessie Hawley, children of her first marriage, and Georgie Dunn and Belle McKiernan, children of her second marriage. A son, Carl Newhall, had predeceased her in August, 1911.

By the terms of the will made by decedent about two years prior to her death the contestant, Grace Ryder, was left the sum of $5. Bessie Hawley and her daughter, Marion Hawley Martin, were left all of the real property of deceased in Santa Clara county, in Capitola, Santa Cruz county, and in Monterey county. The residue of the property was left to the two younger daughters, Belle McKiernan and Georgie Dunn, in equal shares. The entire estate was valued at about $175,000. Due to the fact that after the making of the will and before her death the decedent had sold the most valuable portion of her estate in Santa Clara county and also the house and furniture at Carmel, in the county of Monterey, the estate left to Bessie Hawley was materially diminished, and as a consequence the two younger daughters take, by the terms of the will, the bulk of the estate. A part of the residue consisted of a valuable orange grove near Exeter, Tulare county, Cal., valued at $90,000.

The testatrix had, at one time, lived with her first husband near San Jose. Her two older daughters, Bessie Hawley and Grace Ryder, both of whom had married, continued to reside in that part of the state. The mother subsequently moved to Fresno county, where the two younger daughters, Georgie Dunn and Belle McKiernan, although married, lived much of the time with her. Her son, Carl Newhall, to whom she had given a parcel of real estate in Santa Clara valley, continued to live near contestant. There had always been more or less friction between the children of the two marriages, but prior to 1911 there are no indications that it influenced the mother. Many circumstances, including letters written to contestant and to Marion Hawley, daughter of Bessie Hawley, at that time show a friendly relation existing between the mother and her two older daughters.

In 1911 a proceeding was instituted by Bessie Hawley in the superior court of Fresno county for the appointment of a guardian for Mrs. Newhall upon the ground, as alleged in her petition, that Mrs. Newhall was incompetent to manage and take care of her property. This, of course, aroused the resentment of Mrs. Newhall toward Bessie Hawley. And in a will made in April of that year Mrs. Newhall left to Bessie Hawley only the house in Capitola. The testatrix at this time was, however, friendly with Mrs. Ryder, and provided in the same will that all of the property, with the exception of the house in Capitola, should be divided equally among the remaining four children, Grace Ryder, Georgie Dunn, Belle McKiernan, and Carl Newhall. In a letter written to Grace Ryder about the 1st of July, 1911, Mrs. Newhall said that she expected Mrs. Ryder to help her in the guardianship proceedings.

Mrs. Ryder came to Exeter in July to consult with her mother in regard to the guardianship matter, bringing her attorney with her. It was at this time that several of the statements claimed by contestant to be false and to have influenced the mother in the making of the will were made by her two half-sisters. One of the statements made by Mrs. McKiernan was that Mrs. Ryder was the real instigator of the guardianship proceedings, that Mrs. Ryder was responsible for the whole affair, and that she only cared for her mother for what she could get out of her, and that she was after her property. Mrs. Newhall believed this statement. She told a Mr. Dreisbach, the foreman of her ranch, "more than once" that, although Mrs. Hawley had actually instituted the proceeding to have her declared incompetent, still no one could make her believe that Mrs. Ryder had not instigated those proceedings. It was on this same visit that Mrs. McKiernan told her mother that Mrs. Ryder was an immoral woman, that she was no good, and that she was not decent. The falsity of these statements, as pleaded by contestant, are admitted by a failure of contestees to deny their falsity in any of their pleadings. The denials in this behalf are limited to a denial of the mere making of the statements. There was direct testimony to the effect that the statements in question were false.

In August, 1911, Carl Newhall died, and it was found that he had by will devised and bequeathed all of his property, including the real estate which had originally been given to him in Santa Clara valley, to his half-sister Grace Ryder. This greatly offended the testatrix, who had evidently expected to receive the property back in the event of her son's death. She instituted a contest of his will in the superior court of Santa Clara county, claiming that Grace Ryder had procured the making of this will by her half-brother by persistent importunities and threats. During the course of the trial at which Mrs. Newhall was present attended by her two younger daughters, Georgie Dunn and Belle McKiernan, many charges against the character of Mrs. Ryder were publicly made and attempted to be proved. The jury, however, found against Mrs. Newhall, contestant therein, and brought in a verdict in favor of the validity of the will. From that time the relations between Mrs. Newhall and

Mrs. Ryder were strained, and Mrs. Ryder never thereafter saw her mother to talk to her.

On November 11, 1911, after Carl's death, Mrs. Newhall executed a new will revoking all former wills and leaving all of her property, with the exception of the house in Capitola which she left to Bessie Hawley, to her two younger daughters, Georgie Dunn and Belle McKiernan, share and share alike.

In the fall of 1911 or the spring of 1912 Mr. Mackey, a constable, drove Mrs. Hawley and her daughter, Marion, out to the ranch. Before he left town Mrs. McKiernan called him up on the phone and told him that, if her sister wanted to come out to dissuade her from doing so, that she didn't want her there, and that she would not have her there. When Mrs. Hawley arrived at the ranch, Mrs. McKiernan would not allow her and her daughter to come in, notwithstanding the fact that it was a cold, foggy night; and the further fact that Mrs. Hawley's daughter, Marion, who accompanied her, was ill. Mr. Mackey went into the house and found there Mrs. Newhall, Mrs. McKiernan, and a man by the name of Poe. Beside the door was a rifle, and when he asked Mrs. McKiernan what it was for she replied, "I intended to use it if she forced her way in." The testimony of Mr. Mackey, although denied by Mrs. McKiernan on the witness stand, was corroborated by the testimony of Mr. Poe, who also testified that he had heard Mrs. McKiernan say that, if Mrs. Ryder bothered her, "she had a gun."

In 1912 Mrs. Ryder went out to the ranch to see her mother. Her two younger sisters were there, but refused to call their mother, who was out in the orchard, and one of them carried her lunch to her mother so that it would not be necessary for her to come in while Mrs. Ryder was there.

In 1919 Mrs. Ryder wrote to her mother, suggesting that she would like to come to Exeter to visit her. She received a letter from her mother forbidding her to come and saying:

> "I should think you would be ashamed to come to me with your trouble after the shameful way you have been living. Don't for one minute think I don't know how you have been conducting yourself."

There was some evidence that the will in controversy was drafted and signed by Mrs. Newhall while alone on her ranch with her daughter, Belle McKiernan. Thus the testimony of both handwriting experts was to the effect that the will had originally been dated, "Exeter, California, August twenty-fourth nineteen hundred and nineteen," and subsequently altered to "August twenty-fourth nineteen hundred and eighteen." And the testimony of the ranch foreman was to the effect that the only time that Mrs. Newhall was out at the ranch at Exeter after April, 1919, was one Sunday in the summer of 1919 when she came out with her daughter Belle McKiernan and a Mr. Sparkman, who was named as executor of this will. Mr. Sparkman remained with the testatrix but a short time, but Mrs. Newhall remained until the next day at the ranch with her daughter Belle McKiernan. Judge Church, as a witness for the contestant, testified that prior to 1919 Mrs. Newhall did not know that a will could be made holographic in form. All of her previous wills had been attested wills. Some time in the early part of 1919 Judge Church explained to her the requisites of a holographic will. There is also testimony that in February, 1919, she was worried about two previous wills which were in the custody of Mr. Cook, an attorney at Fresno, notwithstanding the fact that there would have been no reason for her worry had the will in controversy been already executed, inasmuch as it expressly revoked all wills formerly executed.

[2-4] The evidence above narrated will not suffice, in our opinion, to warrant and support the inference that the testatrix was induced to make the will in question as the result of the undue influence of the chief beneficiaries named therein. Undue influence is defined to be the exercise of acts or conduct by one person toward another person by means of which the mind of the latter is subjected to the will of the person seeking to control it. As applied to a ground of contest of the will of a decedent undue influence has reference to the means and methods resorted to and employed by a person for the purpose of affecting and overcoming and which ultimately do affect and overcome the free and unrestrained will of a testator. Estate of Snowball, 157 Cal. 301, 107 Pac. 598; Estate of Ricks, 160 Cal. 467, 117 Pac. 539. As we read and understand the evidence relating to the issue of undue influence, it does no more than show that the two younger sisters had the opportunity to make and did make to their mother, the testatrix, false, derogatory, and defamatory statements concerning the contestant. But there is no showing in addition that the mind of the testatrix, at the time of the making of the will, was subjugated to and dominated by the desires and designs of the contestees to the point of undue influence. That is to say, there is no showing of any restraint by the two contestees upon the mind of the testatrix which resulted in making the will, as executed, represent the wishes of the contestees, who were the principal beneficiaries, rather than the wish and will of the testatrix.

[5] Undue influence is not always the equivalent of fraud. One may exist without the presence of the other. The former, however, may at times be exerted and applied through the medium of fraud. Oftentimes the terms "undue influence" and "fraud" are used interchangeably. Thus it has been held that undue influence, even though exercised

without the aid of actual fraud or fraudulent representations, is a form of fraud. Estate of Ricks, supra. It has also been held that undue influence may be exerted no less by fraudulent misrepresentations than by means of duress or other pressure. Estate of Snowball, supra. Undue influence and fraud as a ground of contest are not, as a matter of law, identical. Theoretically they constitute two separate and distinct grounds of contest. In cases where fraud alone is relied upon as a ground of contest, it is the theory of the law that the testator, even though acting, in a manner of speaking, of his own free will, was nevertheless deceived by false data into doing that which he would not have done had he not been fraudulently imposed upon.

[6] It is the general rule that for false and fraudulent representations to enter as an element into undue influence it is necessary that the misrepresentations be shown to have been intermingled with or made the basis of importunities and mental pressure upon the testator. On the other hand, such false representations, even in the absence of proof that they were used as pressure upon the mind of the testator, have been held to constitute fraud if it can be shown that they were designed to and did deceive the testator into making a will different in its terms from that which he would have made had he not been misled. Estate of Benton, 131 Cal. 472, 478, 63 Pac. 775.

[7] There is some language in the Estate of Ricks, supra, which, when segregated from the text of the opinion, seemingly states the rule in effect to be that such false representations may be relied upon as a ground of contest even though they may not have been made with the intent and purpose of affecting a testamentary disposition. That language is not to be taken as a correct statement of the rule. The question of the procurement by fraud of a will was not involved in that case. The issue presented there was solely one of undue influence and the court, in employing the language referred to, did so merely by way of discussion and for the purpose of emphasizing the distinguishing features which are recognized as existing between undue influence and the inducements of false representations. Obviously the same conditions must exist for the creation and consummation of a fraud in the procurement of a will as must be shown in cases where fraud is relied upon to vitiate an ordinary contract. Estate of Kohler, 79 Cal. 313, 21 Pac. 758. One of the necessary elements is an intent to deceive the decedent or an intent to induce decedent to execute his will. Estate of Benton, supra.

[8] While the evidence was not sufficient to support the inference of undue influence as above defined, there was, however, in our opinion, sufficient evidence to warrant and require the submission to the jury of the issue presented by the pleadings as to whether or not the testatrix was fraudulently induced and impelled practically to disinherit her daughter, the contestant herein, by reason of the false statements made to the testatrix by the two contestees concerning the character and conduct of the contestant.

[9] It is, of course, the general and well-understood rule that ordinarily upon a motion for a nonsuit, in civil cases generally, every inference favorable to plaintiff's case deducible from the evidence and every favorable presumption resulting fairly from the evidence must be taken in favor of plaintiff's case. This rule applies with equal force to cases of contests of wills. Of course, if the evidence is fairly susceptible of two constructions, or if several inferences may reasonably be made from the evidence as a whole, it goes without saying that the view most favorable to the contestant must be taken. And, further, all of the evidence in favor of the contestant must, as against a motion for a nonsuit, be taken as true, and contradictory evidence, if any, must be disregarded. This having been done, if there is any substantial evidence tending to prove the fact necessary to make out the contestant's case, the motion for a nonsuit must be denied and the case given to the jury. Estate of Arnold, 147 Cal. 583, 82 Pac. 252; In re Ross, 173 Cal. 178, 159 Pac. 603; In re Carson, 184 Cal. 437, 194 Pac. 5, 17 A. L. R. 239; Estate of Ricks, 160 Cal. 450, 117 Pac. 532.

From the circumstances shown in evidence it is apparent that the jury might rightfully have found that there was a constant effort on the part of the two younger sisters to prejudice and influence their mother against the two older sisters and particularly against the contestant herein. There is no question but that intense bitterness and hostility existed between contestant herein and her two younger sisters, and that the latter, living as they did with their mother, had ample opportunity to discredit the older sister in the eyes of the mother. There is also direct evidence that disparaging and false statements were made to the mother concerning the contestant by the younger sisters, which must, undoubtedly, have had an influence in creating and keeping alive the bitterness of the mother against the contestants.

There is no doubt but that the mother deeply resented the institution of the guardianship proceedings. If there could be any doubt of this, it is dispelled by the fact that shortly after the institution of the proceedings she made a will in which she left Bessie Hawley only the house in Capitola, dividing the remainder of her estate among her other children. When, therefore, she was told that Grace Ryder was the real instigator of the guardianship proceedings, the resentment which theretofore had been directed only toward Bessie Hawley was transferred to Grace Ryder. The testimony of Mr. Dreisbach, foreman of Mrs. Newhall's ranch, shows that Mrs. Newhall believed the statement that Grace Ryder was responsible for the institution of the guardianship proceedings, and that this belief was persisted in by her.

It is inconceivable that the statements made to the mother that the contestant, Grace Ryder, "was an immoral woman, that she was no good, and that she was not decent," did not adversely affect the feelings of the mother toward her daughter. Indeed, that it did lessen the regard and affection of the mother for her daughter is evidenced by the letter written by the testatrix in answer to a letter from Mrs. Ryder, the contestant, suggesting that the latter visit the testatrix at Exeter, wherein the testatrix objected to the proposed visit of the contestant, basing her objection, in effect, upon the ground that the contestant should be ashamed to come there after the shameful way in which she had been living. This letter, written, as it was, in August, 1919, also demonstrates that a belief in the disparaging statements and their damaging implications as to the character and conduct of her daughter continued and persisted in the mind of the mother.

These circumstances would have warranted a finding by the jury that the whole atmosphere surrounding the mother was poisoned with hatred, hostility, and ill will toward the two older daughters. In this atmosphere the will in contest was made practically disinheriting the contestant herein. Ordinarily in any given case the question of whether or not false and fraudulent statements operated upon the mind of the testatrix in the execution of the will is primarily a question for the jury.

[10] If, from the evidence offered in support of contestant's case, the inference can fairly be drawn that the intent behind the making of the false representations was to influence the execution of the will, and that the will was a result of such false representations and but for such representations would not have been so drafted, then the prima facie case necessary to take the case to the jury has been established. From the very nature of the inquiry the proof must necessarily be largely or wholly circumstantial. The contestant is not required to prove every fact and every conclusion of fact upon which the issue depends. Legitimate and reasonable inferences may be drawn from every fact proved, and any inference fairly deducible from the evidence is as much proved for the purpose of making out a prima facie case as if it had been directly proved. The contestant is not confined to the bare facts, but is entitled to the benefit of all inferences which may legitimately be drawn from the facts established.

While, of course, the statements made by the younger sisters may be explainable solely upon the hypothesis of their animosity and hatred toward their older sister, yet the undisputed existence of this very hostility furnishes ground for the inference that the intention of the sisters was that, by reason of the statements and the belief engendered in the mother's mind therefrom, their mother should execute a will benefiting them and at the same time injuring their sister.

The successful efforts of the two younger sisters to prevent the other sisters from seeing their mother may well have been with the purpose of thwarting any attempt on the part of the older sisters to refute the charges and accusations made against them and to prevent a reconciliation being effected between the sisters and their mother. These efforts would have a tendency to show an endeavor on the part of the two younger sisters to perpetuate the estrangement and to show the intent with which it was done. They would also have the tendency to show that the will was the result of the false representations made by showing that after the representations were made no opportunity was afforded contestant to demonstrate their falsity.

[11] This being a question of fraud, it is not necessary that there should be evidence that the fraud relied upon was practiced at the very time of the making of the will. If the belief in the fraud previously practiced, even though occurring long prior thereto, persisted at the time of the execution of the will, so that but for the persistence of such belief the will would have been different from that actually executed, the fraud vitiates the will. Estate of Benton, 131 Cal. 472, 479, 63 Pac. 775. Of course, if the testatrix at the time of the making of the will no longer believed the false representations, there is no question of fraud. Whether or not the belief persisted is provable not only by direct evidence if available, but also by circumstantial evidence. Although in the instant case the direct testimony is to the effect that the false statements of which contestant is cognizant were made some time in 1911 and 1912, and the will was not made until 1918 or 1919, there is the testimony of Mr. Dreisbach, who became Mrs. Newhall's foreman in 1917, that he had heard her say that Mrs. Ryder was responsible for the institution of the guardianship proceedings, that nothing would ever make her believe differently, and that she had said this more than once. Certainly this is evidence that the belief of testatrix in the accusation that Mrs. Ryder was the real instigator of the proceedings persisted long after they were made. There is also in the letter written by Mrs. Newhall to Mrs. Ryder on August 18, 1919, evidence that the mother still entertained the belief that the conduct of her daughter was questionable. This is sufficient, we think, to support the inference that the belief continuing for such a length of time still persisted in the mind of the testatrix at the time of the making of her will.

It is possible that upon the trial of the case the jury may find that it was the bitterness engendered by the contest of the will of Carl Newhall which was the cause for the disinheritance of her daughter by the testatrix, and that it was the mother who took the initiative against the contestant. On the other hand, taking as true, as we must, the evidence in the light most favorable to contestant, there is evidence to support the conclusion that the disinheritance was the result of false and fraudulent representations made by the two younger sisters concerning contestant. It was therefore for the jury to say whether the contest of Carl's will caused the disinheritance of the contestant or whether it was due primarily to the representations which, it was claimed, were fraudulently made concerning the contestant. It follows that the motion for a nonsuit, in so far as it related to the issue of fraud, should have been denied.

Judgment reversed, and cause remanded for a new trial.

We concur: WILBUR, C. J.; SEAWELL, J.; MYERS, J.; LAWLOR, J.

---

61 Cal. App. 119

PEOPLE v. VACARELLA et al. (Cr. 1075.)

(District Court of Appeal, First District, Division 1, California. Feb. 26, 1923.)

1. Homicide 🔑253(1)—Evidence held to support conviction for murder of Chinaman by members of rival tong.

Evidence of the killing of a Chinaman during a tong war *held* to support a conviction of murder in the first degree of three Chinese defendants belonging to a rival tong.

2. Criminal law 🔑436—Telephone company's record made in regular course of business admissible to show communication between two points.

The written record of telephone company made by an operator in the regular course of business of receiving payment and charging for long distant calls is admissible to show a communication between two points.

3. Criminal law 🔑423(1)—Declarations of coconspirators admissible against defendant, his connection with conspiracy being established.

Where defendant's connection with the conspiracy was established by other proof, declarations of two coconspirators made in furtherance of the common purpose *held* admissible against defendant.

Appeal from Superior Court, Santa Cruz County; Benjamin K. Knight, Judge.

Frank Vacarella and others were convicted of murder in the first degree, and they appeal. Affirmed.

J. B. Peckham, of San Jose, Geo. W. Smith, of Santa Cruz, and V. A. Scheller and Chas. M. Cassin, both of San Jose, for appellants.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

RICHARDS, J. The appellants were tried for the murder of one Lam Gee, also known as Ah Lum, the trial resulting in a conviction of murder in the first degree, with a recommendation of life imprisonment. From said conviction defendants appeal.

[1] At the time of the homicide there was a tong war betwen two Chinese tongs, known as the Hip Sing Tong and the Bing Kong Tong. The Hip Sing Tong was numerically superior in San Jose and the Bing Kong Tong was numerically superior in Watsonville. The strength of the rival tong was such that the members of the Bing Kong Tong left San Jose and the members of the Hip Sing Tong left Watsonville. This was the situation in the latter part of February, 1922, Chinatown in each city being akin to an armed camp. In San Jose it developed that 22 or 23 guards were on duty to protect the members of its tong. The defendant Munoz had been a guard, and the brother of Vacarella was also employed as a guard in San Jose. It required guns and ammunition to equip these men, who acted as watchmen, day and night, and a great quantity of these guns and ammunition was supplied by Hommrich's gun store of San Jose. A record was kept of the number of the various firearms and also the quantity and size of cartridges furnished. Among the firearms sold on February 15, 1922, was a Police Positive Special, No. 243,458, Colt revolver, the money for the purchase of which, as also for all the other arms and ammunition obtained on that date, was guaranteed by one Jew Chuck, known also as Sam Kee, one of the appellants, and who was one of the principal leaders of the Hip Sing Tong.

On February 15, 1922, there was purchased by the Hip Sing Club, a subsidiary organization of the Hip Sing Tong, the address of which was used as the headquarters of the latter organization, from the Osen Motor Sales Company, a used Marmon automobile, $600 being paid in cash and a note signed by Jew Chuck for the remaining $600. The defendants Vacarella and Munoz took this automobile and went to Watsonville, but it appears that the machine broke down en route and was towed to the Corner Garage in that city. These two defendants endeavored on a number of occasions to get a certain San Jose telephone number on the telephone. This number, San Jose 1367, it developed, was the number of the Hip Sing Tong, located at No. 7 Dupont street, in the name of Jew Bick. The telephone calls it is conceded were made for the purpose of obtaining money to pay the garage bill at Watsonville for the repair of the Marmon car. The phone calls were productive of results, as Louis Vacarella under date of February 21st telegraphed $30 to Albert Munoz. The telegraph company's receipt for this money was found upon the person of Sam Kee upon his arrest after the homicide.

Under date of February 21st there was purchased from the W. J. Benson Company, by one Wong Sing, a Hudson touring car, secondhand, license No. 32340. Wong Sing's address was given as No. 7 Dupont street, the same residence number as Sam Kee and headquarters of the Hip Sing Club and the Tong. The payment for said automobile was guaranteed by Sam Kee. The Hudson had been repainted and the body thereof shone brilliantly. The next heard of the Hudson car was that it had arrived at Watsonville and Munoz and Vacarella had possession of it. The story of these defendants as to how they knew the car was for them was conflicting, and it is not definitely shown from their evasive testimony how the car arrived at Watsonville; but Louis Vacarella testified that he was asked by the defendants to "bring down the Hudson car." "He (referring to Munoz) told me to bring down the Hudson car and two demijohns." These statements were afterwards qualified by the witness upon further questioning by counsel for defense:

> "A. Well they phoned down to bring my car but it was broke. Q. What car did you bring them? A. I brought down a Hudson."

Numerous parties saw the defendants Munoz and Vacarella and identified them by their appearance, the clothes they wore, and the Hudson car with the new coat of paint. In the afternoon of the 22d, at or about 3 o'clock, Vacarella and Munoz were observed eating in the California restaurant and the Hudson car was observed standing in front. A brother-in-law of the proprietor was looking at the machine, which he called "highly polished," when one of the defendants asked who he was. The proprietor asked if it was their car and they answered in the affirmative. At approximately 9:45 of this evening Lam Gee, the deceased, employed as chef at the Appleton Hotel in Watsonville, while returning from a Japanese poolroom in said city was accosted at the point on Rodriguez street near the hotel, where his body was found, by an individual, supposed by the witness describing the occurrence to be an "oriental." There was no actual witness to the homicide other than the parties to it, but a witness who had gone on up the street a few moments before and had passed a big black car testified that when but a short distance beyond it up Rodriguez street a shot rang out and he turned to see what was going on. In the meantime the party doing the shooting had fired two more shots. The witness stated that immediately "I see a man run across the street from Appleton side to that big car." The witness took notice of the person running across the street by the kind of coat he wore, identifying the coat of Munoz as one like it, which was a short, brown jacket with a sheep's hide collar, having the appearance of a fur collar, which coat had been worn by Munoz on the trip and which he had on when later observed by the county officers. This party, who evidently did the shooting, was observed by this witness to run to the big car which started before he could board it and went rapidly up Rodriguez street. The murderer disappeared through a vacant lot adjoining a church across the street in the direction of Third street, which parallels Rodriguez street. It is significant that on Third street, and near the point where said party would come through from Rodriguez street, there was found a revolver and a number of cartridges. The revolver proved to be the Colt Police Positive Special which had been sold in San Jose on February 15th, just one week prior to the homicide, the payment for which had been guaranteed by Sam Kee. The cartridges were 38 specials, the bullets of which weigh 158 grains. Two of the bullets which caused the death of Lam Gee were weighed and proved to be 126 and 154 grains. The weight would indicate that both were fired from a 38-caliber revolver. The surgeon who made the autopsy on the body testified that the wound made by the other shot was of the same character and probably made by the same size pistol. Approximately 2 hours and 25 minutes after the homicide the Hudson car heretofore referred to, occupied by Munoz and Vacarella, was stopped outside of San Jose by the sheriff of Santa Cruz county and certain of his deputies. At this time the said occupants stated they had not been in Watsonville but were coming from Salinas. They were allowed to go to their homes in San Jose. Later they admitted having been in Watsonville, but insisted they had left on the afternoon of the 22d.

As to the defendants Vacarella and Munoz, a review of the record would seem to establish beyond a doubt that they were the parties guilty of the homicide, there being a clear trail from the time they left San Jose until their return on the 22d or early hours of the 23d, every detail of their movements cementing the facts which, when woven together, make a conclusion as to their guilt irresistible. In view of the fact that practically the only question presented on this appeal, as to them, is the sufficiency of the evidence to sustain the conviction, we deem a further discussion as to their connection with the case unnecessary.

[2, 3] The contention is made that data concerning certain telephone calls was improperly received in evidence. In all but two instances this data was supplied from the

records of the telephone company, taken in the ordinary course of business. This went to show the name and location of the party making the call and the name and telephone number at the destination of said call. It was only to show the communication between these points that the evidence was admitted. We see no reason why the records of the telephone company, taken in the regular course of business and with its peculiar method of receiving payment therefor and charging the revenue accordingly, especially to long distance calls, where it is necessary for the operator to make a written record thereof, should not be allowed in evidence. Sullivan v. Kuykendall, 82 Ky. 483, 56 Am. Rep. 901; Wolfe v. Missouri Pacific Ry. Co., 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331. The two instances where the conversation over the telephone was allowed was that overheard by those present at the garage at the time the Marmon car was being repaired. This was direct evidence of the statements and conversation of the defendants Vacarella and Munoz and was undoubtedly admissible against them; the only question being as to whether or not it was admissible against Sam Kee. It would clearly be so admissible for the reason that Sam Kee's connection with the conspiracy is established by other proof and hence the acts and declarations of Vacarella and Munoz in connection with these telephone calls and conversations would be admissible against their coconspirator. People v. Collins, 64 Cal. 293, 30 Pac. 847; People v. Oldham, 111 Cal. 648, 44 Pac. 312; People v. Schmidt, 33 Cal. App. 445, 165 Pac. 555.

As to the defendant Sam Kee the contention is raised that the evidence is insufficient for his conviction. The question of motive is raised by appellants, the argument being that there would seem to be no good reason for the defendants Munoz and Vacarella taking the life of Lam Gee. This motive is supplied by the connection of Sam Kee with the Hip Sing Tong, with these two defendants and with this killing showing that a potent reason not connected with Vacarella and Munoz was behind the homicide. It is a conceded fact that there was a tong war raging and that the members of the tongs involved departed from the enemy's camp in these two towns. It is also a fact that Lam Gee appeared to be totally unafraid to remain in Watsonville, indicating that he had nothing to fear from the Bing Kong Tong. There was testimony to the effect that Lam Gee was a member of the Bing Kong Tong and generally known to be such in Watsonville. There was also some evidence that he was a member of the Hip Sing Tong, but this testimony as to the deceased's membership in the Hip Sing Tong was vague and some of it went back thirteen to fifteen years and went merely to his presence on one or more occasions in the clubhouse of said tong in San Francisco. This testimony was given by three Chinese living at 7 Dupont street, San Jose, members of the Hip Sing Tong, one of whom was the defendant Sam Kee himself and another of whom had departed from Watsonville when the "war" started. There is abundant evidence to show that the death of Lam Gee resulted from the activities of the Hip Sing Tong, between which and the defendants Munoz and Vacarella a close connection was established. As to the connection of the defendant Sam Kee with a conspiracy to take the life of Lam Gee, it must be remembered that he was one of the leaders of the Hip Sing Tong; that it was he who obtained the firearms and ammunition, among which was the pistol later found at Watsonville; that he supervised the purchase of the Marmon car, was present at the purchase of and guaranteed payment for the Hudson; the phone calls of Vacarella and Munoz came to his headquarters, and on him the receipt for the money sent to Albert Munoz in Watsonville was found, several days after the homicide. Taking the record as a whole, it would seem clear that a conspiracy existed to take the life of Lam Gee, Munoz and Vacarella carrying the details into execution, and at every crucial point we find the defendant Sam Kee in charge of the details of providing the materials, appliances, and facilities for the commission of the crime.

The judgment is affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

60 Cal. App. 688

MORROW v. MORROW. (Civ. 4072.)

(District Court of Appeal, Second District, Division 1, California. Feb. 5, 1923.)

1. Divorce 🔑184(6)—Trial court's findings of fact conclusive on conflicting evidence.

Where the evidence is sharply conflicting, the trial court's decision must be taken as conclusive of the facts.

2. Divorce 🔑130—Finding against plaintiff on issue of cruelty supported by evidence.

A general finding that defendant husband had not been guilty of extreme cruelty toward plaintiff and had not caused her bodily injury or mental suffering *held* sustained by the evidence, though a particular finding as to the husband's correspondence with another woman was unwarranted; there being no evidence that such correspondence caused plaintiff any mental suffering.

3. Divorce 🔑294—Evidence held to warrant award of custody of children to husband on denial of divorce to either party.

Notwithstanding the court denied a divorce to either party, it was authorized, under Civ.

Code, §§ 138 and 246, to award the custody of children to the husband, and such order was proper where the evidence showed that the husband had always been a considerate and affectionate father, had maintained the family home and business, and had never denied the plaintiff wife a voice in the business or a place in the home; there being nothing in the order preventing her from enjoying the society of the children should she desire to return to the established home.

4. Divorce ⚷312—Where record silent as to conference between judge and children, it will be presumed that information disclosed assisted court in making order.

In a divorce action, where the court denied relief to either party, and, before awarding custody of the children to the husband, talked with the two elder children, aged 13 and 9, respectively, in his chambers, the court will assume, where the record is silent as to what passed at the interview, that the trial court gained information which assisted him in determining the order which he later made in the case.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Divorce action by Alice Adelia Morrow against William Henry Morrow, in which the defendant brought cross-action for divorce. From judgment denying either party a divorce and awarding to defendant custody of minor children, plaintiff appeals. Affirmed.

George D. Blair, of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

JAMES, J. This action was brought by the plaintiff for the purpose of securing a decree of divorce. The defendant filed a cross-complaint. Upon trial being had the court denied the prayers of both, except that the judgment included an order awarding the custody of the minor children, who were at the time of the ages of fourteen, nine, and four years respectively, to the defendant. The eldest child was a girl. The two others were boys.

[1] Upon this, the plaintiff's appeal, the contention is first made that the evidence does not sustain the findings. While the findings fall far short of being models of clarity and conciseness, this contention is completely answered by the statement, which is abundantly borne out by the record presented, that there was a sharp conflict in the evidence, from which it follows that the trial court's decision must be taken as conclusive of the facts. The conflict was so absolute and decided as to leave no room whatsoever for the argument that the evidence opposed to that produced by the plaintiff was not of a substantial character.

[2] The parties to the action were married at Seattle, Wash., in March, 1906. They afterwards removed to Vancouver, B. C., where they established a laundry and by their joint efforts built up a lucrative business. Plaintiff testified that in 1919 the laundry plant was appraised at a value of $112,000, and that the company had acquired subsequent to that time additional property valued at about $35,000. Prior to the date when the plaintiff came to California, as will presently appear, she owned, and has since owned, 50 per cent. of the stock of the laundry company, and her husband has owned the remaining 50 per cent. As secretary and treasurer of the corporation, the wife, prior to coming to California, drew a salary of $300 per month. During the latter part of the time that the couple resided together in Vancouver there were domestic difficulties which the husband asserted were due to the fact that his wife had become infatuated with a man named Hastings, who was five years her junior. Hastings had resided with his wife in the house immediately adjoining that occupied by the Morrows. The plaintiff admitted that in a suit brought against her by Mrs. Hastings she (plaintiff) was accused of having alienated the affections of Mrs. Hastings' husband. At any rate, the domestic difficulties of the Morrows reached a climax in April, 1920, when the defendant agreed that the plaintiff might come to California with the three children for a period of one year. An agreement was drawn up in which it was provided that during that year each of the parties was to draw from the laundry business the sum of $300 per month as salary, and that the expenses of education and maintenance of the children while they were absent from the home should be provided from the returns of the same business, it being expressly stated that the consent of the husband to the taking of the children to California should be without prejudice to "the rights of the parties to the custody of the children." Certain other moneys were agreed to be paid to the plaintiff by the husband, including the rental of a certain house in Vancouver and the price of a motorcar belonging to the wife. Immediately after the making of this agreement the plaintiff came to Los Angeles with the children, where she remained, except for a brief visit to Vancouver after an absence of a year. The year fixed in the agreement referred to having expired, she commenced this action for divorce. She charged that her husband had, several years prior to the bringing of the action, been addicted to the inordinate use of intoxicating liquors. She further charged that he had been guilty of acts amounting to extreme cruelty. She charged that the latter were such as to cause both physical and mental suffering; that on several occasions he had struck her, causing bruises; that he had attempted to indulge in lewd practices; that he had carried on a correspondence with a woman named Lou

---

Finney, who resided in San Francisco, and had visited the said Lou Finney and had planned to take a trip to Honolulu with the latter. Appellant has advanced the particular contention that the court's finding that the defendant did not correspond with Lou Finney or visit the said Finney at San Francisco is not sustained by the evidence. The court first found in general terms that the husband had not been guilty of extreme cruelty toward the plaintiff, and that he had not caused her bodily injury or mental suffering. Defendant was called to the witness stand and was shown two letters, one dated March 3, 1921, and the other dated April 8, 1921, which letters were affectionate in tone. Defendant admitted that he had received the letters from Lou Finney, but was not asked whether he had ever visited the said Lou Finney or whether he had ever planned to make a trip with her to Honolulu, and there was no other evidence introduced upon that subject. We observe that the letters were apparently written, according to their date, during the year that the plaintiff was in California pursuant to the written agreement entered into between her and her husband. While the letters appear to have been produced from the hands of her counsel, plaintiff did not testify or show as to when she had first seen them, or as to what effect the knowledge of their contents produced upon her. Under the admission of the defendant that he had received the letters of Lou Finney, the particular finding against the fact that there had been communication between defendant and the said Finney was perhaps not strictly accurate. But this defect in the findings must be considered as nonprejudicial to plaintiff, for the reason that, under the evidence, had the court particularly found the fact to be that the correspondence had been carried on as alleged, it could not have properly found that any mental suffering was caused to the plaintiff by reason thereof. Hence the general finding that such suffering had not been caused was fully sustained by the evidence.

On his part the husband introduced evidence showing that for a considerable period of time prior to the date when his wife left Vancouver she had been guilty of acts of great familiarity with Hastings, and it appeared in evidence that Hastings arrived in Los Angeles a little in advance of Mrs. Morrow, and that the two had used the same office for purposes of business and had been in each other's company on frequent occasions.

[3] The court was authorized to make the order giving the custody of the children to the defendant (Civ. Code, §§ 138 and 246; Ex parte Gordan, 95 Cal. 377, 30 Pac. 561), notwithstanding that a divorce was denied to both parties. There was evidence that the defendant had always been a considerate and affectionate father to the children. The home of the family and the business of both of the parties was located in Vancouver. The wife had never been excluded from the home nor from the support there which the husband was required to furnish her. A voice in the management of the business was not denied to her, nor was there denied her a right to receive a considerable salary so long as she would consent to perform the not onerous duties of secretary and treasurer of the company.

[4] The trial judge, moreover, upon consent of the parties, talked with the two elder children in his chambers before making the order relative to the custody, and, while the record does not disclose what passed at that interview, we must assume that the court, by that interview, gained information which assisted him in determining upon the order which he later made in the case. There is nothing in the order of the court which in any way serves to prevent the plaintiff from enjoying the society of her children should she desire to return to the established home. Further than this, it may be observed that this order is subject to modification at any time, upon a reasonable showing, and, even though the parties remain separated, the wife, should she chose to become a resident of the city where her husband resides, might reasonably expect to have such conditions added to the order as would enable her to share in the custody of the minors.

The judgment and the order disposing of the custody of the minor children of the parties are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

---

60 Cal. App. 686

POINDEXTER et al. v. LOS ANGELES STONE CO. et al. (Civ. 3975.)

(District Court of Appeal, Second District, Division 1, California. Feb. 5, 1923.)

Judgment ⚷780(2)—Lien of judgment not created against equitable interest.

Under Code Civ. Proc. § 671, providing that, at the docketing of a judgment of the superior court, it becomes a lien upon the real property of the judgment debtor, legal interests in real property only are affected by the judgment lien, and the docketing of a judgment had no effect to establish a lien upon interests created by an unrecorded trust agreement.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action to quiet title by R. W. Poindexter and another against the Los Angeles Stone Company and others. Judgment for plaintiffs, and the defendants appeal. Affirmed.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Newlin & Ashburn, Charles L. Chandler, and J. W. McKinley, all of Los Angeles, for appellants.

W. C. Petchner, of Los Angeles, for respondents.

JAMES, J. Plaintiffs secured judgment quieting title to certain real property. The appeal taken by defendants presents the question as to whether a judgment of a superior court, when duly docketed, creates a lien against the interest of a cestui que trust in real property.

In 1916 plaintiffs were the record owners of the property, holding, under the terms of the conveyance to them, the whole title as joint tenants with right of survivorship. As a matter of fact, one Corbaley and one Emerson were owners of certain undivided interests in the property, which interests were described in an unrecorded trust agreement, executed by all of the persons concerned. It was under the terms of this agreement that plaintiffs here became trustees for Corbaley and Emerson, with the necessary result that the legal title rested in plaintiffs, while Emerson and Corbaley possessed equitable interests in the proportions which were described in the trust agreement. Three judgments were obtained against Corbaley by the defendants, or assignors of certain of them, late in the year 1916. In 1917 the plaintiffs Poindexter brought suit on a promissory note owing them by Corbaley and obtained judgment. Acting under their direction, the sheriff made a levy, first by attachment, and later under writ of execution, upon the interest of Corbaley in the real property, and made sale of that interest to plaintiffs, who in due time received a sheriff's deed.

Appellants contend that liens of their judgments attached to the interest of Corbaley in the property immediately upon the judgments being docketed, and that the attachment and sale made under the judgment subsequently obtained by the plaintiffs were subject to the liens of respondents' judgments. If the lien of a judgment attaches to equitable as well as legal interests in real property, then appellants are right in their contention. Section 671 of the Code of Civil Procedure provides that at the time a judgment rendered by the superior court is docketed—

> "it becomes a lien upon all the real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterward acquire, until the lien ceases."

Interests of an equitable nature are generally held not to be affected by the lien of a judgment. Reeves on Real Property, vol. 2, p. 1572; Tiffany on Real Property, vol. 2, § 570, p. 1308; Black on Judgments (2d Ed.) vol. 1, § 433, p. 674. It is true that execution may be levied against equitable as well as legal interests in real property—this because the statute relating to executions expressly provides that a sale may be made of both real and personal property "or any interest therein" not exempt by law. The case of Belieu v. Power (Cal. App.) 201 Pac. 620, reviews the authorities and announces a conclusion which we think sustains plaintiffs' position. The Supreme Court denied a rehearing in that case; hence the decision may be considered as authority. Irrespective of the contrary holding in a few other states, our own decisions indicate that the construction adopted by our courts, of the language used in section 671 of the Code of Civil Procedure, requires that legal interests only in real property be considered as affected by a judgment lien.

Having disposed of the main law question on its merits, we need not examine the argument of respondents that, by reason of the lapse of time fixed by the Code as measuring the life of a judgment lien, the question has become moot and not possessed of remaining interest.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

60 Cal. App. 722

ARGUS ENTERPRISES, Inc., v. CALMY et al. (Civ. 4066.)

(District Court of Appeal, Second District, Division 1, California. Feb. 8, 1923.)

Appeal and error ⟹194(4)—Objection to authority to enter judgment on cross-complaint first made on appeal too late.

Where plaintiff met defendants' amended cross-complaint by demurrer which was overruled and by motion to strike certain parts and thereafter proceeded to trial without any suggestion that plaintiff was objecting to trial as presenting a controversy relating to the cross-action, and no such objection having been brought to the attention of the trial court at any stage of the proceedings, an objection on appeal that court was without authority to render judgment for defendants on their cross-complaint is made too late.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by the Argus Enterprises, Incorporated, against Henry Calmy and another. From a judgment for defendants on their cross-complaint, the plaintiffs appeal. Affirmed.

Haas & Dunnigan and J. J. Wilson, all of Los Angeles, for appellant.

Meserve & Meserve, of Los Angeles, and Joseph E. Bien, of San Francisco, for respondents.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

CONREY, P. J. This is an appeal by the plaintiff from a judgment rendered against it upon a cause of action stated in the cross-complaint of the defendants. The sole ground for reversal now urged on behalf of the plaintiff is that the court erred in overruling plaintiff's demurrer to the amended cross-complaint. The argument rests upon that part of the demurrer which alleged that said amended cross-complaint "does not contain facts sufficient to constitute a cause of action." It is not claimed that said cross-complaint did not state a cause of action except in this, that the case presented by the cross-complaint is in no manner related to the subject-matter of the plaintiff's action, and therefore that the cross-action does not lie in this case.

For the purposes of this decision we shall assume that, as against objections properly urged, the right of the defendants to proceed by cross-complaint should have been denied. But upon the record now before us we think that this objection really appears for the first time on this appeal from the judgment.

Although it does not appear that the Supreme Court has ever directly stated that a general demurrer to a cross-complaint upon the ground that it does not state facts sufficient to constitute a cause of action is sufficient to raise the question of the right to file the cross-complaint, yet it does appear that a number of cases have been decided upon the assumption that the question could be so raised. In three cases judgments were reversed directly upon the ground that the demurrer had been improperly overruled where the case presented by the cross-complaint was not a proper case for cross-complaint. Demartin v. Albert, 68 Cal. 277, 9 Pac. 157; Silver Creek, etc., Co. v. Hayes, 113 Cal. 142, 45 Pac. 191; Yorba v. Ward, 109 Cal. 107, 38 Pac. 48, 41 Pac. 793. However, in the Silver Creek, etc., Co. Case the Supreme Court held that the cross-complaint did not state a cause of action at all, as well as that it did not present a proper case for a cross-complaint. And in the Yorba Case the plaintiff's objection to the cross-complaint was presented by a motion to strike it out, as well as by demurrer. As far as we have been able to discover, Demartin v. Albert, supra, is the only decision wherein (the record showing a general demurrer that the cross-complaint did not state facts sufficient to constitute a cause of action) the judgment was reversed solely upon the ground that "the cross-complaint was not filed in the proper case," and that the court erred in overruling the demurrer.

In the later case of Riverside Heights, etc., Co. v. Riverside Trust Co., 148 Cal. 457, 469, 83 Pac. 1003, 1008, the question now under consideration was disposed of as follows:

> "The appellant appeared to the cross-complaint, filed a demurrer and answer thereto, and afterward went to trial, not only without objection to the propriety of the cross-complaint as a pleading in the action, but in pursuance of a stipulation to submit for decision a particular question arising out of its allegations. It is too late to object in this court for the first time that the cross-complaint was improperly filed and did not come within the scope of the provisions of section 442 of the Code of Civil Procedure."

In this present action the plaintiff, at the same time when it filed its demurrer, also filed a notice of motion to strike from the amended cross-complaint certain parts thereof. The motion was presented and was granted to the extent that one portion of the cross-complaint was stricken out. When the case was called for trial, statements were made by counsel indicating that the action was to be tried on the cross-complaint. In response to the court's remark, "Then the original complaint and original cross-complaint stand?" counsel for appellant responded, "There is an amended cross-complaint." Thereupon counsel for appellant referred to his motion to strike, and brought to the attention of the court the particular part of the motion that had been granted, closing his statement with the words, "So the rest of it stands." The case then proceeded to trial without any suggestion that the plaintiff was objecting to trial of the action as presenting a controversy relating to the cross-action. It may fairly be inferred that this objection was never brought to the attention of the trial court at any stage of the proceedings. It is not now claimed that on the merits of the case (aside from this single question of being properly in court), the cross-complainants' right of recovery was not fully established. Under these circumstances we think that the objection now comes too late.

The judgment is affirmed.

We concur: JAMES, J.; HOUSER, J.

60 Cal. App. 747

PEOPLE v. ANDERSON. (Cr. 648.)

(District Court of Appeal. Third District, California. Feb. 10, 1923.)

Constitutional law 🔑70(3)—Court bound by law passed by Legislature though it creates hardship.

Medical Practice Act, § 17, as amended by St. 1917, p. 114, § 11, permitting the prosecution of persons practicing medicine without a license, is not a law made by the court, and the court is bound by it, although it creates a hardship on a certain class of practitioners; resort to the Legislature or to the people being the only remedy.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

C. A. Anderson was convicted of practicing medicine without a license, and appeals. Affirmed.

L. J. Maddux, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. [1] The case was on the January calendar for oral argument, but no one appeared to represent appellant. His counsel, however, had communicated with the clerk of this court, asking a reasonable time in which to file a written argument. By an order of court he was granted 10 days for that purpose. More than 30 days have expired, and no brief has been filed. However, we have examined the record and find no error therein. It was charged in the information that the defendant—

> "on or about the 5th day of December, 1921, * * * did then and there willfully, wrongfully, and unlawfully practice, attempt to practice, and advertise and hold himself out as practicing a system or mode of treating the sick and afflicted in this state without having at the time of so doing a valid unrevoked certificate from the state board of medical examiners of the state of California."

The offense was sufficiently described in contemplation of section 17 of the State Medical Practice Act (Stats. 1917, p. 114), and the evidence was sufficient to justify the conviction. Indeed, at the time judgment was pronounced, the learned counsel for appellant admitted that his client had practiced his system of treatment without a license from the duly authorized authorities, but he claimed that said board of medical examiners had acted capriciously and arbitrarily in denying appellant a certificate.

[2] But if such consideration might be regarded in a proceeding of this kind it is sufficient to say that there was no evidence to that effect and such assertion did not, of course, afford any ground for setting aside the verdict. It is very true, as stated by the learned trial judge:

> "This court or no other court made the law. That is a matter, if the law is wrong, if it naturally creates a hardship upon a certain class of practitioners resort to the Legislature or to the people is the only remedy; the courts cannot correct it. We are simply bound by the law, and only perform our duty in accordance with the law as we find it."

We may say, in brief, that the defendant's rights were all safeguarded by the lower court, the trial was eminently fair, the jury was fully and correctly instructed, and we discover no reason for interfering with the verdict.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

---

60 Cal. App. 696

STURTEVANT v. K. HOVDEN CO.

(Civ. 4399.)

(District Court of Appeal, First District, Division 1, California. Feb. 6, 1923.)

Attachment 🔑6—Writ will not lie in action by buyer for seller's breach of implied warranty "contract for the direct payment of money."

Where a buyer suffered loss because goods for which he paid were not as specified, an action by his assignee against seller for breach of an implied warranty is not upon contract for the direct payment of money so as to justify an attachment under Code Civ. Proc. § 537, subd. 1, upon any theory of failure of consideration or of claim for money had and received.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Contract for Payment of Money.]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by J. F. Sturtevant against the K. Hovden Company. From an order dissolving an attachment, plaintiff appeals. Order affirmed.

Thomas, Beedy & Lanagan, of Los Angeles, for appellant.

Fred A. Treat, of Monterey, and Wm. C. Bacon and Redman & Alexander, all of San Francisco, for respondent.

TYLER, P. J. Appeal from an order dissolving an attachment.

The sole question here involved is whether or no the two causes of action set forth in the complaint, or either of them, is of such a character as to warrant the issuance of an attachment. The first cause of action is based upon the theory of rescission and rejection, the complaint, in substance, alleging that plaintiff's assignors purchased from defendant in San Francisco certain canned apricots of specified grades and standards, to be shipped to New York. The goods so purchased were fully paid for. Upon arrival at their destination it was discovered, so it is alleged, that they were not up to standard. Plaintiff's assignors registered an objection to the goods, but subsequently sold the same. Upon such sale they did not receive the amount of the contract price, and, as an additional loss, they were subjected to certain expenses, which brought the amount of their alleged damage to the sum of $2,946.44. The second cause of action sets forth the same state of facts, but under it plaintiff seeks recovery, not upon the theory of rescission, but upon the basis of a breach of an implied contract of guaranty.

An attachment was issued in the action, which was subsequently vacated and set aside by the trial court upon its conclusion that the action was one in which the application of the attachment statutes could not be invoked, and the plaintiff appeals from the order made by the trial court in conformity with such view. It is claimed by him that an analysis of the two causes of action as pleaded will show that they are of such a character as to support an attachment. It is argued that as to the first it sets forth a simple cause of action by a purchaser who has been tendered something different from that which he paid for, and that under such circumstances he is entitled to recover back the money so paid and advanced upon a consideration which has wholly failed, and that therefore the first count is nothing more than an action for money had and received.

With reference to the second count it is contended that the statute equally applies, for the reason that the right of appellant to the remedy for a breach of warranty arises not upon the breach by his vendor of the contract of sale, but upon his separate, distinct, and collateral agreement of warranty, from which the law implies that the vendor upon a breach thereof is deemed to agree to compensate his purchaser by a direct payment of money in case the goods sold are not as represented. Appellant concludes from these premises that, whatever the foundation of his right may be, whether based upon rescission as set forth in his first cause of action, or upon breach of warranty as recited in the second, in either aspect of the case he is entitled to the benefit of the attachment statutes. Respondent, on the other hand, in support of the order, insists that an examination of plaintiff's complaint shows it to be in substance nothing more than an action to recover damages for breach of a contract, and that it is in no sense one for the direct payment of money.

It is obvious that the appellant is seeking to bring the transaction within the purview of subdivision 1 of section 537 of the Code of Civil Procedure, which limits the issuance of an attachment upon contracts to those made for the direct payment of money where, as here, defendant is a resident of the state. It is not claimed, nor could it be, that plaintiff's action is based upon an express contract for the direct payment of money. Whatever rights, therefore, he may have to the remedy here sought would have to arise from an implied contract on the part of defendants to pay under the circumstances here presented.

We do not deem an extended discussion of the case necessary, as we are of the opinion that the questions here involved have been set at rest by the decisions of the appellate courts of this state. In Willett & Burr v. Alpert, 181 Cal. 652, 185 Pac. 976, the rule is laid down that, where an express contract has been fully performed on plaintiff's part, and nothing remains to be done under it but the payment of money by defendant, which is nothing more than the law would imply against him, plaintiff may declare in indebitatus assumpsit. Where this common count will lie the law implies, as a fiction, which cannot be controverted, a promise or contract to pay, in which case some of our decisions go so far as to sustain the issuance of an attachment upon the strength of the promise so implied. But, on the other hand, no such promise or contract will be implied unless a common count will lie. Accordingly, it is there held that, in an action by a vendee upon a contract for the sale of personal property, against the vendors, to recover damages for the failure of the latter to deliver the full quantity of property claimed to be called for by the contract, a delivery of part of the quantity having been made, and the vendee having paid the full purchase price, as here, he is not entitled to a writ of attachment, since the action is not upon a contract, express or implied, for the direct payment of money.

So, also, in California Packing Corporation v. Kato, 45 Cal. App. 491, 188 Pac. 57, it was held that, in an action to recover damages by reason of a breach of contract to sell certain goods, there is no contract for the direct payment of money nor any implied contract unless the law creates the fiction of one for the purpose of allowing an action upon a common count, which is never permitted in actions such as this based upon an obligation to do something other than pay money. Of course, where it appears that there has been a total failure of consideration, so as to entitle the vendee to recover the purchase price on that ground, a different situation is presented. Here, however, appellant's assignors realized the sum of $4,279.17 upon the sale of the property. The action, therefore, cannot be said to be one to recover money paid upon a contract the consideration of which has entirely failed. In such a case, as is pointed out in Willett & Burr v. Alpert, supra, where there is neither an entire failure of consideration nor a rescission of the contract so as to entitle the vendee to recover back his money, a plaintiff is limited to his remedy for damages, in which case the action does not proceed upon any theory of the defendant having received money which he should return to plaintiff, and which the law would imply a promise on his part to return so as to permit indebitatus assumpsit to lie. It is there stated that, if this distinction between actions for the recovery of money paid because of failure of consideration and actions for damages be not sound, it would follow that indebitatus assumpsit would lie in every case of a breach of contract, regardless of whether or no the contract be one for the direct payment of money, the effect of which would be to wipe out the limitation imposed by the subdivision of the attachment statute in question.

Counsel for the appellant seek to draw a distinction between the cases here cited and the instant one. It is argued that in both of those actions the obligation breached was not one to pay money, but to deliver goods, and that in neither was the defendant under any obligation, express or implied, to pay money. The reason for the denial of the application of the attachment statutes in those cases is no more persuasive than in the instant case. In the cases cited there was a breach of warranty of quantity; here one of quality. We see no distinction in principle.

From what we have said it follows that the order appealed from should be, and is hereby, affirmed.

I concur: RICHARDS, J.

---

60 Cal. App. 742

PEOPLE v. SANDERS. (Cr. 1096.)

(District Court of Appeal, First District, Division 2, California. Feb. 9, 1923.)

1. Criminal law ⚷1110(6)—Suggestion of diminution of record to include further transcript from record of lower court denied where matter not included in original application.

Where, after conviction, probation before sentence was granted, which probation was after hearing revoked and sentence imposed, and defendant then gave notice of appeal from both the final order of conviction and the order revoking probation, stating as grounds therefor matters relating solely to the proceedings on motion to revoke the probation, and asked for a transcript of the reporter's notes of all proceedings on such motion, *held*, that the appellate court could not thereafter grant a motion for diminution of the record praying for an order for the transcript of the record of the trial resulting in defendant's conviction, since Pen. Code, § 1247c, relating to notice of appeal and transcript is mandatory and provides "no further transcription shall be ordered * * * unless the application therefor was included in the original application made to the trial court."

2. Criminal law ⚷1071—Appeal from conviction held dismissed for failure to specify any grounds of complaint.

Where an appeal is sought to be taken from a judgment of conviction and from an order revoking probation, where the grounds of appeal assigned relate only to the proceedings on motion to revoke the probation, *held*, that the appeal from the judgment of conviction must be dismissed.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Clinton Sanders was convicted of a felony, and he appeals from the judgment of conviction and from an order revoking probation. On motion for diminution of record, motion denied, and appeal from judgment of conviction dismissed.

Ernest B. D. Spagnoli, of San Francisco, and Harold L. Newman and Walter F. Lynch, both of Stockton, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

LANGDON, P. J. This matter comes before us upon a suggestion of diminution of record made by the appellant. The situation presented is this: The appellant was convicted of a felony. He was granted probation before being sentenced. Later, upon motion of the probation officer, and after a hearing before the trial judge, the probation was revoked, and the defendant was then sentenced to be confined in the state penitentiary at San Quentin. Oral notice of appeal from the order revoking probation was given in open court and, later, and within the time allowed by law, written notice was given of an appeal from the final judgment of conviction and from the order revoking probation. The grounds of appeal stated in this written notice were as follows:

> "(1) Errors of the court in admitting in evidence testimony on the hearing of motion to revoke probation; (2) proceedings on motion to revoke probation were unfounded in matter of law for the reason the defendant had no notice served upon him of the hearing thereof; (3) Probation was revoked in an extrajudicial proceeding not authorized by law, and was based upon hearsay testimony which was objected to at the hearing."

The appellant then asked for a transcription of the reporter's notes of all proceedings on motion to revoke probation.

The suggestion for diminution of record made to this court prays for an order for the transcription of the portion of the record containing the charge to the jury and the entire proceedings at the trial of the defendant in the superior court, which resulted in his conviction.

[1] Section 1247 of the Penal Code provides:

> "Upon an appeal being taken from any judgment or order of the superior court * * * to a District Court of Appeal * * * the defendant * * * must, within five days, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal is wholly ineffectual and shall be deemed dismissed. * * *"

The above-quoted section of the Penal Code is mandatory. Rhodes v. Sargent, 17 Cal. App. 54, 118 Pac. 727; People v. Ali, 38 Cal. App. 544, 176 Pac. 883. The appellant's statement of his grounds of appeal relates solely to the proceedings on motion to revoke probation, and his application for a transcript of the record specifies only proceedings in relation to that matter. Section 1247c of the Penal Code provides that "no further transcription shall be ordered upon the suggestion of the appellant unless the application therefor was included in the original application made to the trial court."

It follows, necessarily, that the motion for diminution of record must be denied, and it is so ordered.

[2] It also appears that there has been no effectual appeal from the final judgment of conviction, because of appellant's failure to specify in any way the grounds of such appeal.

The appeal from the final judgment is dismissed.

We concur: NOURSE, J.; STURTEVANT, J.

---

61 Cal. App. 63

PEOPLE v. PETERSON et al.

(Cr. 909.)

(District Court of Appeal, Second District, Division 2, California. Feb. 23, 1923.)

Burglary 🔑**41(1)—Evidence held sufficient.**

Evidence *held* to sustain conviction of burglary.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

H. Peterson and James De Voore were convicted of burglary, and appeal. Affirmed.

Dorris & Henderson, of Bakersfield, for appellants.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. The appellants, H. Peterson, and James De Voore, were convicted of burglary. Together with B. F. Carrell and E. C. Lierly, they were jointly charged with the burglary of a warehouse in the city of Bakersfield. Lierly pleaded guilty. The three others were tried and convicted. Peterson and De Voore appeal from the judgment. The corpus delicti was proved beyond peradventure. But appellants claim that, aside from the testimony of their alleged accomplices, there is no evidence tending to connect them with the crime. The point lacks merit.

Early in the morning of March 12, 1922, the warehouse was entered and goods were stolen and carried away. One witness, a man who lived near the scene of the burglary, testified that at about the hour of 12:30 a. m. he saw four men with a Ford truck, which was backed up near the warehouse. The witness saw goods loaded on the truck. Two of the four men he identified as Carrell and Lierly. It is a reasonable inference, therefore, that at least four men participated in the crime. At about 2:25 o'clock of the same morning an officer discovered De Voore in the warehouse crouched behind a table as though endeavoring to conceal himself. De Voore vouchsafed no explanation for his presence in that place at that hour, or for his apparent attempt at concealment. The evidence was sufficient to connect him with the crime as one of the perpetrators.

The truck which was used to remove the stolen goods belonged to the defendant Carrell, who lived about a block and a half from the warehouse. At about 4 o'clock on the morning of the burglary the truck was found on Carrell's premises. Its radiator was still warm. The three men who discovered the truck testified that they looked through the back door of Carrell's house into the kitchen, and that they saw there five trunks piled upon the floor. The trunks and their contents were a part of the stolen property. Each of these three witnesses, peeking through the door, saw a man stooping over the trunks. Presently one of them knocked at the door, which, after the expiration of about two minutes, was opened by Peterson, who was dressed. The latter made no attempt to explain his presence there at that time. These circumstances sufficed to connect Peterson with possession of the stolen property, and such possession, under all the circumstances, was sufficient to warrant the inference that he was one of the four who had burglariously entered the warehouse.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

61 Cal. App. 46

PEOPLE v. CLARK. (Cr. 911.)

(District Court of Appeal, Second District, Division 2, California. Feb. 20, 1923.)

1. Witnesses 🔑337(3)—Defendant testifying may be impeached as other witnesses.

Where the defendant in a prosecution for crime becomes a witness for himself, he is subject to impeachment in the same manner as any other witness, and testimony attacking his general reputation for truth, honesty, and integrity is properly admissible.

2. Criminal law 🔑752½—Motion to dismiss for insufficiency of evidence at close of state's case not authorized.

A motion at the close of state's case for a dismissal of the information charging robbery on the ground that the evidence fails to show defendant guilty of the crime charged is properly denied as not within the provisions of Pen. Code, § 1382, fixing the grounds upon which such a motion may be made.

3. Robbery 🔑26—Refusal to dismiss warranted by evidence.

Evidence *held* sufficient to warrant the trial court in refusing to dismiss an information for insufficiency of the evidence, even if such motion be considered as one under Pen. Code, § 1118, asking a direction of acquittal.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

J. B. Clark was convicted of robbery, and he appeals. Affirmed.

Morris & Rosin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

WORKS, J. This is an appeal from a judgment of conviction of the crime of robbery and from an order denying the motion of defendant for a new trial.

[1] At the trial the court, over the objection of appellant, admitted the testimony of certain witnesses concerning the general reputation of appellant for truth, honesty, and integrity. Appellant contends that, as he offered no evidence of his character, the trial court was in error in admitting the testimony in question. In making this point appellant overlooks the distinction between the status of a party to an action strictly as such, and the position occupied by a party when he becomes a witness. Here appellant took the witness stand in his own behalf, and the evidence to which objection is made was admitted after he had done so. The exact point now urged by appellant was passed upon by us in a recent case.

"From a very early date it has been held time and again, that when the defendant in a criminal case testifies for himself * * * he, for the time being, removes from himself the character of a defendant, and takes on that of a witness. He becomes 'subject to the same rules for testing his credibility before the jury, by impeachment or otherwise, as any other witness,' and may be impeached by testimony that his general reputation * * * for truth, honesty, and integrity is bad." People v. Bannon (Cal. App.) 209 Pac. 1029.

[2, 3] At the close of the case made by the people appellant moved the trial court to dismiss the information under which he was charged, upon the ground that the evidence failed to show that he was guilty of robbery. The motion was denied, and appellant assigns the ruling as error. The ruling was proper, as the motion did not come within the provisions of Penal Code, § 1382, fixing the grounds upon which such a motion may be made. If we view the motion as one asking the court to advise the jury to acquit, under Penal Code, § 1118, although we do not decide that it can be so regarded, it is enough to say that the evidence of the people was such that the court could not have given the jury that advice.

Judgment and order affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

60 Cal. App. 718

JULIUS LEVIN CO., Inc., v. COMMERCIAL CENTRE REALTY CO. (Civ. 4362.)

(District Court of Appeal, First District, Division 2, California. Feb. 8, 1923. Hearing Denied by Supreme Court April 9, 1923.)

1. Contracts 🔑305(1)—Negotiations for modification of contract waived performance within stipulated time.

The performance of a contract by defendant to erect a building on a lot owned by defendant adjoining that owned by plaintiff within a time specified is waived by negotiations between the parties for the purchase of that lot by plaintiff, which continued during the entire time specified for the erection of the building, and, if thereafter plaintiff wished to stand on the terms of the contract, plaintiff was bound to give defendant timely notice.

2. Appeal and error 🔑1068(4)—Error in instructions as to damages is immaterial where jury found for defendant.

Error in instructions as to the measure of plaintiff's damages is immaterial, where the jury rendered a verdict for defendant.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the Julius Levin Company, Incorporated, against the Commercial Centre Realty Company, to recover damages for breach of contract. Judgment for defendant, and plaintiff appeals. Affirmed.

Louis H. Brownstone and Louis E. Goodman, both of San Franciso, for appellant.

J. J. West, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover damages for an alleged breach of contract. The defendant was awarded a judgment, and the plaintiff has appealed under section 953a of the Code of Civil Procedure.

The defendant is a corporation engaged in buying and selling real estate. It had sold under an executory contract to the York Realty Company a lot 40x80 located at and being the southwest corner of Stockton and Green streets. Later the purchaser was about to sell its contract to the plaintiff in this case. Whether after, before, or as a part of those negotiations, is not clear; but we will assume, for the purpose of this decision, as a part of the consideration moving to this plaintiff the defendant executed its contract. The defendant, still being the owner of adjacent lands on the north side, and wanting to build up the neighborhood, advised the plaintiff to purchase the contract held by the York Realty Company and, as an inducement, executed and delivered to the plaintiff a contract in words and figures as follows, to wit:

"To Julius Levin Company: Within one year from date of delivery to you or your nominee of our deed to lot N. E. corner Stockton and Green streets, San Francisco, fronting 40 feet on Stockton street and 80 feet on Green street, we agree to erect and complete on the lot 40x80 adjoining same to the north, a store, or market building of one or more stories and basement, and if not so completed within said time we will pay to you, or your successor in interest, the sum of $2,500.00, as liquidated damages for the failure so to complete said building within said time, it being impossible to estimate damages in the event of breach of this agreement, it being understood and agreed that delays caused by act of God, or the enemy, strikes, shall not be considered as part of the said period of one year. Commercial Centre Realty Co., by A. Ruef, Manager. February Twenty-Eighth, Nineteen Hundred Nineteen."

[1] According to the terms of that contract, as applied to the other facts above stated, the defendant should have built its building on or before February 28, 1920. It did not do so. The plaintiff sued as for a breach. The defendant answered and pleaded: (1) A denial; (2) no consideration; (3) a waiver; and (4) a rescission and abandonment. The trial was had before a jury. All of the defenses were supported by at least some evidence, oral or documentary, or both. The jury returned a general verdict in favor of the defendant. No special verdicts were requested or rendered. The third defense was copiously presented. Mr. Ruef, the president of the defendant corporation, testified at length regarding that defense. His testimony was to the effect that in May, two or three months after the date of the contract on which the suit was based, he commenced to have conversations with the officers of the plaintiff corporation of and concerning the nature of the best building which the defendant should build. They discussed a theater instead of a store or market. Estimates indicated that a theater would pay 20 per cent., and tentative leases indicated that a lessee could be found who would advance the most of the money, if not all, needed to construct the theater. When these facts transpired, the plaintiff's officers commenced to negotiate for the privilege of buying the adjoining lot mentioned in the contract as owned by the defendant. These negotiations ran on to a date subsequent to February 28, 1920. Then the plaintiff's officers stated that the plaintiff would not undertake to purchase the theater lot nor to build thereon; but the plaintiff stated that Mr. Ruef might try to get another party to do so. Thereupon with the knowledge of the plaintiff, he made the attempt and, indeed, the record shows that he nearly succeeded. These facts abundantly supported the third defense. But just about the time the defendant was about to close its deal with other parties for the construction of the theater building, the plaintiff commenced this action. After the plaintiff had broken off its negotiations as above stated, it never at any time gave notice to the defendant that the contract period, one year, would again commence to run. On the other hand, after it had by its own acts caused the plaintiff to delay commencing and completing the building contemplated by the contract in suit, and had thus delayed such matters several months, it then terminated its negotiations and commenced its action within a short time after such termination. This, it had no right to do. By entering into the negotiations above recited the plaintiff waived performance, at least in part, during the year February 28, 1919, to February 28, 1920. American-Hawaiian Eng., etc., Co. v. Butler, 165 Cal. 497, 519, 133 Pac. 280, Ann. Cas. 1916C, 44. If thereafter the plaintiff would stand on the terms of the contract it was bound to give a timely notice so the defendant would not be put to a disadvantage.

[2] The appellant claims that the trial court committed errors in instructing the jury. This claim is addressed to instructions on the subject of damages and the subjects covered by the first, second, and fourth defenses. If the jury found for the defendant on the third defense (and in support of the judgment we must assume that it did), then the jury had no occasion to consider damages and the error, if any, was immaterial. The same remark can be made as to instructions addressed to the first, second, and fourth defenses.

Taking in view the whole record, we find no error. But if there was any error committed by the trial court we think it is patent that there is no showing that such error was prejudicial.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court in Banc Denying Hearing.

PER CURIAM. In denying the application for a transfer to this court we do not wish to be understood as approving the opinion to the effect that errors in the instructions upon the first, second, and fourth defenses were cured by the general verdict of the jury in favor of the defendant.

An examination of the record, however, discloses that the instructions complained of were not prejudicially erroneous as to the plaintiff.

The petition for a rehearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 2, is denied.

WILBUR, C. J., and WASTE, KERRIGAN, LENNON, MYERS, LAWLOR, and SEAWELL, JJ., concur.

---

60 Cal. App. 759

HONEY v. HONEY. (Civ. 4084.)

(District Court of Appeal, Second District, Division 1, California. Feb. 13, 1923.)

1. Divorce 🔑231—Statutory allowance authorized to be made to wife for husband's offense differs from "alimony."

An allowance which is authorized on the granting of a divorce to a wife for the offense of the husband, under Civ. Code, § 139, is something different from "alimony" proper, which term refers to support the husband is required to render in fulfillment of the marriage obligation during the continuance of the marriage, and may, in view of section 137, be exacted pendente lite and before the marriage bonds are severed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Alimony.]

2. Divorce 🔑241—Award of lump sum to wife held justified.

In a wife's suit for divorce on the ground of cruelty, wherein it appeared that the husband was 65 years of age and the wife 31, and that the wife had two children by a former husband, and that the husband's property amounted to $42,375, an award of $7,800 in one sum to the wife was justified.

3. Divorce 🔑240(5)—Allowance of lump sum to wife held not excessive.

In a suit by a wife, 31 years old, against her husband, who was 65, for a divorce on the ground of cruelty, wherein it appeared that the wife had two young children by a former husband and that her husband's property amounted to $42,375, an allowance of a lump sum of $7,800 was not excessive.

4. Divorce 🔑184(12)—Exclusion of testimony as to defendant's age not prejudicial, where later admitted.

In a suit by a wife against her husband for divorce, it was not error to sustain an objection to a question asked of plaintiff as to defendant's age, where the age was later given in the husband's own testimony and was not contradicted.

5. Divorce 🔑240(3)—Exclusion of evidence as to how long prior to marriage wife had worked held not prejudicial error.

In a wife's suit against her husband for divorce, where plaintiff had testified that prior to her marriage she had worked in a shoe store, it was not error to exclude evidence as to how long prior thereto she had been at work.

6. Divorce 🔑116—Evidence as to intention of wife in marrying defendant held properly excluded.

In a suit by a wife against her husband on the ground of cruelty, it was not error to sustain an objection to a question as to whether plaintiff had not stated, prior to her marriage with defendant, that she intended to marry him in order to have herself and children supported, and that she would "clean him out" and when the children got to be older would leave him.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Suit by Margaret G. Honey against Edwin A. Honey for a divorce. Decree for plaintiff, and defendant appeals. Affirmed.

D. G. Wettlin and B. E. Tarver, both of Santa Ana, for appellant.

Walter Eden and A. E. Koepsel, both of Santa Ana, for respondent.

JAMES, J. Defendant has appealed from a decree of the superior court awarding to the plaintiff a divorce and the gross sum of $7,800 for future support.

The parties were married in August, 1919, and separated 1 year and 8 months thereafter. At the time of the marriage defendant was 65 years of age and the plaintiff about 31. Both parties had been previously married, and plaintiff had two young children, whom she brought with her to the home provided by the defendant. In her complaint she charged various acts of cruelty, consisting in part of words and epithets used toward her by defendant in a continuous course, culminating in a physical attack upon her, which occurred in May of 1921, after which she ceased to live with her husband. There was ample evidence to sustain the charge that the defendant did violently assault the plaintiff on the date last mentioned, and that his attack was without justification, and that she suffered severe bruises and injuries as a result thereof, the effects of which, especially that from an injury to one of her ears, continued down to the time of the trial.

No serious contention is made that the findings of the court on the divorce issue proper are not fully sustained by the evidence. The main argument of appellant is addressed to the point that neither the pleadings, findings, nor evidence justify the trial judge in making the award of the gross sum for the support of the wife. In the complaint there were enumerated the various possessions of defendant in real and personal property. The defendant made no denial to those allegations. While the plaintiff for the most part declared in her complaint that the market value of the property was unknown to her, counsel for appellant in their brief admit that there was evidence sufficient to establish a total valuation of $42,375. The trial judge in his findings determined that plaintiff had no means of support and that defendant had "a large amount of property," and specifically described the various parcels of land, mortgages, and corporate stocks, as the complaint set them forth. Included in this list of property was a mortgage for $7,800 and one for $3,000.

[1] The Supreme Court has determined that the allowance which is authorized to be made upon the granting of a divorce to a wife for the offense of a husband (section 139, Civ. Code) is something different from "alimony" proper, which term refers to support which the husband is required to render in fulfillment of the marriage obligation during the continuance of the marriage. "Alimony" may be exacted pendente lite and before the marriage bonds are severed. Section 137, Civ. Code. The authority for the making of the former allowance is of course purely statutory. It is in one sense regarded as a penalty imposed upon the husband:

> "It proceeds upon the theory that the husband entered upon an obligation which, among other things, bound him to support the wife during the period of their joint lives, and gave to her a right to share in the fruits and accumulations of his skill; that by his own wrong he has forced her to sever the relation which enabled her to enforce this obligation, and for the wrong which thus deprived her of the benefit of the obligation, he must make her compensation. The court is to fix the measure of that compensation by 'having regard to the circumstances of the parties respectively'; those circumstances furnishing the best means for determining the extent of her loss. * * * This allowance may be entirely independent of the property then in esse." Ex parte Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266, cited in Hogarty v. Hogarty (Cal. Sup.) 206 Pac. 79.

Our Supreme Court has definitely determined, also, that in an action for divorce where the court, as an incident to its judgment, make provision for the future support of the wife, the judgment may require the payment of a sum in gross, and provide, as security for the payment thereof, that a lien be enforced against the separate property of the husband. Further, that to justify a judgment of that kind it need not have been stated in the complaint that the husband has the ability to pay anything, as the power to make the judgment or order is incidental to the action, the same as is the right of the court to award the custody of children to either party. Gaston v. Gaston, 114 Cal. 542, 46 Pac. 609, 55 Am. St. Rep. 86. In the case just cited the court made a further observation, which is pertinent here in view of some of the contentions of appellant, that:

> "It was not essential, however, to warrant the decree for future maintenance that he [the husband] should then have owned property of either class."

See, also, Robinson v. Robinson, 79 Cal. 511, 21 Pac. 1095; Huellmantel v. Huellmantel, 124 Cal. 583, 57 Pac. 582.

[2, 3] We agree with appellant's counsel that as this provision for support money is intended to cover prospective wants of the wife it is more in keeping with the reason of the law that the judgment should provide for installment payments; for it may well happen that the wife will embark upon another matrimonial venture, in which case the husband will assume the duty to support her, and the former husband would be entitled to have a continuing judgment modified so as to relieve him of any further duty in the matter. Tremper v. Tremper, 39 Cal. App. 62, 177 Pac. 868. And where a woman is still young, as in this case, the probabilities that she will marry again are enhanced. Moreover, there was ample real property possessed by the defendant which would have furnished security for the payment of any installment allowances that might have been provided for. But while we admit the logic of counsel's argument addressed to this point, it must be said that the discussion goes only to a matter of policy, and does not establish that the action of the court providing for the immediate payment of a gross sum amounted to an abuse of the discretion which the statute commits to it. Under the authorities cited above it must be held that the complaint, findings and evidence were sufficient to support the incidental judgment requiring defendant to pay to the wife the sum of $7,800, in one sum; nor can it be said, considering the value of defendant's property, and the nature of the cruelty charged against him, that the allowance was so disproportionate to the reasonable demands of the case as to shock judicial conscience. The fact as to whether the property of the defendant was producing an income or was being carried at ex-

pense, would have no effect upon the right of the plaintiff to have a reasonable provision made for her support.

[4-6] There were several alleged errors committed by the court in the rejection of offered testimony, represented, first, by the sustaining of an objection to a question asked of the plaintiff as to what defendant's age was. The age of the defendant was given later in his own testimony, and was not contradicted; hence the first ruling was utterly without prejudice. Plaintiff having testified that prior to her marriage she had worked in a shoe store, objection was sustained to the next question asked of her as to how long prior thereto she had been at work. This ruling we think also was without prejudice. It would only have been material to the question as to what amount might be reasonable to award the plaintiff for permanent support. The question was not asked her as to how much she was earning at the time of her marriage, nor as to what particular work she was employed in doing. We think, too, that the court properly sustained an objection to a question, asked both of the plaintiff and another witness, as to whether plaintiff had not stated prior to her marriage with the defendant that she intended to marry him in order to have herself and children supported, and that she would "clean him out" and when the children got to be older would leave him. An answer in the affirmative to the question would not in any way have shown justification for the cruel conduct charged against the defendant, nor have discredited positive testimony given, particularly as to the acts of violence committed by him. The best that could be said for the testimony designed to be elicited would be that it might have a very remote effect (not legally cognizable) upon the credibility of the plaintiff as a witness.

None of the errors assigned are sustained by the record.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

---

61 Cal. App. 64

TRIPP v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY. (Civ. 4089.)

(District Court of Appeal, Second District, Division 2, California. Feb. 23, 1923.)

1. Divorce 🔑243—Property agreement, incorporated in decree, held enforceable as court's mandate, though payment of amount specified was not expressly ordered.

Where a husband's agreement to pay certain sums as a property settlement was made pending suit for divorce by the wife, and recited that it might be embodied in the decree in that action, the agreement became enforceable as a mandate of the court when incorporated in the divorce decree, though the decree did not expressly order the husband to pay as agreed.

2. Divorce 🔑269(14)—Court may allow divorced husband to purge himself of contempt in failing to make payment for wife by paying in installments.

Where husband was in default as to a payment for his divorced wife, ordered by final decree in her divorce suit, the court had jurisdiction to allow him to purge himself of his contempt by paying the sum due in installments.

Petition by E. E. Tripp for certiorari to review an order adjudging him guilty of contempt of court. Writ denied.

D. Joseph Coyne, of Los Angeles, for petitioner.

Griffith Jones and John J. Craig, both of Los Angeles, for respondent.

WORKS, J. Petitioner's wife sued him for divorce and procured an interlocutory decree against him. Among other things, the decree contained the following:

> "The court further finds that prior to the commencement of this action * * * the parties hereto executed a certain property settlement and agreement, which should be and is hereby incorporated in and made part of this decree, and is in words and figures as follows, to wit."

The agreement was then set out in full. In part, it described several parcels of real property, all of which was stated to be the community property of the spouses, and by it the husband agreed to convey to the wife all his interest in the property. The instrument also contained the following:

> "It is further agreed and understood by and between the parties hereto that there is a total indebtedness against the Orange county property described above of approximately nine hundred ($900.00) dollars, and said [husband] agrees with said [wife] to make said payments as the same may become due to and for the use and benefit of the said [wife]. * * * That said [husband] has herewith made conveyances of all his said property as set forth above, the same to be held subject to the approval of this property settlement by the court, and to be delivered when said agreement is so approved by the court and embodied in the decree of said action."

As partially explaining this reference to "the court," and as showing more specifically what kind of decree was in the minds of the parties, it is to be observed that recitals in the preamble to the agreement were that "said [wife] has filed suit against [the husband] for divorce" and "said [husband] has had competent advice and been advised that his said wife has a good and meritorious cause of action, and, he having no meritorious defense thereto, it is mutually agreed and understood," etc. After setting forth the property agreement, the interlocutory decree ordered:

> "That said plaintiff shall take all of the community property as set forth in said property settlement and agreement as aforesaid."

In due time the court made its final decree of divorce between the parties. In that decree, also, the property agreement was set forth in full, being preceded by the statement:

> "The court further says that prior to the commencement of this action * * * the parties hereto executed a said [sic] property settlement and agreement which should be and hereby is incorporated in and made a part of this decree, and is in words and figures as follows, to wit."

At a time long after the final decree of divorce had become final, respondent court, upon the application of the wife, issued its order to petitioner to show cause why he should not be punished as for a contempt of court in having failed to pay a balance of the $900 mentioned in the property agreement. After due hearing under the order to show cause, respondent found that petitioner, at all times after the entry of the interlocutory and final decrees in the divorce action, had full knowledge of their existence; that at all times he was financially able to pay the $900, but that he had neglected and refused to pay and never had paid the sum of $683.75 thereof. Respondent thereupon made its order:

> "That the defendant is guilty of contempt of court, by reason of his failing to make the payments hereinbefore specified, and that it is hereby ordered that said defendant may purge himself of said contempt by paying to the complainant said $683.75, in sums not less than $50 per month, commencing March 1, 1922, and that, should said defendant not avail himself of this opportunity of purging himself of said contempt, he then may be cited to the court to be punished for said contempt hereinbefore mentioned."

These matters are all before us upon an order to show cause why a writ of review should not issue against respondent for the purpose of reviewing the order thus made in the contempt proceeding.

[1] It is contended that the decrees in the divorce action did not order petitioner to pay the $900 mentioned in the property agreement. It is true that neither of the decrees contained such an order in express terms, but we are nevertheless of the opinion that petitioner's contention cannot be upheld. The agreement recited the fact that a divorce action was pending between the parties, and contained a formal stipulation that it should be subject to the approval of the court and that, when so approved, it should be embodied in the decree, in the divorce action. This stipulation surely contemplated that the terms of the agreement, when it should be embodied in the decree, should have the compelling power of the court behind its every covenant. The court had full power to deal with the matters covered by the agreement and to render its judgment thereon, at least to the extent of making proper provision for the support and maintenance of the wife, provided that it were first ascertained that petitioner was guilty of the charges made against him in the divorce action. Notwithstanding this power of the court, the parties undertook to stipulate a decree as to property matters, subject, under the law as well as under the agreement, to the approval of the court. This approval was evidenced by the fact that the agreement was incorporated in terms in both the interlocutory and final decrees, preceded in each instance by the statement that the agreement was made part of the decree. Under these circumstances we are convinced that the terms of the agreement, except in so far as they were executed either before or at the time of the interlocutory decree, became enforceable as mandates of the court. Petitioner cites Milekovich v. Quinn, 40 Cal. App. 537, 181 Pac. 256, and McCahan v. McCahan, 47 Cal. App. 173, 190 Pac. 458, as opposed to this view, but we find nothing in either case which touches the question, except, in fact, that the first-named case seems to support, rather than to oppose, our conclusion. The court did therefore order petitioner to pay the $900.

Petitioner insists that the order requiring him to pay $683.75, he not having been ordered to make that payment as a fine for the contempt of which respondent found him guilty, was in effect but a modification of the order contained in both the interlocutory and final decrees of divorce and requiring the payment of $900, and authorities are cited to the point that such a modification was not proper under all the circumstances here present. It will not be necessary for us to consider this specific point. The order in question here was responsive to an order requiring petitioner to show cause why he should not be punished as for a contempt of court. We are, therefore, called upon to determine, at least in the first instance, whether respondent had jurisdiction in its order in the contempt proceeding to require petitioner to pay the sum of $683.75.

[2] It is plain, from the order sought to be reviewed, that respondent administered no punishment for the contempt of which it adjudged petitioner guilty. Instead of fixing a punishment, respondent by its order decreed that petitioner might purge himself of his offense against the dignity of the court

by the payment of the $683.75 at the rate of not less than $50 per month. Unquestionably the court had jurisdiction to allow petitioner to purge himself of his contempt by paying the $683.75 at once and in full. 13 C. J. 94. We are cited to no authority showing that respondent was not empowered to allow petitioner to pay this total sum on the installment plan, and as a mere matter of jurisdiction we know of no reason why that course was improper. Such a course was undoubtedly an unusual one. It is strange that a court, after finding an individual in contempt for a failure to pay a total sum due under one of its judgments, should allow him, and that without punishing him for the contempt, to pay the amount in installments. That course in this instance placed petitioner in a better position than he had occupied prior to the order adjudging him in contempt, and it in effect presented him with a reward for his disobedience of the court's judgment. That, however, has nothing to do with the question whether respondent had jurisdiction to allow the payment in installments. We are of the opinion that the jurisdiction existed.

The application for the writ is denied.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

61 Cal. App. 13

PEOPLE v. HERRERA. (Cr. 917.)

(District Court of Appeal, Second District, Division 2, California. Feb. 15, 1923. Hearing Denied by Supreme Court April 16, 1923.)

1. Criminal law 🔑409, 516—Statement by defendant held an admission and not a confession and foundation for admission in evidence unnecessary.

In a prosecution for rape, it was not necessary for the prosecution to lay any foundation for the admission of testimony of defendant's statement that on the morning of the day on which the offense was committed he was so drunk that it would have been possible for him to have killed a man and not remember it, since such statement did not involve a criminal intent, and was therefore an admission rather than a confession.

2. Criminal law 🔑406(1), 516—Admission distinguished from confession.

A statement of guilty conduct, which does not involve a criminal intent, or which states facts amounting to justification, or excuse for the defendant's acts, is an admission rather than a confession.

3. Witnesses 🔑269(12)—Exclusion, during cross-examination, of testimony as to matter not testified to on direct examination held proper.

In a prosecution for rape, refusal to permit defendant to cross-examine complaining witness as to whether those present at her parents' house on the morning of the commission of the offense were drinking heavily *held* proper, where she had not testified as to the matter upon direct examination.

4. Criminal law 🔑448(11)—Question as to whether persons had been drinking pretty heavily held to call for a conclusion.

In a prosecution for rape, question, on cross-examination of prosecutrix, as to whether those present at her parents' house on the morning of the commission of the offense were not drinking pretty heavily, *held* objectionable as calling for the conclusion of the witness.

5. Criminal law 🔑695½—Statement of court on objection to testimony held not to have sustained objection.

Where counsel objected to a question as to whether the witness had been drinking, after the witness had answered "No," the statement of the court, on counsel's objection, that "I think I will sustain the objection. He said, 'No,' however," did not sustain the objection, but permitted the answer to remain before the jury.

6. Criminal law 🔑1170½(2)—Ruling on objection to question held harmless, in view of answer.

In a prosecution for rape, the ruling of the court on objection of the prosecution to question as to whether a witness had been drinking, if construed as sustaining the objection, was harmless, where the answer was that the witness had not been drinking.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Augustine Herrera was convicted of rape, and he appeals. Affirmed.

Emmons & Aldrich, of Bakersfield, for appellant.

J. R. Dorsey, Dist. Atty., of Bakersfield, for the People.

CRAIG, J. Defendant, Herrera, was convicted of rape upon one Victoria Gomez, a girl of 14 years.

[1] The first ground of the appeal is that the defendant was not permitted to show, prior to it having been offered in evidence, that an alleged confession was secured under such circumstances as to make it involuntary. The statement related by a witness as made by the defendant was not a confession, but an admission; therefore it was unnecessary for the prosecution to have laid any foundation for its admission.

[2] The gist of the statement, which the witness testified defendant made, was that, upon the morning of the day on which the offense was committed, he was so drunk that it would have been possible for him to have killed a man and not remember it. This does not amount to a confession. When the statement of guilty conduct is such that it does not involve a criminal intent, or where it con-

stitutes facts amounting to justification or excuse for the defendant's acts, it is an admission rather than a confession. People v. Weston, 169 Cal. 393, 146 Pac. 871; People v. Fowler, 178 Cal. 657, 174 Pac. 892; People v. Wilkins, 158 Cal. 530, 111 Pac. 612; People v. Le Roy, 65 Cal. 613, 4 Pac. 649. The statement attributed to Herrera does not involve a criminal intent.

[3-6] The second ground upon which defendant urges his appeal is alleged error on the part of the trial court in sustaining objections to questions put by defendant's counsel in cross-examining Victoria Gomez, the complaining witness, and Frank Castillo. The first-named witness was asked if all of those present at her parents' house in the morning of the commission of the offense were not drinking pretty heavily. She had given no testimony upon this matter upon direct examination; besides, the question called for a conclusion of the witness. The question put to Castillo, to which it is claimed an objection was sustained, was one asking the witness if he had been "drinking any at all." The witness answered, "No." After this response had been made, counsel for the people interposed an objection, and the court said: "I think I will sustain the objection. He said, 'No,' however." By this statement the objection was not sustained. The judge may have thought he would sustain it, but evidently came to a different decision before ruling, and permitted the answer "No" to remain before the jury. Even if, however, the court's remark were to be construed as a ruling adverse to appellant, the ruling was harmless because of the fact that the witness had answered, "No." Complaint is made that objection was improperly sustained to another question of the same character as the one last considered. Castillo was asked, "Were you drinking over in Kern?" to which he answered, "No, sir." The people again objected, but an examination of the record shows that the court made no ruling.

We find no prejudicial error, and the evidence amply sustains the verdict of guilty.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

---

61 Cal. App. 16

BECKER v. TURPIN et al. (Civ. 4261.)

(District Court of Appeal, First District, Division 1, California. Feb. 16, 1923.)

Partnership ⚷32—Agreement between fruit packer and a selling corporation held to create limited partnership, both parties of which were liable to grower.

An agreement, termed a "joint account agreement," between a purchaser and shipper of fruit and a corporation engaged in the sale of fruit in another state, wherein the parties agreed "to share equally all expenses in securing and buying fruit, also all expenses in packing same," and to divide equally all profits and losses accruing under the agreement, *held* to create a limited partnership and broad enough in its scope and effect to cover executory contracts for the purchase of grapes made by either party prior to the actual entering into the joint enterprise, and to make both parties liable under Civ. Code, § 1589, to a grower for a balance due under a contract for the sale of that year's crop, the benefit of which had been received by both parties.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by Henry Becker against C. B. Turpin and R. Krasnow & Sons, Inc. Judgment for plaintiff, and the last-named defendant appeals. Affirmed.

Harris & Hayhurst, L. B. Hayhurst and Rue C. Gibson, all of Fresno, for appellant.

Carl E. Lindsay and Edward F. Peters, both of Fresno, for respondent.

RICHARDS, J. This appeal is from a judgment in the plaintiff's favor in an action to recover a balance due upon the contract price of certain Malaga grapes sold and delivered by the plaintiff during the season of 1919. The contract for the sale and delivery of said grapes was made by the plaintiff with the defendant Turpin, doing business under the name of Golden Gate Packing Company, on the 10th day of July, 1919, and was in the usual form of an executory contract between the grower and buyer for the delivery thereafter of the grower's entire crop of grapes for the year 1919, at the agreed price of $60 per ton, payable upon delivery. Shortly after the making of this contract and about the time deliveries of grapes began to be made, the defendant Turpin and the defendant R. Krasnow & Sons, Inc., entered into what is denominated by the parties thereto as a joint account agreement, which was presently put in writing and which reads as follows:

> "Joint Account Agreement.
>
> "This agreement is entered into by and between K. Krasnow, representing R. Krasnow & Sons, Inc., hereinafter known as the first party, and C. B. Turpin, doing business as the Golden Gate Packing Company, hereinafter known as the second party, for the purpose of packing fruit jointly, as follows, to wit:
>
> "Both parties agree to share equally all expenses in securing or buying fruit, also all expenses in packing same; also both parties agree to divide equally all profits and losses accruing from this agreement. The second party agrees to pack to the best of his ability such fruit as he is able to procure, of the very best quality possible for him to obtain; to superintend and have charge of said pack of fruit. The first party agrees to sell the product of said pack to

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

> the very best of his ability, to render account sales promptly, etc.
>
> "The second party retains all rights as to labels, firm name, trade-marks, good will, etc., as sole property.
>
> "Both parties agree to transact all the business of the company without charge; to buy, pack, and sell the product of the same without charge.
>
> "The second party agrees to render estimated costs for each car as soon as possible after shipment.
>
> R. Krasnow,
> "For R. Krasnow & Sons, Inc.
> "C. B. Turpin,
> "For Golden Gate Packing Co."

The method by which the parties to this latter agreement did business thereunder was as follows: Turpin received and packed the grapes after they were delivered to him at his warehouse; paid for all labor and material used; loaded them in the cars; took bills of lading in the name of the Golden Gate Packing Company; consigned the first car to the Associated Fruit Company and the rest of them to R. Krasnow & Sons, Inc., Pittsburg, Pa., and later indorsed and delivered the bills of lading, together with an estimate of the cost of each car to R. Krasnow & Sons, Inc., who advanced him approximately $1,000 on each car as the bills of lading were indorsed and turned over. The rest of the costs were advanced and the profits divided after the returns were received from the cars sold. The plaintiff delivered in all a little over 44 tons of grapes to the warehouse of the Golden Gate Packing Company, which grapes were there packed, loaded on cars and consigned to Krasnow & Sons, Inc., and were duly received and sold by the latter under said agreement. The plaintiff received from the Golden Gate Packing Company the sum of $1,200 on account of his crop so delivered, but not being able to obtain payment of the balance due him after the delivery of all his said crop of grapes brought this action in assumpsit against said defendants for the recovery of the balance due. The defendants appeared separately, filing general demurrers, which were overruled. The defendant Turpin did not further plead, but the defendants R. Krasnow and R. Krasnow & Sons, Inc., filed their separate answer denying generally and specifically all of the allegations of the plaintiff's complaint and praying that he take nothing from them or either of them by his said action. Upon the trial of the cause the court, over the said defendants' objection, permitted the introduction in evidence of the so-called "joint account agreement" above set forth, and thereafter and on the strength of said agreement made its findings of fact, construing said agreement to be a joint enterprise agreement between the parties thereto for the procuring, packing, shipping, and disposal of fruit, the costs, expenses, profits, and losses of said joint enterprise to be equally borne by the parties to said agreement. The court further found that the defendant Krasnow & Sons, Inc., received, accepted, and retained the benefit of the proceeds of the fruit sold and delivered by said plaintiff, and by so doing assumed the payment of the purchase price thereof under the terms of said joint enterprise agreement, and thus became indebted to the plaintiff for the balance of the purchase price of said plaintiff's crop of grapes according to the terms of the latter's contract with said defendant Turpin, and rendered judgment accordingly in the plaintiff's favor for the sum of $1,446 against both said Turpin and said Krasnow & Sons, Inc. From such judgment the latter prosecutes this appeal.

The several contentions which the appellant relies upon for a reversal of this judgment are: (1) Its objection to the sufficiency of the complaint; (2) its objection to the admission of the Krasnow-Taylor agreement in evidence; and (3) its objection to the finding of the trial court above referred to. All of these objections depend upon the interpretation to be placed upon the so-called "joint account agreement," which is above set forth in full. If that agreement is to be construed as an agreement for the formation of a limited partnership between C. B. Turpin, doing business under the name of Golden Gate Packing Company, and R. Krasnow & Sons, Inc., for the procuring, purchasing, packing, and marketing of the fruit crop for the year 1919, dividing equally all profits and losses arising out of said joint enterprise; and if said agreement is broad enough in its intendment to cover such executory fruit contracts as said Turpin had negotiated prior to entering into said joint venture, it would seem to follow that it was such an agreement as the grape grower with whom said Turpin entered into such executory contracts, either before or after the date of its execution, could enforce against either party to such agreement in actions for the unpaid purchase price of their product received and disposed of by either party thereto. Looking to said agreement between Turpin and R. Krasnow & Sons, Inc., we can arrive at no other conclusion than that such was its scope and effect. It is expressly denominated a "joint account agreement" and its first binding obligation is that:

> "Both parties agree to share equally all expenses *in securing or buying fruits;* also all expenses in packing same; also both parties agree to divide equally all profits and losses accruing from this agreement."

No subsequent clause or part of this agreement lessens the force and effect of these opening clauses thereof. That they were sufficiently broad to cover executory contracts for the purchase of grapes made by either party prior to the actual entering into this joint enterprise is evident from the construction which the parties themselves placed upon their said agreement, since the grapes of this plaintiff, delivered after the date of the execution of said agreement, were received, packed, and disposed of by the parties thereto under its terms. We can, in fact, discover no substantial difference between this agreement and that construed by the Supreme Court to be a limited partnership agreement in the case of Westcott v. Gilman, 170 Cal. 562, 150 Pac. 777, Ann. Cas. 1916E, 437. In construing an almost identical agreement the court says:

> "The contract in evidence in this case leaves little doubt but that the relationship between these defendants was that of a limited partnership or joint venture. Of course a partnership may be organized for the prosecution of one or two adventures, as well as for the conduct of a general and continuous business. It is not of the essence of a partnership that the parties to it should have known that their contract in law created a partnership. Chaplain v. Hughes, 104 Cal. 302, 37 Pac. 1048, 38 Pac. 109; Hunter v. Martin, 57 Cal. 365. If by contract or by conduct or by both they have in point of law engaged in a partnership venture, so far as third persons are concerned they cannot be heard to deny the relationship and the liabilities arising therefrom. It is plain from the very terms of the agreement between these defendants that it measures up to the definition of a partnership as declared by section 2395 of the Civil Code. It was an association of two persons to carry on a definite business and to divide the profits and losses of that business."

In that case, as in this, the dissatisfied grower sued the parties to such joint enterprise and recovered against both. If upon the authority of the above-cited case we are to hold that the agreement between Turpin and Krasnow & Sons, Inc., was a partnership agreement for the handling and disposal of the fruit crop of that year secured by either; and if, as the evidence shows, the parties thereto did in fact receive, handle, and dispose of the fruit crop of this plaintiff for their joint benefit under said agreement, then there is no escape from the obligation imposed upon both under section 1589 of the Civil Code, which reads as follows:

> "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

It requires no argument to show that Krasnow & Sons, Inc., in contracting with C. B. Turpin under the name of Golden Gate Packig Company "to share equally all expenses in securing or buying fruit," knew, or ought to have known, that the fruit which said corporation shortly thereafter began to receive from said Turpin or said Golden Gate Packing Company was fruit which had been secured by the latter in the course of carrying such agreement into effect. This being so, the said corporation cannot avoid the effect of their full acceptance of the benefit of the transaction between the plaintiff and said Turpin by and through which the grape crop of the former was received, handled, and disposed of under said joint enterprise agreement.

We do not deem any further comment upon the authorities cited by either of the parties to this appeal necessary to make this proposition plain. The case of Westcott v. Gilman, supra, seems to cover and dispose of every question presented upon this appeal.

Judgment affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

61 Cal. App. 797

REESE v. TURPIN et al. (Civ. 4261.)

(District Court of Appeal, First District, Division 1, California. Feb. 16, 1923.)

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by E. O. Reese against C. B. Turpin and R. Krasnow & Sons, Inc. Judgment for plaintiff, and the last-named defendant appeals. Affirmed.

Harris & Hayhurst, L. B. Hayhurst, and Rue C. Gibson, all of Fresno, for appellant.

Carl E. Lindsay and Edward F. Peters, both of Fresno, for respondent.

PER CURIAM. This appeal, being identical as to its facts with the case of Becker v. Turpin, 214 Pac. 255, this day decided, upon the authority of such decision the judgment is affirmed.

61 Cal. App. 102

ROCCA v. STEINMETZ et al. (Civ. 2554.)

(District Court of Appeal, Third District. California. Feb. 24, 1923. Hearing Denied by Supreme Court April 23, 1923.)

Master and servant 🔑303—Automobile owner, permitting use by son known to be reckless driver, is liable for son's negligence.

The owner of an automobile, who permits his son to use the car with knowledge that the son is a reckless driver, is liable for damage caused by son in driving the car, being negligent in permitting a reckless driver to use his automobile.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by William Rocca against D. H. Steinmetz and another. Judgment of dismissal, and plaintiff appeals. Reversed.

See, also, 208 Pac. 964.

J. C. Webster and C. H. Grayson, both of Sonora, for appellant.

J. B. Curtin, of Sonora, and Morrison, Dunne & Brobeck, of San Francisco, for respondents.

BURNETT, J. The defendants are father and son, and the complaint charges Steinmetz, Jr., with having recklessly and negligently driven an automobile off the road and down an embankment, whereby one Marguerite L. Rocca, mother of William Rocca, was killed, she being at the time a passenger in the automobile and a guest of said driver. It is alleged:

> That Steinmetz, Sr., was the owner of the automobile, and bought and kept it for the use and pleasure of his family, including said son, that said Steinmetz, Jr., "was at all the times herein mentioned a careless and reckless person and careless and reckless driver of said automobile, and the said D. H. Steinmetz, knowing said D. H. Steinmetz, Jr., to be such a careless and reckless person and careless and reckless driver of said automobile, negligently allowed and permitted said D. H. Steinmetz, Jr., to drive said automobile, and that, at and immediately prior to the time of the accident hereinafter referred to, defendant D. H. Steinmetz, Jr., was driving said automobile with the consent, knowledge, and permission of defendant D. H. Steinmetz, and was acting in furtherance of and not apart from the service and control of defendant D. H. Steinmetz, and within the purposes for which said automobile was purchased."

A demurrer was interposed by Steinmetz, Sr., which was sustained by the court, and from the judgment of dismissal of the action as to him the appeal has been taken. While the demurrer was both general and special, the only point argued relates to the sufficiency of the facts to charge the father with any liability for the accident. It is the claim of respondent that no such liability is shown, and he thinks the situation is covered by this question:

> "May a father, who owns an automobile, be held liable in an action for damage resulting from personal injuries simply and solely because he loaned his automobile to an adult son, who took the same for a pleasure ride, there being no business relation between father and son, in connection with the ride that resulted disastrously?"

He answers the question in the negative, and in support thereof he cites Spence v. Fisher, 184 Cal. 209, 193 Pac. 255, 14 A. L. R. 1083. If the case were as thus presented by respondent, we should be compelled to agree with him in his conclusion. In Spence v. Fisher, indeed, the question was, as stated by the learned Chief Justice:

> "As to the liability of a father who is not guilty of personal negligence in the matter, for damages sustained by third parties by reason of the negligent driving of an automobile, by an adult member of his family, when such member of the family is using the same for his or her own purposes, the automobile being owned and maintained by the father for the general convenience, use, and pleasure of his family, and the particular member of the family operating the same having his permission to use the same at his or her pleasure."

Therein the liability of the father was sought to be maintained upon the ground that the daughter, in thus using the machine for her own convenience and pleasure, was the agent of the father, and was thereby carrying on his business, since he purchased the automobile for that purpose. The doctrine of respondeat superior was therefore invoked, but the Supreme Court held this view to be unsound, although admitting that upon the subject the authorities are in hopeless conflict. This case, though, presents the vitally additional feature that the father permitted and allowed the son to use the automobile, knowing that said son was a careless and reckless person and a careless and reckless driver. Such element distinguishes this from any case which has heretofore been considered by the appellate courts of this state. In this view we are confirmed by the declaration of the Supreme Court in the opinion rendered on the motion to dismiss this appeal (208 Pac. 964), as follows:

> "It is not necessary to say anything in regard to the liability of D. H. Steinmetz further than this, that his liability has never been decided in any court in this state. He is not sued as the mere owner of the automobile, but he is sued as the owner who has allowed and permitted his son to drive his automobile, knowing that his son is a reckless and careless driver of said automobile. That fact differentiates it from all other cases on the subject."

While it is true that this important question has not been finally adjudicated in California, it must be admitted that the authorities from other jurisdictions, with but a single dissent as far as our investigation has gone, uphold the contention of appellant that his complaint shows liability on the part of Steinmetz, Sr., for the accident.

In Berry on Automobiles (3d Ed.) § 1040, the rule is thus stated:

> "Aside from the relation of master and servant, the owner of an automobile may be rendered liable for injuries inflicted by its operation by one whom he has permitted to drive the same on the ground that such person, by reason of his want of age or experience, or his physical or mental condition, or his known habit of recklessness, is incompetent to safely operate the machine. An automobile is a machine that is capable of doing great damage if not carefully handled, and for this reason the owner must use care in allowing others to assume control over it. If he intrusts it to a child of such tender years that the probable consequence is that he will injure others in the operation of the car, or if the person permitted to operate the car is known to be incompetent and incapable of properly running it,

although not a child, the owner will be held accountable for the damage done, because his negligence in intrusting the car to an incompetent person is deemed to be the proximate cause of the damage. In such a case of mere permissive use, the liability of the owner would rest, not alone upon the fact of ownership, but upon the combined negligence of the owner and the driver; negligence of the owner in intrusting the machine to an incompetent driver, and of the driver in its operation."

The same rule of negligence is announced in the second edition of "The Law Applied to Motor Vehicles," by Babbitt, § 910, and the very recent work of Huddy on Automobiles (6d Ed.) § 662.

In Raub v. Donn, 254 Pa. 203, 98 Atl. 861, the Supreme Court of Pennsylvania held that the trial court did not err in instructing the jury:

> "It is the duty of a man to see that his automobile is not run by a careless, reckless person, but that it is in the hands of a skillful and competent person."

In Gardiner v. Solomon, 200 Ala. 115, 75 South. 623, L. R. A. 1917F, 380, it was declared that, while automobiles are not regarded as inherently dangerous instrumentalities, and the general rule is that the owner is not liable for the negligent use of the same by another, except upon the theory of respondeat superior, yet an exception exists when he knowingly intrusts it to one who is so incompetent as to convert it into a dangerous instrumentality. It was also held therein that the allegation:

> "That Thomas 'was, and had long been, a careless, indifferent, heedless, and reckless driver of such car,' was the equivalent of charging that he was incompetent."

In Tyree v. Tudor et al., 183 N. C. 340, 111 S. E. 714, the Supreme Court of North Carolina held that:

> "Where an automobile owner, knowing the reckless character of his 16 year old son, gave him permission to use the car to convey a young lady to and from a dance, he was liable for his son's negligent driving causing her death."

There are other decisions to the same effect, but further citation is deemed unnecessary.

In his reply brief respondent, referring to the authority of Berry, declares that the cases cited by him are not in point. Brown v. Green, 6 Boyce (Del.) 449, 100 Atl. 475, he affirms, places the liability upon the ground that the automobile was driven by the servant of the defendant. It does not appear from the decision whether the driver was acting within the scope of his authority, but the Delaware court declared:

> "The negligent act averred in these two counts is in permitting the motor truck to be operated upon the road by an unskilled and incompetent servant, and thereby ran the truck into the plaintiff and injured him. It is the opinion of the court that the act of negligence complained of is sufficiently described, it being also alleged that the injury was caused by reason of such negligent act."

It is true the court refers to the driver as the "servant" of the defendant, but it is a fair inference that the distinguishing feature in the mind of the court was the unskillfulness and incompetency of the driver of which "the defendant had knowledge or should have had knowledge," this latter element appearing in the reported statement of the facts.

It seems to be true that the decision in Lynde v. Browning, 2 Tenn. C. C. A. 262, was grounded upon the doctrine that the driver was the agent of his father, the owner of the machine, while the former was operating the car for his own pleasure with the father's consent, and to that extent it is opposed to the doctrine of Spence v. Fisher, supra, and is not the law in this state.

It is said that Parker v. Wilson, 179 Ala. 361, 60 South. 150, 43 L. R. A. (N. S.) 87, did not involve the point and was exactly like Spence v. Fisher and decided the same way. This is true, although, as dictum, the court declared:

> "No doubt liability will arise where the owner intrusts a machine of such dangerous potentialities to the hands of an inexperienced or incompetent person, whether child or servant. In the case of a mere permissive use, the liability of the owner would rest, not alone upon the fact of ownership, but upon the combined negligence of the owner and the driver, negligence of the one in intrusting the machine to an incompetent driver, of the other in its operation."

It is admitted by respondent that Beville v. Taylor, 202 Ala. 305, 80 South. 370, and Gardiner v. Solomon, 200 Ala. 115, 75 South. 621, L. R. A. 1917F, 380, do sustain the text.

Respondent is entirely mistaken in the claim that Allen v. Bland (Tex. Civ. App.) 168 S. W. 35, and Raub v. Donn, 254 Pa. 203, 98 Atl. 861, were like the Spence Case and decided the same way. In the former the liability of the father was expressly and exclusively grounded upon the claim that his son, who was driving the car, was—

> "a very small, weak, reckless, careless, and inexperienced boy, wholly unfit and incapacitated to drive or steer an automobile * * * all of which facts were well known to defendant."

In the latter it was held that there was sufficient evidence to submit to the jury the question "whether the son was acting within the scope of his duties as an employee of his father at the time of the accident" and also, since there was evidence that "the son had a reputation for reckless driving, of which defendant was aware, it was not error to submit that question to the jury, and to charge that it was the duty of a man to see that his automobile was not run by a careless or reckless person, but by a skillful and competent operator."

As to the cases cited by respondent, it may be said that in only one of them it is held that liability will not attach to the owner if he has, with knowledge of the character of the driver, allowed and permitted his automobile to be driven by an incompetent or reckless person and thereby, through the negligence of said driver, injury has resulted to a third person.

In Neubrand v. Kraft, 169 Iowa, 444, 151 N. W. 455, L. R. A. 1915D, 691, the liability was sought to be established upon the ground that "one who lets an automobile for hire is responsible for the proper skill and care of the person to whom he intrusts it," in other words, that he must inquire at his peril as to the competency of the driver. This was the question considered by the Iowa Supreme Court when it declared:

> "But the owner of a livery stable or garage making a business of letting teams or carriages or motor cars to customers * * * has never been held to any such rule of responsibility by any court so far as the precedents have been called to our attention, and we think there is no general rule or principle necessitating such conclusion."

The court, however, by way of dictum, did say:

> "Cases may be imagined, perhaps, where an owner recklessly lets his spirited team or his automobile to an immature child, or to a person who is intoxicated or otherwise manifestly incompetent to manage or control it, with the natural result of a collision upon the public street and consequent injury to others. It may well be that under such circumstances the owner would be held liable in damages, not because the hirer is his servant or because as owner he is required to vouch to the public for the competency of all persons to whom he may let his teams or his cars for hire, but because he knew the incompetency of this particular driver and the imminent peril to which he thereby exposed others who were in the lawful use of the streets and as a person of ordinary prudence should have refrained from so doing."

Brinkman v. Zuckerman, 192 Mich. 624, 159 N. W. 316, and Cohen v. Meador, 119 Va. 429, 89 S. E. 876, are not in point, as there was no claim in either case that the driver was reckless or incompetent or that the owner had any reason to believe that the driver was not a proper person to be intrusted with the car.

The only case cited by respondent that seems to uphold his contention is Doran v. Thomsen, 74 N. J. Law, 445, 66 Atl. 897, wherein it was alleged in the third count of the complaint that:

> "The defendant carelessly allowed his daughter, 'an inexperienced, careless, and incompetent person,' to operate the vehicle in such manner as not to have it under proper control, well knowing that it was operated by his daughter, and that she was inexperienced and incompetent, and defendant 'utterly failed and neglected to take any means to prevent the said motor vehicle from being so operated by his said daughter.'"

The Supreme Court of New Jersey in that case seems to have lost sight of the distinguishing characteristic of that count and to have treated it as an attempt to charge liability upon the ground of agency.

In considering the decisions it is helpful to classify them as suggested in the note to Neubrand v. Kraft, supra, in L. R. A. 1915D, p. 692:

> "(1) Cases where the car was taken without the consent of the owner; (2) cases where the owner intrusted the car to a competent and ordinarily careful person, who, however, was negligent on the particular occasion; (3) cases where the owner intrusted the car to a person who was known to be incompetent or negligent, or not known to be competent or careful."

As the author states, in the first of these classes there is no ground for holding the owner liable, at least in the absence of negligence on his part in guarding against the unauthorized use of his car. In the second class the question of liability turns upon the doctrine of respondeat superior, in other words, whether the driver was acting within the scope of his authority as an agent of the owner. "In the third class," the author says, "there is a tendency, on the part of the later cases at least, to hold the owner responsible because of his negligence in intrusting the car to a person known to be incompetent or negligent."

In its simplest form the question is whether the owner when he permits an incompetent or reckless person, whom he knows to be incompetent or reckless, to take and operate his car, acts as an ordinary prudent person would be expected to act under the circumstances. If he were to intrust his car to a person whom he knew to be insane or intoxicated or utterly incompetent to run a car, it would certainly shock the common understanding to hold that he was not chargeable with negligence. There can be no difference in principle but only in degree, where he knows the driver to be careless and reckless in the operation of the machine. In any such case, consideration for the safety of others requires him to withhold his consent and thereby refrain from participating in any accident that is liable to happen from the careless and reckless driving of such a dangerous instrumentality.

It must be remembered that we are simply passing upon the sufficiency of the complaint to state a cause of action against Steinmetz, Sr., and of that we feel no doubt.

The judgment is reversed.

We concur: FINCH, P. J.; HART, J.

60 Cal. App. 781

RAMSAY v. RODGERS et al. (Civ. 4467.)

(District Court of Appeal, First District, Division 1, California. Feb. 14, 1923.)

1. Damages ⟹85—That provision for liquidated damages is void does not invalidate contract.

Under Civ. Code, § 1670, a contract of employment was not void as a whole because it contained an invalid provision for liquidated damages, but upon its breach, by the employee's discharge without cause, he would be entitled to recover his actual damages.

2. Master and servant ⟹41(1)—Damages for discharge are prima facie contract price for services during term.

In the case of contracts of employment for a fixed term, the measure of damages for breach of covenant against discharge without cause is prima facie the contract price for the employee's services during the term; that is, the amount which the employee would have received under the contract had its terms been fulfilled.

3. Master and servant ⟹39(1)—Excessive damages demanded for discharge held not to invalidate complaint.

That plaintiff in action for wrongful discharge sets forth in his statement of damages an amount in excess of that which as actual damages he would be entitled to recover does not render his complaint defective as against general demurrer, as his having obtained or having been able to obtain other employment are matters of defense for defendants to plead.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by T. H. Ramsay against Elizabeth A. Rodgers and another. From judgment for plaintiff, defendants appeal. Affirmed.

See, also, 207 Pac. 516.

John E. Bennett, of San Francisco, for appellants.

Creed, Jones & Dall, of San Francisco (W. K. Powell, of San Francisco, of counsel) for respondent.

RICHARDS, J. This action was instituted by the plaintiff for recovery of the sum of $12,750, with interest, alleged to be due the plaintiff from the defendants under the terms of a certain written contract for the employment of plaintiff by the defendants as general manager of certain real properties of the latter situate in California and Nevada and for a period from and after December 1, 1916, at a salary of $6,000 per annum, payable in monthly installments, and for additional compensation of 5 per cent. of the amount of the net annual income in excess of $25,000 derived from the operation or leasing of said properties, to be computed in the manner specified in said agreement. The contract, which was attached to the complaint as an exhibit and expressly made a part thereof, contained the following provision:

> "It is mutually understood and agreed between the parties hereto that the owners shall not discharge the general manager during the term of this employment except on account of a breach by the general manager of some material part of this agreement going to the essence thereof. The right is reserved, however, to the owners, of discharging the general manager at any time, but, if they discharge him without legal cause, the owners obligate themselves to pay to him at the time of such discharge, in addition to the amount of compensation due him at such time according to the terms of this agreement, a full year's compensation. If, however, such discharge shall occur prior to the completion of the first year of service, then the extra amount of such compensation shall be the sum of six thousand dollars ($6,000.00); if, however, such discharge shall occur after the first year of his employment as such general manager, then the amount of such additional compensation over and above his regular salary to be paid to the general manager shall be the sum of six thousand dollars ($6,000.00) plus five per cent. (5%) of the estimated net income over and above the sum of twenty-five thousand dollars ($25,000.00), of the year during which he may be so discharged; and the general manager shall have no right to cease his services as such general manager except on account of a material breach of said agreement by the owners or either of them going to the essence thereof."

Plaintiff, in his complaint, alleged that he entered upon the performance of the obligations of said contract on his part to be performed and had continued to perform the same until the 1st day of March, 1919, when the defendants without cause discharged said plaintiff. He further alleged that there was due him at the time of his said discharge on account of his salary for the month of February, 1919, the sum of $500, which was unpaid, and that there became due him thereafter, pursuant to the terms of said contract, the sum of $6,000 as his full year's compensation for the year succeeding said date of his discharge, and the further sum of $6,250, being 5 per cent. of the amount of income of said properties in excess of $25,000 for said year, which sums also remain unpaid. He prayed judgment for the sum of $12,750, the aggregate of these several sums, with legal interest from the date of his discharge, and costs of suit. Defendants demurred to said complaint generally, and also presented a special demurrer alleging certain specified uncertainties therein. These demurrers being overruled, the defendants answered, denying generally the averments of the plaintiff's complaint. Later they asked and obtained leave to file an amended answer and cross-complaint, the former of which em-

---

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

braced amplified denials, and the latter alleged certan breaches of said contract on the plaintiff's part, which it was asserted justified his discharge, from which the defendants were alleged to have sustained a large amount of damage for which they sought affirmative relief through their said cross-complaint. The cause was tried before a jury, which returned a verdict in the plaintiff's favor for the sum of $10,000. Judgment was entered accordingly. A motion for a new trial was presented and denied, whereupon this appeal was taken.

[1-3] The appellants present as the record upon this appeal only the judgment roll, and, this being so, the sole question which is presented for review is as to the sufficiency of the plaintiff's complaint. The contention of the appellants is that the complaint shows upon its face that the action is one for the recovery of liquidated damages for the breach of the agreement set forth therein; that the provisions of said agreement as to payment of the sums sought to be recovered by the terms of said complaint amount in law to a claim for liquidated damages in violation of the provisions of section 1670 of the Civil Code, and that, this being so, the only damages to which the plaintiff would be entitled upon the breach of said agreement would be for actual damages; that the complaint contains no averment as to the actual damage sustained by plaintiff from the alleged breach of said agreement, and is therefore fatally defective. It may be conceded for the sake of the argument that the provision in the contract sued upon for the payment of certain stipulated sums to the plaintiff in the event of his discharge from the defendants' employ without cause amount to an agreement for the payment of liquidated damages. It may also be conceded for the sake of the argument that such provision in said contract was void under the terms of section 1670 of the Civil Code. It does not follow, however, that the entire contract is for that reason void. On the contrary, said section of the Code provides that such contract shall only be void to the extent of such void agreement for liquidated damages. This contract being otherwise valid, upon its breach through the discharge of the plaintiff by the defendants without cause, the plaintiff would have been entitled to recover his actual damages for such breach. In the case of contracts of employment for a fixed term the measure of damages for the breach of the covenant against the discharge of employees without cause is prima facie the contract price for his services during the term; or, in other words, the amount which the employee would have received under said contract had its terms been fulfilled. Seymour v. Oelrichs, 156 Cal. 782, 801, 106 Pac. 88, 134 Am. St. Rep. 154; Hancock v. Board of Education, 140 Cal. 554, 562, 74 Pac. 44. This being so, the plaintiff, in setting forth the contract in his complaint, in alleging performance on his part, in stating its breach on the part of the defendants through his discharge without cause, and in alleging his damages thereby to have been a fixed amount, stated a cause of action. The cases of Long Beach v. Dodge, 135 Cal. 405, 67 Pac. 499, and Sherman v. Gray, 11 Cal. App. 351, 104 Pac. 1004, cited by appellants, have no application to a case involving the discharge of an employee wherein the damage for such discharge is prima facie the contract price for his services during the term. The fact that the plaintiff may have set forth in his statement of damages an amount in excess of that which as actual damages he would be entitled to recover did not render his complaint defective, at least as against a general demurrer, and the defendants do not specify any such defect in their special demurrer, and hence could not take advantage of such defect, if any, upon this appeal. If it was the contention of the defendants that the plaintiff was not entitled to recover as actual damages the full amount to which he would have been entitled upon the fulfillment by him of the terms of said contract, which was interrupted by his discharge without cause, as, for example, that he had obtained or by the exercise of reasonable effort could have obtained employment elsewhere, these were defensive matters which could have been set forth if they existed, in the defendant's answer. Sutherland on Damages (4th Ed.) § 693, and cases cited; Hancock v. Board of Education, supra; Seymour v. Oelrichs, supra; Rosenberger v. Pacific Coast Ry., 111 Cal. 313, 43 Pac. 963. The defendants, however, made no such claim in either their answer or cross-complaint filed therein, relying solely upon their contention and assertion that the plaintiff had been discharged for cause, consisting of his willful and habitual neglect of duty in the performance of his obligations as their employee. In conceding for the purpose of the foregoing discussion that the defendants' claim that the provision in said contract relating to the payment of a stipulated compensation in the event of his discharge without cause is void as in violation of sections 1670 and 1671 of the Civil Code, we are not to be understood as admitting such to be the fact. On the contrary, looking to said contract as a whole, we are of the opinion that the actual damages which would be sustained by the plaintiff through the breach of its obligation that he should not be discharged during the term of his employment without cause are such as in the nature of the case it would be impractical or extremely difficult to fix. We do not deem it necessary, however, to amplify the discussion of this question in the state of the record before us. The appeal is presented upon the judgment roll alone, and we have therefore no means of knowing what the

evidence in this case disclosed with relation to the actual damage sustained by the plaintiff through his said discharge. The jury evidently determined that such discharge was without cause, and, having so determined, it fixed the plaintiff's damage at the sum of $10,000. By so doing it gave the plaintiff an amount in damages not only much less than the amount of his stipulated damage for such discharge under the terms of the contract, but also an amount much less than the sum he would have been entitled to receive as his compensation under said contract, had its terms of service and employment been fulfilled. It thus becomes immaterial whether the provisions of said contract with regard to the payment of liquidated damages are valid or void, since in either event the amount of the plaintiff's recovery was less than that to which he would have been entitled upon the breach of said agreement.

Finding no error in this record, the judgment is affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

60 Cal. App. 700

CHUCOVICH v. SAN FRANCISCO SECURITIES CORPORATION et al. (Civ. 4193.)

(District Court of Appeal, First District, Division 1, California. Feb. 7, 1923.)

1. Estoppel 🔑72—Title of innocent purchaser held good against assignee of conditional seller.

Under the rule of Civ. Code, § 3543, that where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer, where a securities corporation loaned money to retail automobile company on its conditional sale contract covering a truck, and, on buyer's default in payment, the automobile company repossessed itself of the truck, under instructions from the securities company and on the authority from that company to resell the truck, and did resell it to an innocent purchaser, such resale conveyed valid title to the purchaser, although the sole owner of the automobile company appropriated to his own use the proceeds of the resale.

2. Estoppel 🔑75—One placing automobile in another's possession estopped to set up registration law.

Where securities corporation loaning money to retail automobile company on its contract of conditional sale of a truck had the automobile company, on buyer's default, retake the truck and authorized that company to resell it, and an innocent purchaser bought it from that company, the securities corporation could not successfully contend that the sale to the last purchaser was void and did not convey title to him because there was no showing that any registration certificate was assigned and delivered to such purchaser when he bought the truck, as required by Motor Vehicle Act 1919, § 8, for the securities corporation, having placed the truck in the purchaser's possession by its own act, was estopped from setting up the statute.

3. Replevin 🔑76—Damages for wrongful detention of truck held rental value during wrongful deprivation of use.

In an action of claim and delivery to recover truck, the measure of damages for wrongful detention *held* to be its rental value during the period plaintiff was wrongfully deprived of its use.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Action by M. D. Chucovich against the San Francisco Securities Corporation and others. Judgment for plaintiff, and named defendant appeals. Affirmed.

I. P. Aten, of Fresno (M. K. Harris, of Fresno, of counsel), for appellant.

Everts, Ewing & Wild and T. M. Stuart, all of Fresno, for respondent.

TYLER, P. J. This is an action in claim and delivery. Plaintiff had judgment, and defendant San Francisco Securities Corporation appeals.

The appellant (hereafter referred to as the Securities Company) was engaged in the business of loaning money to automobile dealers upon conditional sales contracts, the payment of which was guaranteed by the dealers. On the 21st day of January, 1920, the Knox-Mundorff Company (hereafter referred to as the Knox Company) was a retail dealer in automobiles in Fresno, and at that time was the owner and in possession of a certain Fageol truck. On the last-mentioned date it entered into a contract of conditional sale of this truck with one Willard Brooks for the sum of $3,600, $1,200 of which was paid by Brooks at the time the contract was entered into, and he agreed to pay the balance in installments at different times thereafter. Among other things, the contract provided that, should Brooks make default in any payment or violate other provisions of the contract, the Knox Company might at its option, without previous notice or demand, retake possession of the property, and that the contract should be at an end and all rights of the purchaser terminate.

The day after this transaction was had this company assigned all its benefits in the contract to the defendant Securities Company, and guaranteed the amount due thereunder, which was the sum of $2,400. Several days later Brooks took delivery of the truck. On March 11, 1920, the Securities Company wrote to the Knox Company that Brooks was delinquent in his February payment, and that another installment would be due March 15,

1920. The company advised Knox that, if payment was not received promptly on this last-named date, it would take the necessary steps to repossess the truck and turn the same back to the Knox Company under its arrangement and have it close the account. No further payments having been made by Brooks, the Knox Company, acting under instructions from the Securities Company, repossessed itself of the truck and made arrangements for its resale. At no time during these transactions did the Securities Company ever have or receive actual or physical possession of the automobile.

In October, 1920, Knox succeeded to all interest in the Knox-Mundorff Company and thereafter conducted the business in his own name. From the time this Company repossessed itself of the truck up to April 11, 1921, it remained in the undisputed possession of the Knox Company at its place of business for the purpose of resale, with the full knowledge and consent, and under the express instructions, of the Securities Company. On the last-mentioned date Knox made a conditional sale of the truck to respondent Chucovich, who immediately took possession of the same. The purchase price was $2,567.50. Of this sum $1,567.50 was paid in cash, and the balance, amounting to the sum of $1,000, was to be paid in installments, for which promissory notes were given. The contract with respondent, together with the notes executed by him, were sold and assigned to the General Motor Acceptance Company. Thereafter plaintiff took up and paid the notes in full. Knox appropriated to his own use the $1,567.50 in cash paid by respondent, and also the proceeds of the notes, which he had sold to the Motor Acceptance Company. There is also evidence to indicate that in other transactions with the Securities Company the Knox Company had been delinquent, but it is unnecessary to discuss this feature of the case.

At the date of the resale of the truck respondent Chucovich was not known to appellant Securities Company, nor did that company learn of the sale until after it was consummated and respondent had the truck in his possession. On ascertaining the facts the Securities Company took possession of the property without the consent of respondent, and this action was brought by him to recover the same and damages for its detention.

It appeared in evidence that respondent had no knowledge whatever of any claims of any persons to the property in question, and that he purchased the same in good faith from Knox, in whose possession it was under instructions from the Securities Company to sell the same.

Upon these facts the court rendered judgment in favor of plaintiff together with damages in the sum of $1,080.10 for unlawful detention.

[1] As grounds for reversal it is first claimed that, as the evidence shows that the title to the truck at the time of the sale to respondent was in either the Knox Company or the Securities Company, and that as neither of these companies had conveyed title to Knox, he could convey none to respondent. We see no merit in this contention. Aside from the fact that the evidence strongly indicates that the Knox-Mundorff Company was owned and operated by Knox individually, it affirmatively appears therefrom that express authority was given to Knox personally to make a resale of the truck after it had been repossessed from Brooks, the first purchaser. Then, again, the resale was not made until after the time when it is admitted that Knox was the sole owner of the Knox-Mundorff Company.

But whether authority was given to Knox personally or to the firm which he represented is to our minds of no consequence. The record does not disclose, so far as we have been able to ascertain, whether the Knox-Mundorff Company was a partnership or corporation; but, however that may be as a member of that concern Knox had authority to make sales and to convey title. The Securities Company, having given it possession of the property for sale, was bound by its acts. It is a familiar maximum of jurisprudence that, where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer. Section 3543, Civ. Code. Appellant Securities Company had not only clothed Knox, but also his company, with control and possession and with express power of disposition of the property; and under such circumstances appellant is estopped to deny the authority of Knox or his company as against an innocent purchaser. Shirey v. All Day & All Night Bank, 166 Cal. 50, 134 Pac. 1001; Fowles v. First Nat. Bank of Cal., 167 Cal. 653, 140 Pac. 271.

We conclude, therefore, upon this question that Knox had complete authority to and that he did convey a valid title in the property to the respondent.

[2] The further point is urged that, even conceding this to be true, the sale to respondent was void and had no effect whatsoever to convey title to him, since the evidence fails to show that any registration certificate was assigned and delivered to respondent at the time he bought the truck from Knox. This contention is based upon the claim that the sale was not made in conformity with section 8 of the Motor Vehicle Act (Stats. 1919, p. 191), relating to the transfer and registration of ownership of any registered motor vehicle. The defendant is in no position to raise such question, for by his own

act he placed the automobile in the respondent's possession; and he is therefore estopped from evoking the provisions of the statute referred to. Boles v. Stiles (Cal. Sup.) 204 Pac. 848.

[3] And, finally, the appellant complains that the evidence does not support the finding of the court that the respondent had been damaged in the amount awarded for the wrongful detention of the truck. The proper measure of damages was its rental value during the period the respondent was wrongfully deprived of its use. No useful purpose would be subserved by a review of the evidence upon this subject. The award made was less in amount than the evidence shows respondent to have been entitled to.

For the reasons given, the judgment is affirmed.

I concur: RICHARDS, J.

---

60 Cal. App. 704

COALINGA MOHAWK OIL CO. v. STANDARD OIL CO. (Civ. 4352.)

(District Court of Appeal, First District, Division 2, California. Feb. 7, 1923. Hearing Denied by Supreme Court April 5, 1923.)

1. Appeal and error ⚷854(4)—Reasons stated for exclusion of evidence are not controlling on appeal.

The reasons stated by the trial court in support of its ruling, excluding certain evidence as irrelevant, are not controlling nor exclusive on appeal, but the ruling will be sustained, if the offered evidence was irrelevant for any reason.

2. Sales ⚷358(4)—Price at which buyer sold similar oil held irrelevant in determining price under contract.

Where a contract for the purchase of oil from the producer provided that, if the buyer paid more for similar oil produced by others in that district than the contract price, it would pay the seller the additional price, evidence that under a contract between the buyer and the railway company for the exchange of oil the buyer received oil at a value which made the price received for the oil it sold greater than the contract price it paid the seller, was irrelevant, since the value of the oil to the buyer was the price which it had to pay for it, and not the price at which it was offering it for sale.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by the Coalinga Mohawk Oil Company against the Standard Oil Company, to recover additional compensation for oil delivered under a contract. Judgment for defendant on directed verdict, and plaintiff appeals. Affirmed.

Walter H. Linforth and Henshaw & Black, all of San Francisco, for appellant.

Pillsbury, Madison & Sutro, of San Francisco, for respondent.

LANGDON, P. J. This is an action upon a contract entered into between plaintiff and defendant for the recovery of additional compensation, claimed by plaintiff to be due for oil delivered under the contract. At the conclusion of plaintiff's case, the court directed the jury to bring in a verdict for defendant. The appeal is from the judgment rendered on that verdict.

The contract between the parties was dated May 17, 1915, and a copy thereof appears in the record. It provided for the sale by plaintiff, for the period of one year from the date thereof, of certain crude oil produced by plaintiff from the premises described in the contract. The controversy between the parties arises under the price clause of the contract, which reads as follows:

> "The first party agrees to sell and deliver to the second party, and the second party agrees to accept said oil under the conditions herein named, and, except as herein otherwise provided, the first party agrees to accept, and the second party agrees to pay therefor the current prices offered by the second party to other producers in the said Coalinga Oil Field for oil of like gravity and quality as the oil delivered hereunder; said prices, at the date hereof, being as follows: [Then follows a specification of prices, varying with the gravities of the oils.]"

The contract then proceeds:

> "Whenever and as often as the prices so offered by the second party, at any time during the period of this contract, to such other producers in the Coalinga Oil Field for oils of like gravity and quality as the oil delivered hereunder are higher than the prices hereinabove mentioned, the first party shall be entitled to such higher prices from and after the tenth day after such higher prices are offered, and whenever and as often as the prices so offered are less than the prices hereinabove stated, then, at the expiration of ten days after such lower offer is made to such other producers, but not before five days' written notice thereof has been given to the first party, the first party shall deliver said oil under this contract at the lower price so offered, unless, prior to the expiration of said ten-day period the first party notifies the second party that such lower prices are not acceptable, in which event this contract shall by such notice, be terminated at the expiration of said ten days, and the first party relieved of all further obligation to deliver, and the second party relieved of all further obligation to receive, any further oil hereunder."

On June 7, 1916, the contract between the parties was extended—

> "with the understanding that all of the proceeds resulting from the sale of the oil to the Standard Oil Company will, from and after the date

of this letter, be deposited by the Standard Oil Company in such responsible bank as you (Coalinga Mohawk Oil Company) may select, there to remain until the title to your property is finally adjudicated."

On March 12, 1917, the contract was again extended "to include all oil produced and delivered from the property described to and inclusive of September 30, 1917."

On October 6, 1916, defendant and Southern Pacific Company entered into an agreement, pursuant to which defendant delivered to Southern Pacific Company fuel oil suitable for use in the locomotives of that company, in exchange for refinable crude oil to be obtained by Southern Pacific Company from Kern Trading & Oil Company, which said crude oil was to be delivered by the Southern Pacific Company to defendant. The basis of exchange fixed in the agreement between defendant and Southern Pacific Company was governed by the values of the respective oils deliverable under the contract, which values were determined according to the same schedule of prices as was then in force under plaintiff's contract with the defendant. This contract further provided that:

> "Whenever and as often as and while the prices offered by the Standard Company at any time during the period of this contract to other producers in the San Joaquin Valley fields for oils of like gravity shall vary from the prices specified herein, then the values as expressed in such changed prices shall become effective from and after the tenth day after and while such other prices are offered."

The complaint alleged the making of the two contracts by the defendant, and alleged that the Southern Pacific Company had received in exchange for its oil (which was the same kind and quality as that sold by the plaintiff to the defendant), fuel oil at the agreed value set forth in the contract between it and the defendant, but which was, in reality, of the market value of $1.57 per barrel; that therefore the defendant had paid to the Southern Pacific Company for its oil a higher price than had been paid to the plaintiff. Judgment was asked for the difference between the sum actually paid to plaintiff by defendant and the sum that plaintiff would have realized had it received for its oil, fuel oil on the same basis as the Southern Pacific Company received it, and had plaintiff succeeded in selling such fuel oil for $1.57 a barrel, which is alleged to have been the market price of the same.

The answer admitted the making of the two contracts alleged by plaintiff and a copy of the contract between Southern Pacific Company and the defendant was attached to and made a part of the answer. The answer denied that the Southern Pacific Company was a producer in the same field as the plaintiff; alleged that the contract between defendant and Southern Pacific Company was one for the exchange and not for the sale of oil; that the values of oil stated in the contract between the defendant and Southern Pacific Company were the market prices of said oils and the current prices offered therefor at that time by the defendant to other producers in the Coalinga oil field for oil of like gravity and quality, being the same as the prices for oil of said gravities and qualities set forth in a certain notice of September 20, 1916, from defendant to plaintiff, and that, as often as said current prices offered by defendant to said producers were changed, defendant notified plaintiff of such changes, and likewise notified the Southern Pacific Company in accordance with the contract between defendant and Southern Pacific Company. The answer denied that at any of the times mentioned in the complaint the fuel oil referred to in the contract between the defendant and Southern Pacific Company was of the reasonable or market value of $1.57 a barrel or of any value in excess of the said current prices offered for such oil by defendant to other producers in the Coalinga oil field. It was denied that, had defendant paid plaintiff for the oil delivered by plaintiff to defendant in the same manner as is provided by the contract between defendant and the Southern Pacific Company, the oil delivered to plaintiff by defendant in payment of the oil delivered by plaintiff to defendant would have been worth, at the times of the delivery thereof by defendant to plaintiff, any sum in excess of the amount actually paid to plaintiff therefor.

There are two points urged upon the appeal, first, that the trial court erred in refusing to admit in evidence the contract between the defendant and Southern Pacific Company, and, second, that the court erred in directing a verdict for defendant.

[1, 2] As we have stated, the making of the said contract, as alleged, was admitted by the answer, which went further and set out a copy thereof. However, when this contract was sought to be introduced in evidence by the plaintiff to establish its claim that defendant had offered a higher price to other producers in the Coalinga oil field than the price paid to plaintiff, the defendant objected on the ground that such evidence was not competent, relevant or material. A number of reasons were urged as to why it was not relevant. It is true the trial court, in sustaining the objection to the relevancy of the evidence offered, stated certain reasons for its ruling which are not controlling nor exclusive here. It is sufficient to sustain the ruling, if the evidence offered be irrelevant for any reason for the purpose for which it was offered. We are of the opinion that it was irrelevant upon the contention of the plaintiff. As we have stated, it was in evidence that the values placed upon the fuel

oil for the purpose of exchange with the Southern Pacific Company were the same as the prices offered and paid to the plaintiff for the oil purchased from it. Plaintiff claims to have been injured because the selling price to the public of fuel oil was placed at a higher figure by the defendant than the price defendant paid for such oil. We think that circumstance is immaterial under the facts here. The value of the fuel oil to the defendant was, assuredly, the price at which it could purchase the same and not the price at which it was offering the same for sale.

Sweeping aside, for the moment, all questions as to whether the contract between the defendant and the Southern Pacific Company was for a sale or exchange of oil, and also many of the other questions raised by the respondent as presenting objections to the introduction in evidence of the said contract, we think it clear that, even though said contract be regarded as an offer to the Southern Pacific Company for its oil, and even though the Southern Pacific Company be regarded as a producer in the Coalinga oil field, nevertheless, the value of the article offered by the defendant to the Southern Pacific Company must be established at the price the defendant would have to pay for such article in the open market and not the price at which it might expect or offer to sell the same. Assuredly, a barrel of oil was worth to the defendant exactly the amount of money it would have to pay for the same in the open market and not the selling price to be exacted for the same from the "trade." The defendant paid to the plaintiff, in money, for plaintiff's oil, the same value that defendant paid to the Southern Pacific Company, if we estimate the value of the consideration paid to the Southern Pacific Company at the cost price to defendant. It is apparent, therefore, that the contract sought to be introduced did not establish plaintiff's contention that a higher price had been offered to the Southern Pacific Company for oil than had been paid to the plaintiff.

The ruling upon the relevancy of the Southern Pacific Company contract was proper. It was also decisive of the case. The existence and terms of said contract were admitted by the answer, but its relevancy was contested. Our disposition of the first question raised by appellant also answers the second. If the contract between the Southern Pacific Company and the defendant did not tend to establish the allegations of the complaint, then they were not sustained, for no other evidence was offered, and the trial court properly instructed the jury to find for the defendant.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

60 Cal. App. 61

PEOPLE v. ROSS. (Cr. 1063.)

(District Court of Appeal, First District, Division 1, California. Feb. 21, 1923.)

1. Burglary 🔑41(5)—Evidence held to prove commission of burglary between "sunset and sunrise."

In a prosecution for burglary in the first degree, evidence that the pearls claimed to have been taken by the defendant from a jewelry store located at a corner of two principal business streets were left on display in show window when the store was closed after sunset, and that when the store was opened on the following morning, 1 hour and 17 minutes after sunrise, the glass window had been broken and the pearls were missing, *held* sufficient to prove that the burglary had been committed between sunset and sunrise, as required by Pen. Code, §§ 460, 463.

2. Burglary 🔑41(6)—Evidence held to identify defendant as person committing crime.

In a prosecution for burglary, evidence as to a confession by the defendant *held* sufficient to identify the defendant as the person who committed the crime.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

James Ross was convicted of burglary in the first degree. From the judgment of conviction, and from an order denying his motion for a new trial, he appeals. Affirmed.

N. S. Lee, of Cottage Grove, Or., for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

ST. SURE, J. Defendant was convicted of burglary in the first degree, and appealed from the judgment and from an order denying his motion for a new trial.

When the jewelry store of Albert Samuels & Co., at the corner of Fifth and Market streets, San Francisco, was closed on the evening of January 19, 1922, there were eight strings of pearls, valued at several thousand dollars, left on display in the show window. The clerk who closed the store returned the following morning at 8:30 o'clock, to find the glass window broken and the pearls missing. On the 7th of February, 1922, the defendant was arrested and charged with the theft.

[1] Defendant contends that the evidence is insufficient to sustain a verdict of guilty of burglary in the first degree, committed during the period "between sunset and sunrise." Pen. Code, §§ 460 and 463. The evidence is undisputed that the burglary was committed between the hours of 6:15 o'clock (after sunset) January 19, 1922, and some time prior to 8:30 o'clock (1 hour and 17

minutes after sunrise) on the following morning. The store where the burglary was committed is located at a corner of two of San Francisco's principal business streets. It was a reasonable inference for the jury to draw from the evidence that the burglary was committed in the "nighttime" rather than in the "daytime." Consummation of the crime after sunrise would have necessitated breaking the window and taking the pearls in full view of passing pedestrians. The conclusion is obvious that the crime was committed at dead of night. People v. Schafer, 161 Cal. 573, 119 Pac. 920.

[2] Defendant further contends that there is no evidence connecting him with the commission of the crime. Such claim is untenable. The undisputed evidence shows that the arresting officer informed the defendant that he was wanted for "burglarizing Samuels' store." Defendant neither protested innocence nor denied the charge. He was taken to a pawnshop by the arresting officer, who told him that he had recovered six of the strings of pearls, and asked what became of the other two. The defendant replied: "I do not know anything about them." On the way to the Hall of Justice he said to the officer in the presence of witness Brandt:

> "You let me go; you got all the pearls, I got six strings, all I got, and you got them; you ought to let me go."

After proof of the corpus delicti this confession was sufficient to establish the identity of the defendant as the person who took the pearls.

The judgment and order denying a new trial are affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

---

60 Cal. App. 764

REINDERS v. OLSEN. (Civ. 4085.)

(District Court of Appeal, Second District, Division 1, California. Feb. 13, 1923. Hearing Denied by Supreme Court April 12, 1923.)

1. Negligence 🔑136(8)—Contributory negligence question for jury.

It is only when there is no dispute as to the facts, and reasonable men can reach but one conclusion, that the court is warranted in taking the question of contributory negligence from the jury.

2. Municipal corporations 🔑706(7)—Contributory negligence of motorcycle rider for jury.

Where plaintiff operating a motorcycle collided with defendant operating an automobile at a street intersection, defendant being on the wrong side of the street in making a turn, evidence showing that both parties, just prior to the collision, were in a serious dilemma, *held* sufficient to make the question of plaintiff's negligence one for the jury.

3. Appeal and error 🔑1033(5)—Appellant cannot complain of favorable instructions.

Appellant cannot complain of instructions favorable to himself.

4. Appeal and error 🔑882(12)—Invited error not reversible.

Appellant cannot complain that instructions are inconsistent or not based on the evidence or based on facts of which there is no evidence, where it appears that such error was partly, if not entirely, caused by his request for such instructions.

5. Trial 🔑295(3)—Error cannot be predicated on omission of instruction covered by another.

Instructions must be considered as a whole, and error cannot be predicated on the omission of a particular instruction in a particular respect, where the law in that regard is fully covered by other instructions given.

6. Municipal corporations 🔑705(4)—Practice of drivers to use wrong side of street no justification for defendant's violation of statute in that regard.

In an action for personal injuries suffered by motorcycle rider by collision with an automobile, a custom or practice of automobile drivers to use the wrong side of the street at the intersection where the accident occurred, could not be binding on plaintiff, so as to excuse defendant from violating the statute in that regard, if such were the proximate cause of the accident.

7. Negligence 🔑72—Best possible choice in avoiding peril not required.

The law does not require that one placed in a dangerous situation by the negligence of another shall make the best possible choice in extricating himself from peril.

8. Municipal corporations 🔑706(8)—Instruction on the doctrine of imminent peril warranted.

In an action by motorcycle rider for injuries in collision with automobile, evidence *held* to warrant an instruction as to the degree of care required in perilous situation.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Robert Reinders, a minor, by Anna Fuller, his guardian ad litem, against William Olsen. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 212 Pac. 49.

W. H. Thomas and B. P. Gibbs, both of Los Angeles, for appellant.

D. A. Stuart, of Los Angeles, for respondent.

HOUSER, J. Plaintiff, by his guardian, brought action against defendant to recover damages for personal injuries sustained in a collision between a motorcycle upon which plaintiff was riding and an automobile operated by defendant. The principal undisputed facts appear to be as follows: At about 8 o'clock p. m. of August 27, 1920, plaintiff was riding his motorcycle eastward on Third street in the city of San Pedro, approaching the intersection of Third street with Bandini street, the former extending east and west and the latter north and south, the two streets intersecting at right angles. A single street car track was located about the center of Bandini street, the rails being slightly above grade at the street intersection. Neither of the streets was paved, and each of them was somewhat rough. When plaintiff was a considerable distance from the intersection of the two streets he was traveling at a rate of about 20 miles an hour, but when within one block of the intersection the speed of his motorcycle was slowed to about 10 or 12 miles an hour, and so continued until the accident upon which this action is based occurred. The headlights of each of the vehicles were burning brightly and were plainly visible to the respective operators of the two vehicles. Just before the accident occurred, defendant had been traveling west on Third street, and plaintiff was at all times traveling east on Third street. As defendant neared the intersection of Third street and Bandini street he was traveling north of the center line of Third street. On approaching the corner of Third street and Bandini street, defendant caused his automobile to make a wide turn to the left, as though he were about to turn into Bandini street to the south of Third street, but on the easterly side thereof and to the east of the street car track. He was traveling at a speed of about 4 or 5 miles an hour. The two vehicles collided very close to the southeast corner of the intersection of the two streets, and plaintiff sustained injuries on which he bases this action.

Plaintiff's testimony relative to the accident includes the following: That he was struck where the curb would be on the southeast corner of the intersection, and was traveling on the right or the south side of Third street; that the automobile was about 40 feet east of Bandini street when he saw it commence to make a turn to the south; that it kept curving until the collision, and he was watching it make the turn; that the automobile was going slowly, and he thought it was going to stop, but that it suddenly lunged ahead and struck him when he was passing in front of it; that upon entering the intersection he commenced to swerve slightly to the right at a point about 75 feet west of the tracks; that plaintiff was operating his motorcycle upon his right-hand side of the street and so far to the right that if a curb had been constructed he would have been on the curb. With reference to plaintiff's position, another witness testified: "You could not get over to the right any further because he was as far as he could go."

Plaintiff further testified that when he had gotten almost to the west intersecting line of Third street and Bandini street he noticed that the automobile commenced to turn to the left, and when he reached the car track the automobile was the same distance from the point of the accident that plaintiff was, and while plaintiff was on the car track the automobile was traveling 4 or 5 miles an hour. What happened after that is shown by the following questions and answers:

> "Q. When you were on the railway track crossing did you notice as to what the automobile was doing? A. It was going pretty slow; I thought it was going to stop. The engine was racing, and I thought they were stopping there, and I had plenty of time to get by, so I kept on going, and just as I got right in front of them he let go of his clutch and the car gave a lunge and hit me."

Two eyewitnesses corroborated the last statement of plaintiff.

The witness J. E. File testified as follows:

> "Q. Did it (the automobile) change its speed at any time while you were noticing it? A. Very little, until it seemed just about the time it struck, then made a kind of jump. Q. Jumped forward? A. Yes."

The witness Mrs. Anna File testified as follows:

> "Q. Did you notice whether there was any difference in its speed from the first instant you saw it until it struck? A. Well, it seemed to kind of make a jump and then stopped; just a kind of start like, and then stopped instantly."

[1] Appellant's first point is (a) plaintiff was guilty of contributory negligence, and the motion for nonsuit should have been granted, (b) the court erred in refusing to instruct the jury to return a verdict in favor of defendant. The two points are discussed as one. Negligence is the want of ordinary care on the part of one of the parties to an action, and contributory negligence means the same thing as applied to the other party. Neither is of any consequence, unless it proximately or directly produces the accident, and, of course the rule of law in an action arising out of personal injuries is that, where plaintiff is guilty of contributory negligence, he cannot recover. The question of whether plaintiff has been guilty of contributory negligence ordinarily is one exclusively for the jury. It is only when, there being no dispute as to the facts and reasonable men can reach but one conclusion—that of plaintiff's lack of ordinary care in the circumstances which contributed directly or proximately to the accident of which he complains—that the judge is warranted in deciding that fact in place of the jury, and declaring therefrom as a matter of law that plaintiff shall not be permitted to recover damages. If reasonable men might differ as to whether or not the plaintiff did what an ordinarily prudent person would have done

in the same or similar circumstances, then the judge is not justified in drawing the conclusion that, because in his own mind the plaintiff was guilty of contributory negligence, all other reasonable persons must think likewise. A determination by the trial judge to the effect that a plaintiff has been guilty of contributory negligence must rest upon such a state of facts that not merely a bare majority of reasonable men will agree with his conclusion. It is immaterial whether the trial judge actually believes the evidence to be true or not. Plaintiff's case must be taken absolutely at face value. He is entitled to every favorable inference fairly arising from the evidence produced by him. The motion is equivalent to a demurrer to the evidence, or an objection that, admitting all the evidence introduced to be true and disregarding all inconsistencies therein, if any, the evidence is insufficient in law to entitle plaintiff to a judgment in his favor. It is only when reasonable men can draw but one inference, and that inference pointing unerringly to the negligence of the plaintiff, contributing directly or proximately to his own injury, that the law will step in and forbid a recovery.

> "It is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence, that the court can say, as a matter of law, that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury." Zibbell v. Southern Pacific Co., 160 Cal. 241, 116 Pac. 515, citing cases.

At a time when each of the parties to this action was several feet from the point of the accident, plaintiff saw defendant start to turn toward him. Neither plaintiff nor defendant was traveling at a high rate of speed, but defendant was doing an unlawful thing in making the turn as he did—that is in turning into the left side of an intersecting street. At the time of the collision plaintiff was over as far as he could go to the right side of the street on which he was traveling; there was no escape in that direction. Viewed as at this time and not as it may have appeared to plaintiff at that time, plaintiff might have stopped his motorcycle and escaped injury, or he might have gone around to the rear of defendant's automobile with the same result; but there was no certainty that, had he stopped, defendant would not have run him down; neither was there any certainty that, had he violated the "law of the road" by attempting to pass defendant on the left, that defendant would not have also turned in that direction or stopped his automobile altogether, and thus have produced a collision. Plaintiff and defendant were each facing a serious dilemma. The indications were that, according to plaintiff's testimony, the engine of defendant's auto was racing, and defendant was about to stop his automobile in order that plaintiff, who was traveling at a much faster rate of speed than defendant, might safely pass in front of defendant; and plaintiff, acting upon such appearances, attempted to carry out such plan. The testimony of plaintiff and that of two other witnesses is that at that instant defendant's auto suddenly made a "lunge" or a "jump" and struck plaintiff's motorcycle, thus causing the injury of which plaintiff complains.

[2] It is impossible to say absolutely that plaintiff was negligent or careless. The evidence presented a question of fact which was at least fairly debatable; that is, such a question that in its answer reasonable men might disagree; hence there was no error committed by the court, either in denying counsel's motion for nonsuit, or in denying the motion for a directed verdict in favor of defendant.

Appellant next complains of two instructions given by the court, in the first of which the jury was, in effect, told that if the plaintiff was in a place of safety, and discovered the defendant turning to the left, cutting the corner, and, after discovering the defendant operating his automobile in the manner stated, speeded up his motorcycle in an effort to get ahead of the defendant's automobile as it was cutting the corner, then he was guilty of negligence; and in the second instruction, in practically the same circumstances, the jury was instructed that, if he "took the chance of speeding up his motorcycle in an effort to pass in front of defendant's automobile at the corner of the intersection, then it is for you to determine under all the circumstances whether he was guilty of negligence or not."

Appellant's contention is that these two instructions were misleading and inconsistent one with the other, in that, by the first instruction, the jury was led to believe that, if plaintiff left a place of safety and "speeded up" his motorcycle in an effort to get ahead of defendant's auto and was injured thereby, such act constituted negligence, while by the second instruction the question of whether such an act amounted to negligence was left to the jury. But, in the first place, counsel for appellant says that the first instruction was in effect requested by himself, and the second instruction, which in substance was also requested by defendant, included the proposition as given by the court that, if plaintiff "took the chance of speeding up his motorcycle in an effort to pass in front of defendant's automobile at the corner of the intersection, then his acts in so doing were negligent," but that the court modified that instruction so as to leave the question of negligence to the jury, and omitted from the instruction the possible question of plaintiff's contributory negligence arising from his knowledge of the fact that it had been a general custom for some time for vehicles to turn to the left and cut the corner at the intersection of Third and Bandini streets, in proceeding south from such intersection. Appellant's brief contains the further statement "that there is nowhere in the entire record any testimony or evidence whatever by the respondent that he 'speeded up' his motorcycle in an effort to get ahead of the automobile of appellant."

[3, 4] The first instruction is altogether in defendant's favor; he is in no position to complain of it. The cases are numerous which hold that instructions given at the request of the party are not subject to his exception, and even though erroneous, cannot be taken advantage of on a motion for new trial. While the general rule is that instructions should be based on the evidence and not on facts of which there is no evidence, where it appears that such an error was partly, if not entirely, caused by the party complaining, he can be afforded no relief; in other words, he should not be permitted to profit by his own wrong. It is a sound principle, as well as a most salutary one, that a party cannot be heard to complain of an error which he himself has been instrumental in bringing about. Missouri Pacific R. Co. v. Fox, 60 Neb. 531, 83 N. W. 744, citing cases. If there was no evidence as to plaintiff's "speeding up" his motorcycle, then no instruction covering that point should have been given; but where it appears that both such instructions upon that phase of the case were suggested by defendant, he should be estopped to claim any redress by reason of the fact that they were submitted to the jury. If such instructions were inconsistent one with the other, defendant was at least partly responsible therefor, and he cannot be heard to complain on that account.

Complaint is also made of the following instruction:

> "But if a person, either plaintiff or defendant, is put in great peril by the negligence of the opposite party, of either doing an injury or of being injured, where immediate action is necessary to avoid it, he is not required to exercise all of that presence of mind and carefulness that are justly required of a careful and prudent man under ordinary circumstances; and the reasonableness of his effort to escape injury, after discovery of the danger, is a question for the jury to determine, under all the circumstances of the case. And it is for them to determine under the circumstances, where plaintiff or defendant has been put in peril of being injured or of doing injury by the negligence of the other—you are to consider that in determining the question of negligence."

[5, 6] It would appear that the instruction was as favorable to defendant as it was to plaintiff. But appellant contends that the giving of this instruction was erroneous for two reasons: First, that it did not exclude or negative the negligence of the respondent, if any, in placing himself in the dangerous situation; and, secondly, that it had no application to the case where respondent's own statements showed "that he was familiar with the custom of using the east side of Bandini street by vehicles going south thereon; that he saw the automobile for a distance of several blocks and watched it all the time it was making the turn; that he could have easily avoided any injury by slackening up his speed or slightly changing the course of his motorcycle; that nevertheless and in the very face of the moving and turning car he continued serenely on his way, directly into the path of the automobile without making the slightest effort to avoid the collision." With reference to the first of appellant's contentions, as well as to all other points, with the exception of one to be noticed directly, it is sufficient to point out that instructions must be considered as a whole, and it appears that all such points to which appellant directs attention were fully covered by other instructions given by the court. As to that part of appellant's objection to the instruction with reference to the failure of the court to include the fact of knowledge on the part of plaintiff, relating to the "custom" or, rather, practice, of automobile drivers using the wrong side of the street, no such practice could be binding on plaintiff so as to excuse defendant from violating the statute in that regard, provided that such act was the proximate cause of the accident. The evidence shows that plaintiff saw defendant in the act of violating the statute in that respect; so any question of practice by other automobile drivers would be immaterial, and, as the attention of the jury was directed generally by other instructions to all acts and conduct by plaintiff, as well as by defendant, at the time of or immediately prior to the accident, it would be unnecessary to mention this particular act, even though it might be considered of some importance to defendant's case.

[7, 8] Counsel also argue that the "doctrine of imminent peril" had no application; but, as has already appeared in the matter of the motion for nonsuit, circumstances in connection with the accident were such that the court could not rightfully decide that contributory negligence on the part of plaintiff was shown. The question of the negligence of plaintiff was left with the jury to determine, also the question of whether or not plaintiff was put in great peril by the negligence of defendant, and then followed in the instruction the rule of law that, where immediate action on the part of plaintiff becomes necessary to avoid injury, he is not required to exercise that presence of mind

and carefulness that is justly required of a careful and prudent man under ordinary circumstances. As has been elsewhere adverted to, the evidence shows that plaintiff found himself in a dangerous situation—whether through his own negligence or not was a question for the jury to decide. He had little, if any, time to consider what action on his part would be most likely to safely extricate himself therefrom, and, as is succinctly stated in the instruction to which objection is made, the law does not demand that he make the best possible choice. "It is always easy after an accident to see how it could be avoided; but a man's duty before the calamity is not measured by such ex post facto information." The jury was particularly instructed, in substance, that, if, at the time plaintiff was thus hastily called upon to determine his course of action, he did what a reasonably prudent and careful person might have done in the same or similar circumstances, he did all that reasonably could be expected of him.

The court having noticed all the alleged errors occurring on the trial of this case, and it appearing that none of them has resulted prejudicially to the defendant, it is ordered that the judgment herein be, and the same is hereby, affirmed.

We concur: CONREY, P. J.; JAMES, J.

---

60 Cal. App. 693

PEOPLE v. OLIVER. (Cr. 645.)

(District Court of Appeal, Third District, California. Feb. 5, 1923.)

1. Rape 🔑40(3)—Testimony of prosecutrix as to intercourse with others properly stricken.

In a prosecution for statutory rape, it was not error to strike, on motion of prosecuting attorney, testimony of prosecutrix in answer to questions whether she had ever had sexual intercourse with a person other than defendant.

2. Criminal law 🔑938(1)—No abuse of discretion in denial of new trial.

There was no abuse of discretion in denying defendant, convicted of rape, a new trial on the ground of newly discovered evidence, consisting of medical testimony tending to show that prosecutrix, under the age of consent, was suffering from gonorrhea two days after the alleged offense, and that if defendant had intercourse with her as charged he would have contracted the disease, where testimony of prosecutrix on the trial that intercourse with defendant had ruined her health should have put him on inquiry as to the fact, and the newly discovered evidence was at least uncertain and of doubtful value, and as tending to show intercourse with others than defendant immaterial.

3. Criminal law 🔑938(1)—New trial for newly discovered evidence not favored.

A motion for new trial on the ground of newly discovered evidence is addressed to the discretion of the trial court, and is to be regarded with distrust and disfavor.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Ozias Oliver was convicted of statutory rape, and he appeals. Affirmed.

L. J. Maddux, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of rape accomplished with a girl of the age of 14 years. He prosecutes this appeal from the judgment and the order denying his motion for a new trial.

At the time of the alleged offense the defendant was a married man, but separated from his wife, from whom he had theretofore secured an interlocutory decree of divorce. He resided, apparently alone, in a house near the residence of his mother. The prosecutrix had lived with her parents for several months in the same neighborhood in which defendant resided, and was a friend of defendant's sister; both girls being of about the same age. The prosecutrix testified that the defendant committed the act charged, her resistance being formal only, if any; that prior to that time he had done things which were not gentlemanly "in different ways; fooled with me * * * with his hand." The defendant denied the crime charged, but did not deny the acts of familiarity, further than to say that his relations with the prosecutrix had been "proper." According to the defendant's testimony, the girl was the pursuer and he the pursued. He testified that he met her nearly every evening by her appointment; that he frequently kissed her; that she asked him to marry her, and he replied: "I will talk with you after I get my final decree." As is usual in such cases, there was no direct testimony as to the commission of the act, other than that of the prosecutrix and the defendant. It is not contended, however, that the evidence is insufficient to sustain the charge.

[1] On cross-examination the prosecutrix was asked if she had ever had sexual intercourse with another young man, naming him. Over the people's objection she was permitted to answer in the negative. Thereafter, on motion of the district attorney, the answer was stricken out by the court. The ruling was not erroneous. People v. Harlan, 133 Cal. 16, 65 Pac. 9; People v. Kilfoil, 27 Cal. App. 29, 148 Pac. 812; People v. Wademan, 38 Cal. App. 116, 175 Pac. 791.

Appellant complains of one of the instructions given by the court. It is sufficient to say that the instruction is in the exact language of one approved in the case of People v. Wolff, 182 Cal. 728, at page 739, 190 Pac. 22.

[2] It is contended that the court should have granted defendant's motion for a new trial on the ground of newly discovered evidence. On the hearing of the motion testimony was taken pursuant to a stipulation that the transcript thereof should be treated as affidavits. On such hearing two physicians who attended the prosecutrix at the county hospital, where she was taken the third day after the alleged offense, gave testimony which tended to show, but not certainly, that the prosecutrix was suffering from gonorrhea when taken to the hospital, though no microscopic examination was made. One of the physicians testified that he had known of the disease developing in three days after exposure; that he would not say it would not develop in two days, but that the usual period is from three to ten days; that "where the male has been exposed to an infection prior to the time of coming in contact with the female, there is a possibility of the male carrying and transmitting these germs without getting them himself, that is, get the infection"; that "it has been known that cases of gonorrhea that have been quiescent for years have been transmitted from the male to the female, and where the individual was apparently cured." The prosecutrix testified at such hearing that the disease developed on January 22d, two days after the commission of the offense. The defendant testified that he was not afflicted with any venereal disease during the year in which the crime is alleged to have been committed, but that he had gonorrhea in 1914 or 1915. At the trial, on cross-examination, the prosecutrix testified that she had never had sexual intercourse with any person but the defendant, and with him but the one time; that she was taken in charge by the juvenile court and placed in the county hospital on the 23d of January, where she was given treatment on account of defendant's sexual intercourse with her; and that such act had ruined her health for life.

[3] In denying the motion for a new trial, the court referred to this testimony of the prosecutrix and said:

> "That was sufficient, it seems to me, to put the defendant on inquiry and he could easily then have ascertained * * * almost at the beginning of the trial of the case that this condition existed."

The court further expressed the opinion that the evidence claimed to have been newly discovered would not have changed the result if it had been produced at the trial. If it be conceded that such evidence was admissible, it was uncertain in character and of doubtful value. As tending to show intercourse with other men, the evidence was immaterial. As tending to show that, if the act charged was committed by the defendant, he probably would have contracted the disease, the evidence was at least uncertain, because the infection of the prosecutrix did not develop until two days after the commission of the act charged. It has often been held that a motion for a new trial on the ground of newly discovered evidence is addressed to the discretion of the trial court and is to be regarded with distrust and disfavor. Under the circumstances of this case, it cannot be said that the trial court abused its discretion in denying the motion.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

61 Cal. App. 7

PEOPLE v. GRAFFT et al. (Cr. 1087.)

(District Court of Appeal, First District, Division 1, California. Feb. 15, 1923.)

1. Criminal law 🔑519(9)—Confession held not rendered inadmissible because obtained after admonition by sheriff.

Even though a confession may have been obtained after admonition, advice, exhortation, or adjuration by a sheriff, it would not have been thereby rendered inadmissible.

2. Criminal law 🔑736(2)—Whether confession was free and voluntary determinable by trial judge.

The question whether a confession was free and voluntary is one peculiarly within the province of the trial judge to decide upon the facts.

3. Criminal law 🔑531(3)—Evidence held to support trial court's conclusion confession was voluntary.

Evidence of the means by which a confession was obtained by a sheriff *held* to support a conclusion of the trial court that it was free and voluntary.

4. Homicide 🔑234(5)—Abandonment of conspiracy to rob before homicide committed held not established.

In a prosecution for murder, *held*, that the killing was the natural and probable cause of forces set in motion by a common plan and attempt to commit a robbery, notwithstanding that the killing actually occurred while those engaged were attempting to make their escape after outcries by the intended victim who was clinging to one of his assailants and trying to prevent his escape; such showing being insufficient to establish an abandonment of the conspiracy to rob.

5. Indictment and information 🔑189(8)—Though homicide committed in perpetration of robbery is first degree murder, conviction may still be in second degree.

Though the statute makes killing in the perpetration of a robbery murder in the first degree, it is still within the province of the jury to convict for murder in the second degree.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

George Grafft and James Dunn were convicted of murder in the second degree, and the former appeals from the judgment of conviction and the latter from the judgment of conviction and an order denying his motion for a new trial. Judgments and order affirmed.

Frank Curran and C. O. Hansen, both of Fresno, for appellant Dunn.

H. H. Baker, of Fresno, for appellant Grafft.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

ST. SURE, J. Defendants were jointly charged by information with murder, tried together, and convicted of murder in the second degree. Defendant Grafft appeals from the judgment, and defendant Dunn from the judgment and order denying his motion for a new trial. Grafft bases his appeal upon the insufficiency of the evidence and alleged errors of law. Dunn seeks reversal solely upon the ground that his confession, introduced against him, was procured through inducement and intimidation.

Chow Wing Hop, known as Wing Hop, kept a grocery store at Coalinga, Fresno county. Near the store was a blacksmith shop and radio station. At the front of the store was a porch, the floor of which cleared the sidewalk by about two feet. On November 10, 1921, between 6 and 6:15 p. m., three young men named, respectively, Mayberry, Bryan, and Davis, in an automobile, stopped at the blacksmith shop. They noticed another car parked in front of the grocery store, faced in the same direction as their own. Mayberry alighted and entered the station, while Bryan and Davis remained in the car. A few seconds after, Mayberry heard two screams in close succession. The screams were also heard by Smith, radio man, though he had on a radio headpiece, and were recognized by him as the cries of the Chinese. It was too dark to recognize individuals even at a short distance, except by form or general peculiarity of movement. Both Bryan and Davis testified that while waiting for Mayberry they first heard a noise like that of scuffling in the store, followed by screaming; that four men emerged from the store; the first, somewhat in advance of the others, leaped into the car; the second got in just as the motor started, and two were scuffling together on the porch. Bryan saw one of these two strike the other about the head and shoulders. Davis "heard something hit." One jumped into the car as it got into motion, and the other fell to the sidewalk from the porch. All the men getting into the car seemed to be in a great hurry. Mayberry came out of the station in time to see but three men, one getting into the car and two on the porch, the latter holding on to each other, and he saw a blow struck by one knocking the other headlong off the porch. This blow Mayberry both heard and saw. Smith came out only in time to see the Chinese lying on the sidewalk and a man partway into the car. By an arc light some 70 yards distant he recognized the one fallen to the sidewalk as Wing Hop by his "striped overalls and white shirt."

Mayberry, Bryan, Davis, and Smith gave chase to the fleeing car, attempting to get its number; but they soon lost it and never saw it again. Returning to town, they joined the city marshal and went back to Wing Hop's store, where they found the Chinese lying on the sidewalk. In response to questioning on the way to the hospital, Wing Hop said: "Nobody hit me; what you want?" But they did not consider him rational, and Dr. Mountfort, who attended him at the hospital, testified that he was dazed and semiconscious from the time he was received at the hospital (between 6:20 and 6:30 o'clock) until his death shortly after 8 o'clock the same evening. An autopsy showed death was caused by a fractured skull. Dr. Mountfort also testified that the large wound in the back of the head was caused by a blunt instrument.

Between 5:30 and 6 o'clock in the evening of the same day, both defendants, in company with a third man, were seen and spoken to by the sheriff with two of his deputies at a restaurant in Coalinga. None of the three was seen again by any of the sheriff's party until Grafft's arrest November 22, and Dunn's December 21, 1921.

On November 22d the sheriff and Grafft had a conversation alone, lasting about three or four hours. On the next day there was another meeting between them in the afternoon, and in the evening of the same day another, at the latter of which there were also present the district attorney, court reporter, and Deputy Sheriff Collins. Grafft told his story through answers to questions put by the district attorney. This story was of a plan to rob Wing Hop, with the attempt resulting in his death. Though Grafft had been with Green (the third man not apprehended) and Dunn for a ride in a stolen machine, and had heard them discuss robbing the Chinese, he asserts that he took no part in the plans; that he did not believe the others would try it; and that, though actually staying with the others on the trip to Wing Hop's store, refused to get out on Green's orders on arrival there, but remained seated in the car during all the occurrences which followed. Dunn's attorney objected to the introduction of Grafft's confession, and put him on the stand in an endeavor to show that the confession was procured by inducements. He testified that he had been in solitary confinement three days; that the sheriff had told him the first day:

"You better confess because we have the goods on you and will convict you anyway. No man ever hung in this state that ever confessed." On the second day the sheriff talked to him, he says "about my mother more than anything else," with reiterations of what he had said the day before. At the meeting at which the statement was made the sheriff told him, "Just remember what I told you yesterday." All of this the sheriff denies, admitting that he told the defendant that "the truth should not hurt any one," and that he talked to defendant about the case and urged him to tell the truth of what he knew about it.

Dunn was arrested December 21st. An hour's conversation was had between the sheriff and Dunn the same evening, and another the next day of equal length, after which Dunn also made a statement; there being present the sheriff, Deputies Sheriff King and Collins, a Coalinga constable named Peterson, and the district attorney. Dunn's statement tallied generally with that of Grafft except as to the latter's nonparticipation, and also with the testimony of the eyewitnesses. Briefly, the offenders had stolen a car and taken a trip to the coast and back to Coalinga. Being short of money, they planned to rob the Chinese, noting his place when coming into town. They later encountered the sheriff and his deputies at the restaurant. Leaving there they drove to Wing Hop's grocery, which they found closed. A dim light showed in a back room, and on calling him, the Chinese came out and opened the store. They entered, asking for supplies, and while the Chinese was bent over Dunn hit him on the head with an eight-inch Crescent wrench which he had carried from the car in his sleeve. The Chinese showed fight, and Dunn hit him again. By this time Wing Hop was screaming and trying to hold any of his assailants he could grasp. Dunn freed himself, and running out jumped into the car and started the motor. Green and the Chinese grappled on the porch, and Green finally threw the Chinese off and leaped into the moving car. The same objections to the introduction of this confession were made by Dunn's attorney, and the sheriff and defendant put on the stand for the purpose of showing how the confession was obtained. The sheriff again testified that there were no threats, inducements, or promises. The defendant testified that he was told by the sheriff that he would be "railroaded," "that no man in the state of California ever hung that made a confession," and that "if I made a confession that there was a very slim chance of my hanging, and that I had better confess." Dunn also testified that he was not permitted to have an attorney at the time he asked for one, and that the district attorney made the same statements regarding confessions as the sheriff, and that he would not have made a disclosure of the facts had it not been for such statements on the part of the district attorney and sheriff. The court admitted the confession.

Defendant Dunn bases his appeal on the answer to one question, namely: "Did the trial court err in admitting the confession of the defendant James Dunn?"

Counsel for defendant Dunn call our attention to the cases of People v. Loper, 159 Cal. 6, 112 Pac. 720, Ann. Cas. 1912B, 1193, and People v. Clark (Cal. App.) 203 Pac. 781. The facts and circumstances in the instant case are wholly dissimilar to those in the cases cited. The Clark Case (citing People v. Loper) presents an extreme example of what is termed a "relentless sweating process." In the Clark Case, Mr. Justice Nourse, writing the opinion for the court, says:

> "It is apparent from the testimony of the witnesses for the state that the relentless sweating process to which the appellant was subjected was such as to render her statements involuntary."

[1] In that case the complaining appellant was put through a course of cross-examination continuing over a period of two weeks when she was in such a low physical and mental condition that she had to be assisted by matrons into the examination room with her head covered with wet towels to keep her in a condition to answer questions. No such facts or circumstances relating to the confession of Dunn obtain in the instant case. The sheriff denied making the statements attributed to him. And even if there had been admonition, advice, exhortation, or abjuration by the officer to the defendant, the confession would not have been rendered inadmissible. People v. O'Brien (Cal. App.) 200 Pac. 766; People v. Haney, 46 Cal. App. 317, 189 Pac. 338; 16 Corpus Juris, p. 720, sec. 1474; 16 Corpus Juris, p. 721, sec. 1476.

[2, 3] The question whether the confession was "free and voluntary," or the result of inducement, coercion, intimidation, or duress exerted by the officer, was one peculiarly within the province of the trial judge to decide upon the facts. His conclusion thereon has substantial support in the evidence, and we are of the opinion that we should not interfere with it.

[4] Counsel for defendant Grafft makes specious deductions from the evidence to the effect that the real cause of death was the fall from the porch to the ground; that the conspiracy to rob had been abandoned, and that therefore death was not the natural consequence thereof; that decedent contributed to his own death by clinging to Green, and that Grafft had no part in aiding or abetting the killing. Based on these deductions, he argues that the defendants were not liable as conspirators, but, if at

all, individually, and that the death was accidental or caused by Green's act alone. He alleges as errors of law refusal of the court to give instructions favoring such theory.

The errors of law complained of by defendant Grafft are based on the fallacious premise that there was a sufficient intervening break in the continuity of the plan to rob, followed by flight, to admit of the theory of abandonment of conspiracy, and that death resulted otherwise than as a natural and probable consequence of the common enterprise to commit robbery. The entire record points to but one cause of death: Acts the natural and probable result of forces set in motion by a common plan and attempt to commit robbery. People v. Vasquez, 49 Cal. 560; People v. Lawrence, 143 Cal. 148, 76 Pac. 893, 68 L. R. A. 193; People v. Friedman, 205 N. Y. 161, 98 N. E. 471, 45 L. R. A. (N. S.) 55.

[5] It is also urged on behalf of defendant Grafft that the statute making a killing in the perpetration, or attempt to perpetrate, robbery, murder in the first degree, must be strictly construed, and that the verdict of the jury of murder in the second degree was outside its province and an acquittal of statutory murder, and further, in this connection, that the court's instructions to the jury with reference to other verdicts which it might bring in were prejudicial, inharmonious, inconsistent and tended to confusion.

This assignment is unique, in that it really is an objection by defendant Grafft that he was convicted of murder in the second instead of the first degree, for, from the evidence adduced at the trial, the jury might very properly have found defendant Grafft guilty of murder in the first degree. The error of which he complains redounded to his advantage rather than to his prejudice. People v. Tugwell, 32 Cal. App. 520, 163 Pac. 508.

The judgment and order as to the defendant Dunn, and the judgment as to defendant Grafft, are affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

---

61 Cal. App. 98

PEOPLE v. GORDON. (Cr. 936.)

(District Court of Appeal, Second District, Division 2, California. Feb. 24, 1923. Rehearing Denied March 24, 1923.)

1. Assault and battery 🔑92—Robbery 🔑24(1)—Evidence held sufficient to support conviction for assault with intent to rob and assault with deadly weapon.

In a prosecution for assault with intent to commit robbery and assault with a deadly weapon, two of the defendants having confessed, evidence *held* sufficient to support a conviction of the third defendant.

2. Criminal law 🔑1159(2)—On appeal truth of evidence not subject to question.

On appeal the truth of the evidence implicating defendant is not subject to question.

3. Criminal law 🔑407(1)—Defendant failing to resent incriminating statement in his presence, both statement and defendant's conduct admissible.

Where a defendant under arrest on hearing a statement made incriminating him fails to act as it might reasonably be expected that an innocent person would act under such circumstances, both the statement and defendant's conduct are admissible as some evidence of guilt.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Barry Gordon was convicted of assault with intent to commit robbery and of assault with a deadly weapon, and he appeals. Affirmed.

Mart Coles, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CRAIG, J. The defendants, Barry Gordon, Ralph O'Brien, and William Shea, were prosecuted jointly under an information containing three counts. The first charges assault with intent to commit robbery; the second, assault with a deadly weapon; and the third, assault to commit murder. O'Brien was committed to an asylum for the insane. Shea pleaded guilty to assault with a deadly weapon, and Gordon was found guilty as charged in the first and second counts.

[1, 2] It is urged that the evidence is insufficient to sustain the verdict. As against this particular defendant the evidence is circumstantial, but we think it cannot be said that the jury were not warranted in their conclusion as to his guilt. On appeal the truth of the evidence implicating the defendant is not subject to question. This was to the effect that at the time of the commission of the offense, and for a short period prior thereto, Gordon and Shea jointly occupied a room in the Dorris Apartments in Los Angeles. Gordon registered under the name of Thomas and Shea under that of Wright. Before the 26th of June, 1922, Gordon and Shea discussed holding up and robbing a cashier of a film employment concern. On the morning of the 26th of June, 1922, after planning among themselves to rob Harry St. Alwyn, Gordon drove Shea and O'Brien to a point near Eleventh and Hill streets by automobile. At about the same time Harry St. Alwyn left his place of business carrying a satchel containing about $1,847. After walking a short distance O'Brien approached him and demanded the satchel.

O'Brien threatened St. Alwyn with a gun and ordered him to "put them up, put them up." A struggle ensued in which St. Alwyn was badly beaten with a gun in the hands of Shea. But the assailants were unsuccessful in their efforts to secure the satchel and they finally ran. Shea went down an alley, coming out on a street where he stopped for a moment and looked around and then jumped upon a passing automobile, which at that point slackened its speed slightly. This machine was driven by Gordon, and its number was obliterated. Gordon and Shea were later arrested in their room at the Dorris Apartments. Shea subsequently made a statement concerning the attempted robbery which was read in the presence of Gordon, upon which occasion he (Gordon) said:

> "I have nothing further to say. You have enough on me to hang me now. If I say anything, my attorneys will talk for me."

In addition to the claim that the evidence is not sufficient to connect Gordon with the commission of any offense, it is insisted that the evidence did not warrant a verdict of guilty upon two counts of the information. No definite reasons are advanced to maintain this proposition nor are any authorities cited except People v. Warriner, 37 Cal. App. 107, 173 Pac. 489. However, that case was one having to do with a matter of pleading and is not in point here. The evidence showed that appellant's codefendants and coconspirators, Shea and O'Brien, engaged in a physical encounter with the witness St. Alwyn, in which they struck him a number of blows both with their fists and with a gun. A construction may have been placed upon the evidence to the effect that at least one of the assaults was made with intent to commit robbery, but that before running Shea struck St. Alwyn with the gun without the specific intent to rob. Such matters involve the weighing and construing of evidence which are within the province of the jury.

[3] The trial court, over the objection of the appellant's counsel that it was hearsay, allowed this statement to be read, and a witness to testify to the remark above quoted having been made by Gordon. Shea's confession admittedly implicated Gordon in the crime. There can be no doubt as to the correctness of the ruling to which objection is made. If a defendant, upon hearing a statement made incriminating him, fails to act as it might reasonably be expected that an innocent person would under such circumstances, both the statement and the conduct of the accused are admissible. People v. Bradley, 23 Cal. App. 44, 136 Pac. 955; People v. Teshara, 134 Cal. 542, 66 Pac. 798; People v. Philbon, 138 Cal. 530, 71 Pac. 650. The defendant's conduct here was not an unequivocal admission of guilt, but it was susceptible of such a construction and was therefore a matter for the jury to weigh. People v. Bradley, supra. Nor does the fact that the entire incident occurred while the defendants were under arrest render the evidence of what was said and done subject to objection. People v. Schoon, 177 Cal. 678, 171 Pac. 680; People v. Byrne, 160 Cal. 217, 116 Pac. 521; People v. Amaya, 134 Cal. 531, 66 Pac. 794.

It is next objected that counsel for the people caused a court reporter to read in the presence of the jury a statement made by a deputy district attorney at the time Gordon's codefendant, Shea, was sentenced. We are assured that the reading of this statement was "without any color of right." However, an inspection of the record clearly discloses that at the time the evidence was offered and admitted, the prosecutor indicated that it was offered as impeachment of Shea, and as such there can be no doubt that it was admissible. The facts in regard to the introduction of this evidence were as follows: Shea first testified that Gordon had refused to take any part in the attempted robbery, and that when the witness boarded the automobile in which the escape was made he was greatly surprised to see Gordon driving it. After laying a foundation for impeachment, Shea was then asked if he had not at the time of his arraignment answered "yes" to a question put by the court as follows: "Those were substantially the facts?" This inquiry had reference to a statement just read by Deputy District Attorney Fricke, and which the witness had said was substantially correct, contained assertions entirely inconsistent with the testimony which he had given as a witness in the trial of this case, and which we have quoted. Fricke purported to briefly review the salient facts of the holdup, and, among other things, he said that—

> "Gordon was driving the automobile. It was waiting in the vicinity, and which pulled up there right after this thing had happened. * * * Shea ran and jumped on an automobile which had an obliterated number on it. That is the automobile which we believe the evidence shows was driven by Gordon. * * * Both Shea and O'Brien confessed and said Gordon was in on the holdup, and drove them to the place in the automobile and was the driver of the car in which Shea escaped from the scene."

It is too apparent for argument that this was proper impeachment.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

60 Cal. App. 710

ROBSON v. O'TOOLE et al. (Civ. 4380.)

(District Court of Appeal, First District, Division 2, California. Feb. 8, 1923. Rehearing Denied March 9, 1923. Hearing Denied by Supreme Court April 9, 1923.)

1. Mortgages 🔑283(3)—Extension of time to principal without consideration does not release surety.

An extension of time granted by the mortgagee to a grantee of the premises who had personally assumed to pay the mortgage, which was not supported by any consideration, and was therefore not binding on the mortgagee, does not release the liability of the grantor as surety for the grantee so as to make the grantor's payment of the deficiency judgment voluntary and preclude his recovery thereof from the grantee.

2. Mortgages 🔑283(2)—Consent that grantee assuming mortgage have new trial does not release prior debtor.

Though as between a grantor and grantee of mortgaged property the grantee who assumed the payment of the debt is the principal debtor, and the grantor his surety, the right of the mortgagee is entirely several as to each of them, and his consent that the grantee should have a new trial after judgment against him in the foreclosure proceedings did not release the liability of the grantor as surety.

3. Mortgages 🔑291—Trustee through whom title is conveyed can bind grantees to assume mortgage.

Where an owner of mortgaged premises conveyed them to a grantee, who did not assume the mortgage debt, but who had no beneficial interest in the premises, and was merely a conduit through whom the title was conveyed to a purchaser who did assume the payment of the debt, the original grantee was merely a trustee and could bind his grantee by the assumption of the mortgage debt, though he could not have done so if he had been a grantee of the beneficial interest who did not assume the payment of the debt.

4. Appeal and error 🔑197(3)—Variance curable by amendment must be called to trial court's attention to be available.

A variance resulting from failure to plead that a grantee in the chain of title was a mere trustee, so that he could bind his grantee to assume the mortgage debt without having assumed it himself, can be cured by amendment, and is therefore not available on appeal to sustain an order of nonsuit, where that variance was not called to the attention of the trial court in the motion for nonsuit.

On Petition for Rehearing.

5. Evidence 🔑419(4)—Assumption of mortgage as part of consideration for conveyance can be shown by parol.

An exception to the parol evidence rule occurs when the parol testimony is directed to the consideration for a deed, so that parol evidence is competent to show that, as part of the consideration for the deed, the grantee assumed the payment of a mortgage.

6. Evidence 🔑419(4)—Assumption of mortgage as part of consideration for preliminary contract can be shown by parol.

Parol evidence is competent to show that part of the consideration for a preliminary contract for the conveyance of land was the assumption by the purchaser of the mortgage debt.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Kernan Robson against Michael O'Toole, John G. Hoyt, and another. From a judgment entered upon an order granting the motion of defendant Hoyt for a nonsuit, plaintiff appeals. Reversed.

James P. Sweeney and Frank J. Fontes, both of San Francisco, for appellant.

J. J. Lermen and G. K. Burgren, both of San Francisco, for respondent.

LANGDON, P. J. This is an appeal from a judgment entered upon an order granting the motion of the defendant John G. Hoyt for a nonsuit. Different phases of this litigation have been considered before by the Supreme Court and District Court of Appeal of this state. Robson v. Superior Court, 171 Cal. 588, 154 Pac. 8; Robson v. O'Toole, 45 Cal. App. 63, 187 Pac. 110. Many of the questions discussed in the briefs in the present case have been authoritatively settled by the opinions filed upon the former appeals. As the facts are quite completely discussed in said opinions, reference is made to the same, and an extended statement of facts will not be made herein. Only those matters will be discussed which differentiate the present case from the cases previously considered upon the appeals involving the same controversy.

At the outset, in view of the rule that all the evidence is to be taken most favorably for the plaintiff in considering the defendant's motion for a nonsuit, we must say that the record shows that the payment of the mortgage under consideration was undertaken personally by the respondent Hoyt, as a part consideration of the purchase price of the property involved.

[1] In the trial court it was urged by respondent that in paying the amount of the deficiency judgment to the mortgagee, Hibernia Savings & Loan Society, Robson was a volunteer, and therefore was not entitled to be reimbursed by Hoyt. This is upon the theory that Hoyt was the principal debtor and Robson the surety, and that the creditor, the mortgagee, by granting an extension of time to Hoyt within which to pay the debt, had released the surety. We think this po-

sition is unsound. In the first place, there was no valid, binding agreement upon the part of the bank to extend the time of payment of the loan. The bank was asked if it would be agreeable to it to extend the time of payment upon the loan, and replied that this would not be objectionable. There was no consideration for this extension of time, and it was unenforceable. In the case of Title Guarantee & Trust Co., v. Weiher et al., 30 Misc. Rep. 250, 63 N. Y. Supp. 224, it was said:

> "The agreement made by the mortgagee with the owner of the equity of redemption, who had purchased the premises subject to the mortgage, that the payment of the mortgage debt might be delayed until March 12, 1899, apparently left the owner at liberty to pay off the mortgage [debt] at once, if he wished to do so, and was therefore without consideration, and not enforceable. See Moser v. Walker, 23 App. Div. 91, 48 N. Y. Supp. 341."
>
> "To have the effect of discharging the surety, an agreement for the extension of time of payment made by the creditor with the principal debtor without the consent of the surety must be upon a valid consideration, such as will preclude the creditor from enforcing the debt against the principal; and an agreement by a mortgagee to extend the time of payment of the bond and mortgage until a future day, without other consideration than the continuance of the original terms, including the tax, insurance, and interest clauses, is void for want of consideration. See Olmstead v. Latimer, 158 N. Y. 313." Title Guarantee & Trust Co. v. Weiher et al., 30 Misc. Rep. 250, 63 N. Y. Supp. 224.

To discharge a surety by giving time to the principal, the time must be given by a positive contract that can be enforced. Olmstead v. Latimer, 158 N. Y. 313, 53 N. E. 5, 43 L. R. A. 685.

[2] It is also urged by defendant and respondent that, as the mortgagee consented that the defendant Hoyt should have a new trial after judgment against him in the foreclosure proceedings, the rights of the surety, the plaintiff herein, were prejudiced, and consequently he was released from his obligation, and therefore his payment of the deficiency judgment was merely voluntary. That contention is answered by the opinion in the case of Robson v. Superior Court, 171 Cal. 588, 154 Pac. 8, which considered the effect of the mortgagee's action in relation to that matter. As stated in the opinion in Robson v. O'Toole, supra:

> "The Supreme Court held that the relation between each of the defendants Robson and Hoyt arising out of the successive assumptions by each of the mortgage debt was an entirely several and separate relation as to the plaintiff in said foreclosure proceeding, and that, this being so, the plaintiff therein was in a position to stipulate with the defendant Hoyt as it pleased with respect to his motion for a new trial, and that the defendant Robson was in no wise affected by such stipulation. * * *"

It is true, of course, that as between Robson and Hoyt, Hoyt was principal and Robson surety. However, as between these parties and the mortgagee, the relation took on a different aspect.

> "This right existing in the mortgagee was entirely several as to each of said persons, none of whom would have a right, as against said mortgagee, to insist that any of the others should be made parties defendant to the foreclosure proceedings or be embraced in any judgment in the mortgagee's favor to be rendered therein." Robson v. O'Toole, supra.

See, also, Robson v. Superior Court, supra; Hopkins v. Warner, 109 Cal. 133, 41 Pac. 868.

[3] The most formidable defense of the order granting the motion for nonsuit is maintained by respondent in his position that the showing made by plaintiff does not meet the rule, that, where a grantor of real property is not personally liable for a mortgage debt, a stipulation in a deed from him to his grantee that said grantee shall pay, personally, the mortgage indebtedness will not be regarded in law or equity as a contract intended for the benefit of a third person. Case v. Egan (Cal. App.) 207 Pac. 388, and cases therein cited. This position is taken because the chain of title to the real property involved here runs from Theresa Lewin to Robson, with assumption of mortgage by Robson; from Robson to O'Toole, to hold merely as a trustee for Robson, no consideration being paid by O'Toole; from O'Toole, upon the direction of Robson and on his behalf, to Curtis Hillyer, who agreed to assume the mortgage as a part consideration for the property; from Hillyer to Hoyt, with the same agreement as a partial consideration. It is contended that, because O'Toole never assumed the mortgage indebtedness, he could not impose this burden upon his grantee, Hillyer, and consequently it could not have been imposed upon Hoyt. But, viewing the evidence upon a motion for a nonsuit made by the defendant, the record indicates that O'Toole never had any beneficial interest in the property. He was a mere conduit, as such a position has been aptly characterized. He held title for Robson and acted for him in making the transfer to Hillyer, and O'Toole's lack of beneficial interest and absence of personal obligation cannot take from Robson his right to bind his grantee (even though the grant be made indirectly through the medium of a trustee) to pay the mortgage debt. In the case of Riverdale Mining Co. v. Wicks, 14 Cal. App. 535, 112 Pac. 899, it was said:

> "But the fact is, the legal relation existing between Kellogg and Cornell as to the property was at all times only that of principal and agent. In the conveyance of the property to McDonald it transpired that it was more convenient for Kellogg to use Cornell as an instrumentality or a trustee—a conduit, so to speak,

through which that act might be consummated. Cornell first proposed that the property be bonded to him, but Kellogg refused to accede to that proposition, and then suggested the deed in escrow, said deed to remain undelivered until Cornell either bought the property himself or it was sold to others, and finally the delivery of the deed to Cornell was not because Cornell had bought the property or had acquired any interest whatever in it, but for the sole reason, as suggested, that, under the circumstances, that was the most convenient way of conveying to McDonald, the actual purchaser. Cornell's part in the transaction was, therefore, as both he and Kellogg declared on the witness stand, that of a mere trustee of Kellogg."

[4] The respondent does not seriously contend that Hoyt would not be liable upon his assumption of the mortgage, if O'Toole was a mere trustee for Robson, and not a beneficial grantee, but he meets this situation by urging that the complaint did not so allege the facts, but that it alleged that O'Toole had assumed the mortgage as a part of the consideration for the transfer to him, and that therefore there is a fatal variance between the pleadings and the proof.

Of course, the trial court might have permitted an amendment of the pleadings to conform to the proof, or might have found the facts in accordance with the proof. Code Civ. Proc. §§ 469, 470. That neither of these things was done is perhaps due to the fact that the defendant and respondent did not call the matter to the attention of the court or of the plaintiff. The nonsuit was not asked for this reason, and defendant's strongest position with reference to the matter is that this was an implied ground for nonsuit. It is the policy of courts to favor liberal amendments in the interest of justice, and undoubtedly a party relying upon appeal upon a variance between pleadings and proof should call attention to the matter explicitly in the trial court. Keefe v. Keefe, 19 Cal. App. 310, 125 Pac. 929; Breidenbach v. McCormick, 20 Cal. App. 184, 123 Pac. 423; Stover v. Stevens, 21 Cal. App. 261, 131 Pac. 332; McCarthy v. Phelan, 132 Cal. 404, 64 Pac. 570; Palmer v. Marysville Democrat Pub. Co., 90 Cal. 168, 27 Pac. 21. As stated in the case of Moore v. Moffatt (Cal. Sup.) 204 Pac. 220:

> "It was a defect in the plaintiff's case which might have been remedied had attention been called to it by the motion for nonsuit, and, inasmuch as it was not made a ground for the motion for a nonsuit, it could not, upon that motion, be considered by the trial court, nor can it, for the same reason, be considered by this court in determining the merits of the motion."

The order granting the nonsuit cannot be sustained, therefore, because of a variance between the pleadings and proof. We find no theory upon which such order was proper.

The judgment is reversed.

We concur: STURTEVANT, J.; NOURSE, J.

On Petition for Rehearing.

LANGDON, P. J. In the above-entitled matter, after decision by this court, respondent John G. Hoyt has petitioned this court for a rehearing. The first matter urged upon our attention by the petition for rehearing has reference to the following statement in the opinion heretofore filed herein:

> "At the outset, in view of the rule that all the evidence is to be taken most favorably for the plaintiff in considering the defendant's motion for a nonsuit, we must say that the record shows that the payment of the mortgage under consideration was undertaken, personally, by the respondent Hoyt, as a part consideration of the purchase price of the property involved."

[5] Petitioner admits the correctness of the rule stated, but urges that the testimony in record which tends to show that Hoyt assumed the payment of the mortgage as a part consideration for the purchase price of the property was parol testimony, and, since such assumption of the mortgage does not appear by the deed conveying the property to Hoyt nor by the written preliminary agreement between the parties, the plaintiff is precluded from showing it by parol, under the well-settled rule that no variation of a written instrument by parol will be permitted. In response to this contention we desire to point out that an exception to the parol evidence rule occurs when the parol testimony is directed to the consideration for a deed. It has always been held that the amount or kind of consideration recited in a deed is open to contradiction or explanation. White v. Schader, 185 Cal. 606, 198 Pac. 19, 21 A. L. R. 499; 10 R. C. L. p. 1042, § 236.

[6] The same rule applies to the instrument setting forth the preliminary contract. The amount or kind of consideration is not considered an essential part of a contract and is open to contradiction or explanation like a common receipt. 10 R. C. L. p. 1042, § 236; Moffatt v. Bulson, 96 Cal. 106, 30 Pac. 1022, 31 Am. St. Rep. 192. The testimony tending to show that Hoyt assumed the mortgage was given by the agent who negotiated the sale between Hoyt and his grantor, and he stated that Hoyt had undertaken to pay the mortgage as a part consideration for the transfer of the property. This evidence was properly admitted and was sufficient to go to the jury. It should have been given full weight by the court upon defendant's motion for nonsuit.

The other matters urged in the petition for rehearing are sufficiently covered we think by the opinion heretofore filed.

The petition for a rehearing is denied.

All concur.

61 Cal. App. 110

RICHARDSON et al. v. BROWNING et al. (Civ. 2565.)

(District Court of Appeal, Third District, California. Feb. 24, 1923.)

1. Statutes 🔑207—Section last in numerical order must prevail in case of conflict.

Where conflicting provisions are found in different sections of the same chapter or article, the provisions of the section last in numerical order must prevail under Pol. Code, § 4484, unless such construction is inconsistent with the meaning of such chapter or article.

2. Drains 🔑67—Sections of statute relating to assessments for maintenance charges construed together.

Pol. Code, §§ 3455, 3456b, as amended by St. 1919, p. 604, should be construed together, and, as so construed, the former section was intended to provide for the assessment for maintenance charges made before the completion of the reclamation work, and should cover only the period of construction, and assessments for future maintenance should be governed by the provisions of section 3456b.

3. Drains 🔑91—Remedy provided by statute against illegal assessment exclusive.

Under Pol. Code, § 3455, as amended by St. 1919, p. 604, providing for notice to be given by the trustees of a reclamation district of a hearing of any objections to plans and estimates and under subdivision 5 thereof, providing that the action of the reclamation board after hearing shall be final, and under section 3462, providing that the final order of the board of supervisors approving assessments shall be final, the remedy provided to landowners by section 3462, by an action in the superior court to have the assessment corrected, modified, or annulled, is exclusive.

4. Drains 🔑91—Levy and collection of assessments not enjoined where property owners failed to make statutory objections.

Where property owners assessed for maintenance of reclamation district failed to make any objection before the trustees at the hearing held as provided for in Pol. Code, § 3455, as amended by St. 1919, p. 604, and made no objections to the action of the board of supervisors as required by section 3462, they had no standing to bring an action in equity to enjoin the levy and collection of assessments, the principal objection to which was excessiveness of amount and manner in which apportioned.

Appeal from Superior Court, Butte County; J. O. Moncur, Judge.

Suit by John C. Richardson and others against J. W. Browning and others, as Board of Trustees of Reclamation District No. 833, to enjoin defendants from levying and collecting assessments. From a judgment of dismissal, plaintiffs appeal. Affirmed.

King & King, of Gridley, for appellants.

A. H. Hewitt, of Yuba City, for respondents.

BURNETT, J. This action was begun in the superior court of Butte county on June 2, 1922, for the purpose of—

> "restraining and enjoining them (the trustees of reclamation district No. 833) from proceeding in any manner to levy, assess, or collect said assessment No. 2, or in any manner, or by any bond issue whatsoever, attempting to proceed with the collection of said assessment No. 2 of said district No. 833, and that no further proceedings whatsoever be had by the board of trustees of said reclamation district in connection therewith, and that this honorable court decree and adjudge that all proceedings heretofore had by said board of trustees in connection with assessment No. 2 are void and of no effect and as in excess of and beyond the jurisdiction of said board, and that a writ of injunction issue on an order to show cause enjoining and restraining said board of trustees from proceeding in any manner with the levy, collection, and furtherance of said assessment No. 2 and for further relief."

An alternative writ and a temporary restraining order were issued by the superior court, and on the return day a general demurrer was filed. This was sustained by the court, and from the judgment entered thereon dismissing the action and vacating the temporary restraining order the appeal has been taken.

The complaint, after setting forth the regularity and validity of the organization of the district and the election and qualification of defendants as members of the board of trustees, proceeds:

> "That on the 18th day of August, 1921, said trustees approved and adopted certain plans and report, by them designated 'First Supplemental Plan and Report of Reclamation District No. 833,' and the estimates of the cost of the work of reclamation done and to be done, both under the original plan as modified and changed by said supplemental plan and report and under said supplemental plan and report, were also approved and confirmed. Said plan and report recites that theretofore there had been assessed against the lands of said district to meet the expenses and costs estimated in the original report and plan of reclamation in the sum of $500,000; that work under said original plan was then progressing, and the sum of $345,855.22 had already been spent under said original plan, and approximately 36 per cent. of the work provided to be done under the original plan had been completed; that the difference between the cost of the work to be done under the original plan, including expenses of all character, as therein estimated, and the estimated cost of the same as shown in the supplemental plan and report, is the sum of $725,099.32, and the estimated cost of new work provided in the supplemental plan is the sum of $71,835.47, and the estimated amount to be raised for maintenance for the period of 20 years is the sum of $202,065.21, making a total amount to be raised to complete the reclamation of the lands of the district in the sum of $1,000,000; that said plan and report was filed in the office of the county

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

clerk of Butte county on the 19th day of August, 1921."

It appears further that on October 11, 1921, said trustees presented to the board of supervisors of the county their petition for the appointment of commissioners to view and assess upon the lands of the district and to apportion the same according to benefits the said sum of $1,000,000, reciting in said petition that the amount to be raised for the work done and to be done is the sum of $759,357.10, the amount for maintenance for the period of 20 years the sum of $202,065.21, and for incidental expenses $38,597.69; that said petition was granted, the commissioners appointed, who made and apportioned the assessment on said lands and filed their assessment list on May 3, 1922, with the clerk of said board of supervisors, "and proceedings had and taken thereon as under an original assessment pursuant to the provisions of law respecting an original assessment."

Then follows an allegation:

> That on May 11, 1922, said trustees ordered a special election to be held on Tuesday, June 6, 1922, at Gridley, in said district, to vote upon the question whether bonds of the district shall be issued to the amount of $1,000,000; that said assessment is about to be approved and confirmed by the board of supervisors, and proceedings had by the trustees whereby either bonds will be issued and sold or payment demanded of petitioners of their proportion of said assessment in a very large sum of money; that it nowhere appears that it will require 20 years to complete the work of reclamation, and that all of said reclamation works, as estimated in the original and supplemental plans, were substantially completed on or about January 1, 1922, and "said trustees well knew at all times herein mentioned that all of said proposed reclamation works would not, nor could not, require 20 years, * * * and that said trustees have not since the completion of said reclamation works instituted any proceedings to obtain maintenance funds as provided by section 3456, subd. B, of the Political Code.
>
> "That the said proceedings had and made in connection with said assessment No. 2 are unlawful and in excess of the jurisdiction of said board of trustees, in this, that said board has no jurisdiction to combine in one assessment an assessment for reclamation works and incidentals with another assessment for prospective and future maintenance over a long period of time; that said future maintenance assessment of $202,065.21 can be based only on assessment valuations as provided in section 3456b of the Political Code, and in the form and manner as therein provided, and cannot be combined with the assessment for reclamation works and incidentals as provided by law; that so to do was and is beyond the jurisdiction of said board of trustees and in excess of the powers delegated or authority vested in said board by law."

The foregoing is sufficient to indicate the ground of petitioners' alleged grievance. It is apparent that the trustees acted under the authority and direction of section 3455 (b) of the Political Code, as amended by St. 1919, p. 604, providing that:

> "(1) The board of trustees of such reclamation district must report to the board of supervisors of the county in which the district, or the greater part thereof is situate, by filing with the county clerk of said county two copies of every new, supplemental, or additional plan, if any, together with estimates of the cost of the contemplated works of the district, including incidental expenses, maintenance and repairs, necessary for the reclamation of the lands of the district in pursuance of any such plan.
>
> "(2) Thereupon the board of supervisors of such county must appoint three commissioners. * * * Said commissioners must view and assess upon the land within said district the said sum so estimated and shall apportion the same according to the benefits that will accrue to each tract of land in said district, respectively, by reason of the expenditures of said sums of money, and shall estimate the same in gold coin of the United States," etc.

But it is the claim of appellants that, to meet the expense of the future maintenance of the reclamation district, the trustees should have proceeded under said section 3456 (b), as amended by St. 1919, p. 607, providing:

> "In all cases when the work contemplated by the original or any supplemental plan of reclamation of any reclamation district shall have been completed, the trustees may so report to the board of supervisors of the county in which the district, or the greater part thereof is situate, together with a petition to the said board of supervisors to appoint assessment commissioners. Said report and petition shall set forth that the work contemplated by the original or supplemental plan of reclamation has been completed, and that hereafter the said reclamation district will only require funds for the maintenance and repair of the said works of reclamation. Upon filing said report and petition the said board of supervisors shall appoint three commissioners, each of whom shall be similarly qualified, and shall make and subscribe the same oath as is provided hereinabove for commissioners. When so appointed and so qualified such commissioners shall prepare an assessment list, which list shall contain the following information in separate columns. * * * Thereafter said assessment valuations shall be used as a basis for assessments in raising funds for the maintenance and repair of the works of reclamation and incidental expenses of said district. * * *
>
> "Thereafter, whenever, in the opinion of the trustees of the district, it shall be necessary to raise any sum for the construction, maintenance or repair of the works of reclamation, or for the incidental expenses of the district, the said board of trustees shall make an order, which order shall be entered in the minutes of the board and shall recite the total amount necessary to be raised and shall fix a rate designating the number of cents to be levied on each hundred dollars of assessment valuation shown on the list prepared and approved in the manner hereinabove provided."

In support of their contention that the trustees have no discretion to proceed otherwise than as provided in said section 3456b, appellants have traced the history of the legislation upon the subject, and they assert that "the species of maintenance provided for in section 3455 and the second clause of section 3459 was clearly limited to the duration of actual construction, and there was before 1917 no provision for maintenance after completion," but in that year the Legislature saw fit to depart from the former uncertain and irregular method of raising maintenance funds, and by said section 3456b was provided a "definite and reasonable way for the maintenance of the district after completion of the reclamation works." The clause of said section 3459 to which appellants refer provides:

> "If the original assessment is insufficient to provide for the complete reclamation of the lands of the district, or if further assessments are from time to time required to provide for the protection, maintenance and repair of the reclamation works, the trustees may file with the clerk of the board of supervisors of the county in which the district or the greater part thereof, is situated two copies of the plan of reclamation and a statement of the work done or to be done and its estimated cost, and the same proceeding shall be had thereon as provided in section three thousand four hundred fifty-five for an original plan of reclamation."

[1] Appellants contend that the two methods are entirely irreconcilable, since the basis for the assessment for construction of the works is the benefit to accrue to the land, while for future maintenance it is the assessed valuation. It is furthermore claimed that, if the two sections are in conflict, 3456b, being later in time and in numerical order, must prevail over 3455 and should be regarded as prescribing the only rule of procedure for expenditures in maintenance after the completion of the works. People v. Dobbins, 73 Cal. 257, 14 Pac. 860; section 4484, Pol. Code. In this connection, however, it is to be observed that section 3459, as we have quoted it, was enacted at the same time as 3456b (Stats. of 1919, p. 604), and the rule of construction prescribed by said section 4484 is:

> "If conflicting provisions are found in different sections of the same chapter or article, the provisions of the sections last in numerical order must prevail, unless such construction is inconsistent with the meaning of such chapter or article."

Said section 3459 does undoubtedly authorize the trustees to proceed according to the directions in section 3455, not only in providing for the complete reclamation of the lands, but also for the "maintenance" of the district without prescribing any limit as to the time of said maintenance.

[2] However, the reasonable view of these various sections is that the Legislature thereby intended that the assessment for maintenance made before completion of the works should cover only the period of construction, and that it should be apportioned and levied as prescribed in said section 3455, but the assessments for future maintenance should be governed by the provisions of said section 3456b. Manifestly it is difficult, if not impossible, to determine in advance with accuracy what the cost of maintenance would be for 20 years in the future, and why the trustees should have attempted it is probably known to themselves, but the reason does not appear upon the face of the record. We may assume, though, that in the sale of bonds and in the collection of the assessment the burden will be made as light as possible upon the property owners. Of course, the purpose of the reclamation legislation is commendable, but it is a matter of common knowledge that many farmers are staggering under the load of taxation thereby imposed, and it is but a truism to say that the trustees of these districts, clothed as they are with almost unlimited power to tax, which may be exercised so as to destroy the value of lands within the district, should exercise the power with the utmost regard for the welfare of those who carry the burden.

[3] But it does not appear to us that the act complained of was void, so as to be set aside in this proceeding.

Said section 3455 provides for notice to be given by the trustees of a hearing of any objections that may be made to the plans and estimates and (subdivision 5) "when the said reclamation board shall have taken action approving, modifying, or rejecting any such original, supplemental or new plan of reclamation after a hearing as herein provided, such action shall be final, and thereafter the sufficiency of said plans shall not be subject to attack either before the reclamation board or in any court." Herein it does not appear that appellants made any objection to said action of the trustees, nor is it questioned that notice of the hearing was given as required by the statute.

After providing for the appointment of commissioners of assessment and prescribing their duties and what the assessment lists shall contain and where they shall be filed, and requiring notice to be given of the hearing of any objections to said assessment, and authorizing the board of supervisors to hear any evidence that may be offered at said hearing and to modify or amend the assessment in any particular or to make a reapportionment of the entire assessment, the Legislature, in section 3462, has provided as to the final order of the board of supervisors approving the assessment that—

> "Such decision of said board of supervisors shall be final, and thereafter said assessment lists shall be conclusive evidence that the said

assessment has been made and levied according to law, except in an action commenced as hereinafter provided. * * * No objection to such assessment shall be considered by the board of supervisors, or allowed in any other action or proceeding, unless such objection shall have been made in writing to the board of supervisors as above specified.

"Any person aggrieved by the decision of the board of supervisors may commence an action in the superior court of the county in which the greater part of said district is situated to have said assessment corrected, modified or annulled. Such action must be commenced within thirty days after said assessment list has been filed in the office of the county treasurer."

It is not disputed that all the steps required in said statutory proceeding were taken by the trustees and supervisors as therein prescribed, and it is not claimed that appellants made any objections whatever before the board of trustees or the board of supervisors, Indeed, it affirmatively appears that, at the time this action was brought, said assessment, which is herein challenged, was before said board for modification, amendment, or reapportionment, and it had not become final. It was undoubtedly the purpose of the Legislature to provide in said section 3462 an exclusive remedy for the landowner against an excessive or illegal assessment. Therein a tribunal is designated for the hearing and determination in the first instance of any objection that might be made by a landowner, and in case of an adverse decision an action may be brought in the superior court to correct or annul the assessment.

[4] We understand that this section would not operate to curtail the power of a court of equity to entertain an original proceeding to nullify an assessment in case of fraud or where it has been levied for a purpose not authorized by law (Finnan v. Reclamation Dist. No. 273, 26 Cal. App. 714, 148 Pac. 227, 152 Pac. 1197), but we have no such case. No element of fraud is suggested by the complaint nor is it claimed that it was not competent for the board of trustees to provide for the assessment of the lands for "maintenance" of the reclamation district, but the objection goes to the time and amount of the assessment—questions which appellants should have presented to the board of supervisors as required by said section 3462. The contention of appellants really amounts to this, that the assessment was excessive, and that it should have been differently apportioned. The policy of the law is to expedite the determination of such objections by requiring the pursuit of the method set forth in said section, and there seems to be no reason why it should not be regarded as furnishing an exclusive remedy in this case.

The subject is more elaborately considered in the Finnan Case, supra, and we deem it unnecessary to prolong the discussion.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

61 Cal. App. 59

In re LASLEY. (Motion No. 4051.)

(District Court of Appeal, Second District, Division 2. California. Feb. 21, 1923.)

Attorney and client ⚷40—False affidavit of attorney filed with application for admission to bar ground for revocation of license.

An attorney's false affidavit that he had never been charged with unprofessional conduct, filed with application for admission to the bar, made with knowledge that a charge of unprofessional conduct had in fact been made against him in other state in which he had practiced, *held* ground for revocation of license regardless of whether the charge was well founded.

Application by the Los Angeles Bar Association for revocation of license admitting James Frank Lasley to practice law. License revoked.

Robert B. Murphy and John E. Biby, both of Los Angeles, for petitioner Los Angeles County Bar Ass'n.

W. T. Helms, of Los Angeles, for respondent.

FINLAYSON, P. J. James Frank Lasley, who had been a practicing lawyer in Illinois before coming to this state, filed with the clerk of this court his application to be admitted to the bar of California. He accompanied his application with an affidavit, in the form prescribed for that purpose, wherein he swore that, so far as he was aware, no charges of unprofessional conduct or proceedings for disbarment had been filed against him before any bar association, court, or other body. On the recommendation of the board of bar examiners, to whom his application had been referred, this court, on March 8, 1920, made its order admitting him to practice law in all the courts of this state. The Los Angeles County Bar Association has filed a petition for the revocation of that order, alleging that Lasley's affidavit was false, in that, while practicing his profession in Illinois, charges of unprofessional conduct had been filed against him before the Peoria Bar Association. Lasley filed an answer which, admitting that charges had been preferred against him as alleged, attempts to justify his false affidavit by pleading, with much detail, that the charges were false and destitute of merit. He admits that when he filed the affidavit in this court he was fully aware of the charges previously made against him in Illinois.

Lasley's affidavit that he had never been charged with unprofessional conduct and his concealment of the fact of such charges was a fraud upon this court and upon the bar examiners. Regardless of whether the charges against him were well or ill founded, it was his duty to report them to this court and to the board of bar examiners, and to set forth in his affidavit a truthful statement of all the facts, in order that his previous record might be carefully delved into by those charged with that responsibility. In re Mash, 28 Cal. App. 692, 153 Pac. 961.

The order heretofore made admitting James Frank Lasley to practice in the courts of this state is set aside, his license is revoked, and his name is stricken from the roll of attorneys and counselors at law.

We concur: WORKS, J.; CRAIG, J.

---

60 Cal. App. 786

PEZZALIA v. SAN JOAQUIN LIGHT & POWER CORPORATION et al.

(Civ. 2558.)

(District Court of Appeal, Third District, California. Feb. 14, 1923. Hearing Denied by Supreme Court April 12, 1923.)

1. **Negligence** ⚷136(9)—**Contributory negligence question for jury.**

Contributory negligence is a question of fact for the jury, even when the facts are undisputed, if reasonable men may draw different conclusions therefrom.

2. **Electricity** ⚷19(12) — **Lineman, injured when telephone line, held by him, came into contact with defendant's high voltage wires, held not contributorily negligent as a matter of law.**

Lineman, with 15 years' experience, who climbed pole to put new brackets thereon, with knowledge that a single telephone wire extended from such pole under high voltage electric power line on other side of road about 18 inches or 2 feet from such high voltage wire, and who was injured when pole swayed, causing telephone wire to come into contact with high voltage wire at a time when telephone wire was being held by lineman, *held* not contributorily negligent as a matter of law, question being one for the jury.

Appeal from Superior Court, Merced County; Stanley Murray, Judge.

Action by Charles A. Pezzalia against the San Joaquin Light & Power Corporation and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Lindsay & Conley, of Fresno, for appellants.

Ford & Johnson, of San Francisco, for respondent.

BURNETT, J. In an action for damages, a jury awarded the plaintiff the sum of $10,000, and from the judgment entered thereon the appeal has been taken. The nature of the action may be shown by the following allegations of the complaint:

"That on or about the 3d day of May, 1918, defendants owned, controlled, maintained, and operated a certain high voltage electric power line, in the said county of Merced, situated on the east side of a certain county highway in said county, which highway extends from the towns of Los Banos to Newman in said county. * * * That the defendants at all times herein mentioned transmitted and conducted electric current over and through said power line, and said wires carried and conducted more than 600 volts of electricity.

"That on or about the 3d day of May, 1918, the Pacific Telephone & Telegraph Company owned, operated, and maintained a certain telephone pole line along the west side of said highway. * * * That said telephone pole line at all times herein mentioned carried and conducted less than 600 volts of electricity. That at a point on said highway about 2½ miles in a northerly direction from the said town of Los Banos, and in the county of Merced, and as a part of said telephone pole line, the said the Pacific Telephone & Telegraph Company maintained a certain pole known as No. 61/12. That connected with said pole and running thence in an easterly direction there was at all times herein mentioned a certain single telephone wire. That said single telephone wire forms a part of a telephone system connected with a certain farmhouse in the vicinity of said pole No. 61/12. That in leading from said pole to said farmhouse said single telephone wire passes under the said high voltage electric power line of the defendants herein before referred to, and said power line passes over said single telephone wire. * * * That said single telephone wire and said telephone pole line were erected and operated prior to the erection and operation and maintenance of said high voltage electric power line.

"That on or about the 3d day of May, 1918, the plaintiff was employed by the said the Pacific Telephone & Telegraph Company as an electric lineman * * * and while in the course of his employment, plaintiff was required to climb to the top of said telephone pole No. 61/12. That when plaintiff was near the top of said pole, and while at a height from the ground of about 25 feet, and while he was working on a wire forming a part of said telephone pole line and had said wire in his hands, the top of said pole was caused to sway slightly. That thereupon and without any carelessness and negligence of plaintiff the said single telephone wire was caused by said slight sway to come in contact with said high voltage electric power line.

"That immediately upon said contact, approximately 11,000 volts of electricity were transmitted through said single telephone wire to said pole No. 61/12 and into said wire being held in the hands of plaintiff, and into plaintiff's body."

Then follows an allegation and a description of the serious injury caused to plaintiff, and the particular negligence of defendants is specified as consisting "in constructing, operating, and maintaining said power line in such close proximity to said single telephone wire" and thereby causing "a high voltage of electricity" to be "transmitted to the body of plaintiff as aforesaid," and inflicting "upon him the injuries hereinbefore enumerated."

Appellants introduced no evidence at the trial, resting their case upon the showing made by respondent, and their only contention is that "the evidence shows conclusively that the respondent was guilty of contributory negligence as a matter of law," and that the trial court should have granted their motion for a nonsuit based upon that ground.

[1] Of course, there is no dispute as to the principle of law that applies to such situation. In Fernandes v. Sacramento City Ry. Co., 52 Cal. 45, it is stated as follows:

> "But when there is no controversy as to the facts, and from these it clearly appears what course a person of ordinary prudence would pursue under the circumstances, the question of negligence is purely one of law. In such a case there is no function for the jury to perform in respect to the question of negligence. But there is a large class of cases in which, though all the facts are admitted, a question arises whether the act imputed to a party as negligence was such as persons of ordinary prudence would have performed under the circumstances, and the court is unable to determine that question from the nature of the act itself and the other undisputed facts. In such cases it should be submitted to the jury whether the act in question was such as ordinary prudence dictated, or to the contrary."

It is unnecessary to multiply authorities on this question, but we may call attention to the emphasis placed by the Supreme Court in Herbert v. Southern Pacific Co., 121 Cal. 227, 53 Pac. 651, and Zibbel v. Southern Pacific Co., 160 Cal. 237, 116 Pac. 513, upon the solicitude that should be exercised by the courts to refrain from any unwarranted invasion of the province of the jury to pass upon disputed questions of fact or to determine between conflicting rational inferences.

In the former it is said:

> "The rule is, that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence. * * * If one sensible and impartial man might decide that the plaintiff had exercised ordinary care, and another equally sensible and impartial man that he had not exercised such care, it must be left to the jury. McKune v. Santa Clara Co., 110 Cal. 480. Our ideas as to what would be proper care vary according to temperament, knowledge, and experience. A party should not be held to the peculiar notions of the judge as to what would be ordinary care. That only can be regarded as a standard or rule which would be recognized or enforced by all learned and conscientious judges, or could be formulated into a rule. In the nature of things no such common standard can be reached in cases of negligence, where reasonable men can reach opposite conclusions upon the facts."

And hence it was declared that, in such instances, the question should be submitted to the jury.

In the Zibbell Case, the court declared:

> "It is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence, that the court can say, as a matter of law, that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury."

[2] With this well-established principle, as thus enunciated, in view, must we say that plaintiff's conduct was such that no other reasonable inference can be drawn than that imputing to him such want of ordinary care as to deprive him of any right to recover, no matter how gross was the negligence of appellants contributing to the injury?

By his own testimony must he be judged, as no other evidence presents him in any more favorable light. He testified he had been an electric lineman for about 15 years prior to the accident. His work that day required the placing of two new brackets, one on each side of the pole, and the transferring of the iron circuit on the middle bracket down to the new bracket, and putting a copper circuit on said middle bracket. Before going up the pole he observed the high tension wire of appellants and said telephone wire to be quite close together, "about 18 inches, 2 feet, something like that it looked from the ground." He knew that the line on the east side of the road was a high power line and that contact between those two lines was likely to cause injury. He consulted with the other two members of his crew, and it was agreed that if he would go up there carefully he could do the work required. He started up the pole, and when he arrived at the point where the brackets were to be nailed on, in his own language:

> "I done just the same as I always did, I put my safety around the pole and nailed the bracket, and then moved to step up a little higher to lower my iron wires. I had to unbuckle my safety to do that, and I got up a little higher, and while I was doing it I put my hand up on this drop wire, and about that time the pole swayed and that was the last of me."

He further testified that he put his hand on top of the bracket; that, after he had nailed the bracket, one step further was required to go higher on the other circuit and, as quick as he moved, the pole moved "a little bit," about six inches.

> "Q. Was there any way, Mr. Pezzalia, that you, in that position that you were in, could have then prevented the pole moving? A. I don't know how. Q. Well, was there any way? A. There was not, unless you would have the guys, four guys, and that ain't practicable. Q. And were you moving on the pole after you had taken this one step as carefully as it was possible for you to do? A. Yes, sir."

It appears further that he had tools in his belt with which to remove the wires, and, in response to questions as to his conduct in putting his hand on the bracket, he replied:

> "Well, it is customary to get hold of anything that is on a pole when you are moving and working on it. I could have taken hold of the board or the other bracket, but I didn't know that this one bracket was going to give me this shock, it just happened that it came from that. I put it on the bracket to hold myself going up, steadying myself."

It is apparent that in many cases it is difficult, if not impossible, for the trial or a reviewing court to determine whether "sensible and impartial" men might disagree as to whether plaintiff exercised due care. In the last analysis it is plain that the attempt to apply the rule prescribed by the law results in the expression of the opinion of the court as to whether the party acted as a sensible and prudent man ought and might be expected to act. The case may be so clear and palpable that the opinion against the plaintiff may be declared with assurance of general acquiescence on the part of intelligent and informed persons. But, if there appears to the court any element of uncertainty as to whether a rational exculpatory inference may be drawn, the court then should not substitute its judgment or opinion for that of a jury. In applying the test to the peculiar accident the court may in some instances, no doubt, be guided wholly by its own knowledge and judgment of human nature and rational conduct, but, generally speaking, the court will be aided by the opinion of those having had experience in the particular line of work. Herein it is the claim of appellants that the court should of its own knowledge say that the conduct of respondent, as revealed by the evidence, is so incompatible with reasonable caution and prudence as to deprive him of the right to complain of the admitted negligence of appellants.

On the other hand, the contention is that the bare facts are not such as to coerce the judgment and conscience of the judge against the plaintiff, but the case falls within that debatable zone wherein other circumstances, including the opinions of other persons, may be accorded some significance. Respondent says:

> "In this case four experienced linemen, after due consideration of the problem confronting Pezzalia, came to the conclusion that the work could be safely done. The fact that it was subsequently safely done is a justification of this opinion. (This refers to the subsequent restoration by one of the employees of the line on said pole.) Here the undisputed evidence shows that Pezzalia was doing the work as carefully as he could. He had partially accomplished his purpose, when the pole gave an unusual, as distinguished from the anticipated, sway, causing the accident. This is not a case where a man forgot dangers. The evidence shows that Pezzalia knew and appreciated the possible danger at all times, and was endeavoring to avoid it. It is not a case where the injured man went heedlessly into danger. He acted upon the combined experience of men engaged in this particular line of work, when he carefully undertook to do it under the unjustifiable belief that it was safe."

Of course, it is no answer to say that he was engaged in a hazardous and dangerous piece of work. The occupation of a lineman is necessarily dangerous, and he is only required to exercise that degree of caution which should be expected of ordinarily prudent men occupied with that kind of endeavor. If we may attach any importance to the opinion of those experienced in such matters, we may not lay aside the view of those who were participating with him. It is true that the danger was increased by the act of appellant in placing their wires so close to the telephone wire, but it should be a clear case of recklessness and indifference to consequences on the part of plaintiff that would permit appellants to maintain that, by reason of their own negligence, he should have abandoned his business rather than subject himself to the increased peril. At any rate, we feel sure that it cannot be said, as a matter of law, that plaintiff's conduct in ascending the pole in pursuance of his duty as a lineman manifested such imprudence and want of caution as to make the consequences of his injury necessarily imputable to his own negligence.

The only feature in the case, as we view it, that injects any doubt into the question is the act of plaintiff in placing his hand upon said wire or bracket at the time he took the last step. But it must be remembered that the wire was then perfectly harmless, and the contact would have resulted in no injury if it had not been for the unusual swaying of the pole, which brought the wires together. We think he was not bound at his peril to anticipate such contingency, and it is fairly debatable whether, under the circumstances, said act was excusable.

We may say that the jurors were fully and accurately instructed as to every feature of the case, and especially as to the doctrine of contributory negligence, and some consideration should be paid to their opinion, as expressed in their verdict, of the care exercised by plaintiff, as well as to that of the trial judge, manifested in the denial of the motion for nonsuit, unless the reviewing court is compelled by its own judgment to say that, in reason, only a decision opposed to plaintiff can be reached.

Many interesting cases are cited by appellants, which, they claim, point the way to a reversal herein, but most of them are easily distinguishable in their facts and can therefore afford little aid, but we may notice specifically those that are more nearly analogous.

In Woodward v. City of Taunton, 203 Mass. 63, 89 N. E. 114, as stated by appellants, an experienced lineman was injured while engaged in the performance of his duties by reason of a contact of an electric light wire with the telephone wire upon which he was working. The plaintiff was sent out to lower a messenger wire because it was too close to an electric light wire of high voltage. The plaintiff testified "that the wires were moving a little at the time," and that the wires were very close to each other. He touched the telephone wire while he was standing on a copper roof, a thing which he knew to be dangerous. Defendant's motion for a nonsuit was granted, and the judgment was affirmed by the Supreme Judicial Court of Massachusetts. It was not clear just how the accident happened, but the court declared:

> "As we have said, the two wires must have been brought together by him [the plaintiff] or been so near each other that they came in contact without any action on his part. It is of no consequence which was the fact. In either event, for an experienced man to grasp the wire under those circumstances, while standing on a copper roof, is as matter of law an act of negligence."

It may be observed, however, that the wires were so close together, being only 4 or 5 inches apart, that several times they were seen to be "flickering and sparking," and the danger was so great and menacing that the conduct of plaintiff could be properly characterized as destitute of ordinary care. Herein the wires were from 18 inches to 2 feet apart, and there was ground for the opinion that the work might be done without injury.

Another Massachusetts case is Chisholm v. New England Telephone & Telegraph Co., 176 Mass. 125, 57 N. E. 383. Therein a lineman met his death by contact with an electric wire of a third person at a point where, by the chafing of the wire against a tree, the insulation had been worn off. The relation of master and servant existed between the plaintiff and the defendant, and the court, after noting that the deceased had violated a standing order of the defendant that linemen should examine poles before ascending them, said:

> "The danger from an imperfectly insulated wire is the most characteristic risk which a lineman has to encounter. That general risk the deceased assumed by entering upon his employment."

It was also impliedly, if not directly, held that the defendant was not guilty of negligence.

In Columbus R. Co. v. Dorsey, 119 Ga. 363, 46 S. E. 635, a lineman was killed upon ascending a pole in the discharge of his duty by coming into contact with a heavily charged wire belonging to a third person, from which wire the insulation had worn off near the pole. It was held that the danger was so obvious that it was the duty of the deceased to avoid it, and that he should have taken a safe way to pass, or, if none was available, he should have declined to proceed rather than to incur such peril.

In Dwight Mfg. Co. v. Word, 200 Ala. 221, 75 South. 979, the cause was reversed for errors in rulings upon the pleadings and in giving certain instructions. The plaintiff, who was an expert lineman, ascended the tree where the accident occurred for the purpose of wrapping a telephone wire with tape, to prevent its contact with a limb. In doing this he pushed his shoulder against defendant's wire and was severely injured. The tree was from 10 to 15 feet from the power and telephone pole, from which the wires of both companies ran into and through the branches of the tree, about 15 feet above ground. Plaintiff had known for five years of the presence of the power wires on the street, had seen the poles, and knew the wires carried high voltage. He testified that he did not know that they were in the tree or so close to the telephone wires, and that he went about his work without looking for or thinking about the power wires, which he never saw at all at the time of his injury. The Supreme Court did not hold that the plaintiff was necessarily chargeable with contributory negligence, but only that he could not excuse himself for his ignorance of the danger, if he failed to exercise ordinary care to discover and avoid the danger and the injury.

In Ergo v. Merced Falls Gas & Electric Co. 161 Cal. 334, 119 Pac. 101, 41 L. R. A. (N. S.) 79, the decisive factor was the forgetfulness of the danger on the part of the plaintiff, and the court followed the rule of the authorities that:

> "It is negligence for one to remember and avoid a known danger in one moment, and forget it the next, where nothing has happened to confuse or distract him or cause such forgetfulness, except his own failure to exercise his memory."

Therein the employee of the defendant was working in close proximity to wires carrying a high current of electricity, which he knew to be dangerous and to be avoided, and he came in contact with such wires as the result of his own forgetfulness, there appearing to be no reasonable excuse for his forgetfulness.

In Andrews v. Valley Ice Co., 167 Cal. 11, 138 Pac. 699, plaintiff's testate was an employee of the defendant, Valley Ice Company. He was working on the construction of a building near wires heavily charged with electricity, and he brought his ruler in contact with one of these wires and was killed by the resultant shock. It is quite apparent that the conduct of the decedent was inexcusable, but it is worthy of note that the Supreme Court, although stating that the case fell under the rule that "one who places himself in the way of an obvious and well-understood peril is guilty of contributory negligence" and that "temporary forgetfulness or a reckless curiosity hurried him to an untimely death," also based the decision upon the ground that deceased "was acting outside the scope of his employment and against the order of his master."

Of all the cases cited respondent thinks that Teachout v. Grand Rapids, G. H. & M. R. Co., 179 Mich. 388, 146 N. W. 241, is the most nearly in point. Therein however, there was no eyewitness to testify, the lineman having been killed. The Supreme Court of Michigan, though, held that whether such lineman "was negligent in coming in contact with certain high tension electric wires, strung not more than 18 inches above the telephone wires, while he was repairing the latter" was a question for the jury, the presumption being that he was in the exercise of ordinary care. Therein was reiterated the rule declared in 15 Cyc. 475, and other authorities, to the effect that to give rise to the defense of contributory negligence in an action for injury done by electricity—

> "it must be shown that plaintiff, in coming in contact with the appliances, voluntarily and unnecessarily exposed himself to danger, and if reasonable men might honestly differ on the question, the court will not hold plaintiff guilty of contributory negligence as a matter of law."

As we view the record and understand the principles of law that must be applied to the facts, we do not feel warranted in holding that the plaintiff was so clearly negligent as to require the case to be withdrawn from the jury.

The judgment is therefore affirmed.

We concur: FINCH, P. J.; HART, J.

---

61 Cal. App. 21

ANDERSON v. SAN FRANCISCO-OAKLAND TERMINAL RYS. (Civ. 4377.)

(District Court of Appeal, First District, Division 2, California. Feb. 17, 1923. Hearing Denied by Supreme Court April 18, 1923.)

1. Carriers 🔑327—Prospective passenger struck by car while crossing track to board car traveling in opposite direction held not contributorily negligent.

Prospective passenger who was struck by interurban street car while crossing the private right of way to board other car going in opposite direction, with notice that the car which later struck her was coming faster than usual, *held* not guilty of contributory negligence.

2. Carriers 🔑280(1)—Carriers owe extraordinary duty to passengers.

Carriers owe more than an ordinary duty to their passengers.

3. Carriers 🔑318(1)—Street railroad held negligent where car struck prospective passenger crossing right of way to waiting station.

Where street car operating between two cities struck prospective passenger crossing private right of way of railroad toward waiting room established by railroad for persons desiring to board its cars, at a point from which the passenger could have been seen by the trainmen for a distance of 600 feet, while the car was passing the waiting room at a speed of 15 miles an hour, without ringing a bell, or giving any warning of its intention of passing the station without stopping, the evidence was sufficient to warrant finding the railroad guilty of negligence.

4. New trial 🔑131(2)—Motion on ground of insufficiency of evidence without specifying insufficiency denied.

A motion for new trial on the ground that the evidence was insufficient to justify the verdict without specifying in its bill of exceptions any particulars in which the evidence was insufficient could not be considered.

5. Damages 🔑130(3)—$12,000 verdict for painful injuries to scalp, wrist, right clavicle, fourth cervical vertebra, and four ribs held not excessive.

Where plaintiff suing for personal injuries was 78 years old at the time of the accident, with an expectancy of five years, was not shown to be dependent on her earnings for her living, nor to have had any earning capacity, nor to have suffered impairment of earning power, and where the injuries consisted of laceration of the scalp, numerous abrasions on the body, injury to wrist, fractures of the right clavicle, the fourth cervical vertebra, and four ribs, causing her to suffer great pain and to expend for medical treatment more than $2,000, a verdict of $12,000, *held* not excessive under Code Civ. Proc. § 657, subd. 5.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by Lois Anderson against the San Francisco-Oakland Terminal Railways. Judgment for plaintiff, and defendant appeals. Affirmed.

Morrison, Dunne & Brobeck and M. M. Bourquin, all of San Francisco, and Chapman & Trefethen, of Oakland, for appellant.

Snook & Brown, of Oakland (Geo. M. Naus, of Oakland, of counsel), for respondent.

STURTEVANT, J. The defendant operates street cars between Piedmont and Oakland. From Highland avenue to the east the cars are operated over a private right of way. The diagram attached to the transcript shows a section of that right of way 100 feet wide and 900 feet in length. On the south the private right of way is bounded by Park way. Hillside avenue approaches from the south and ends in Park way. The railroad track comes from a southerly direction, and at Highland avenue swings into the private right of way, and then down a grade of 7 to 8 per cent. throughout the strip of ground included in the diagram. For the uses of the patrons of the road the defendant has located on the private right of way opposite the foot of Hillside avenue a waiting place which is marked on the diagram "Umbrella Shed." An intending passenger from Hillside avenue can cross Park way, then cross a concrete sidewalk, then pass up some stairs to the umbrella shed, and, if he desires to board a car going toward Oakland, it is necessary for him to cross the tracks leading to Piedmont and then continue on his course, going still further north until he reaches a fence that is on the north side, and there he will be in a position to enter the cars operated by the defendant, which have a side entrance located in about the middle of the car. The right of way on both sides of the tracks has been planted with small bushes and palms. Photographs attached to the transcript show that the distances and obstructions are such that between the umbrella shed and the curve in the tracks at the east end of the private right of way are such that one of fair vision can see a person 5 feet 6 inches tall without difficulty. The railroad tracks consist of ties and rails placed on the surface of the ground in about the same manner as the ordinary tracks of a steam railroad. In some places fillings appear making the surface somewhat more nearly level and regular. One of these filled spots is the space between the umbrella shed and the fence opposite. The locations of objects, distances, etc., as above described, have existed since 1913, and ever since the plaintiff went to reside in that immediate neighborhood.

[1, 2] On the 20th day of January, 1921, the plaintiff left the place where she was residing with her daughter (the second house on the street from the station), and went to the umbrella shed, intending to go to Oakland. The exact time is not clear, but in any event it was in the neighborhood of half past 1 or 2 o'clock in the afternoon. When she arrived at the umbrella shed, she looked for a car coming from the east, and seeing none she took a seat. Later she arose from her seat, and looking up the track, she saw a car coming around the curve into the private right of way. She then commenced to cross the right of way to the fence opposite the umbrella shed. She stated that she looked toward the on-coming car at least three times, which she specifically mentioned. She also stated that she looked at other times, but in this connection she based that statement upon her habit of doing so, and did not claim to have any independent recollection of facts as to the specific time and specific place of such observations. In reply to a question propounded by the appellant she stated that when the car was from 50 to 120 feet away from her she was 5 feet or 6 feet on the south side of the inbound car. At about that time she noticed that the car was coming faster than usual; nevertheless she proceeded toward the fence. In view of the testimony that we have just mentioned the appellant urges most vigorously that the respondent was guilty of contributory negligence, and cites and relies on such authorities as Arnold v. San Francisco-Oakland T. Rys., 175 Cal. 1, 164 Pac. 798. Such authorities are not in point in the case at bar.

> "They are, most of them, if not all, cases of strangers or persons acting independently, and having no relation to the defendant—cases of persons toward whom the defendant owed no duty other than that which all persons owe to each other under like circumstances of meeting by chance, not cases involving the duties and obligations of a carrier to a passenger. Carriers owe more than an ordinary duty to their passengers. * * *" Franklin v. Motor Road Co., 85 Cal. 63, 70, 24 Pac. 723, 725; 10 C. J. 1112, § 1492; Chunn v. City & Suburban Ry., 207 U. S. 302, 308, 28 Sup. Ct. 63, 52 L. Ed. 219.

[3] The appellant urges with equal vigor that the record does not show any negligence on the part of the defendant. We think the contention is not sustained by the record. In addition to the circumstances of time and place as above indicated, the record shows that the plaintiff left the umbrella shed and was walking out across the defendant's right of way and in the direction of the fence where it was necessary for her to go to board a car for Oakland. In very short, she was inside of the premises of the defendant and by the movements of her body she was indicating to the employee of the defendant that she was an intending passenger to go to Oakland. She was in a position where she could see and could be seen for a distance of 600 feet up the track toward the curve. She was near by a point that the company had established as a waiting room for persons desiring to board its cars. It owed to her a higher degree of care than it owed to persons in the public streets. While she stood in that position the defendant's car approached from the east, one witness testified, at a speed of 25 to 30 miles an hour; and, as it passed the umbrella shed, the car was going at a speed of 15 miles an hour without ringing a bell or giving any warning of its intention of passing the station without stopping. It was going so fast that after it struck the plaintiff it ran on a distance of 75 or 100 feet before it was

brought to a standstill. If the jury based its verdict on the facts which we have stated it cannot be said that the verdict was not sustained by the evidence. Chunn v. City & Suburban Ry., supra; 10 C. J. 929, § 1351.

[4, 5] The jury brought in a verdict for $12,000. Judgment was entered accordingly. Thereafter the defendant moved for a new trial on all of the statutory grounds, the motion was denied, and at this time the defendant attacks the verdict as being excessive. At the time of the accident the plaintiff was 78 years of age; her expectancy of life was 5 years. The evidence does not show that she was dependent upon her earnings for her living, or that she had any earning capacity, and there is neither allegation nor proof that her earning power has been impaired. In the accident her scalp was lacerated. There were many abrasions on the body and many black and blue spots. The left hand suffered what is known as wrist drop, caused by the injury to the seventh cervical nerve. The right clavicle was fractured a little to the left of the middle. There was also a fracture of the fourth cervical vertebra, and of the second, third, fourth, and fifth ribs. There was angulation and some displacement of the fourth rib, and angulation on the right side. The break of the cervical vertebra constituted what is commonly called a broken neck. The kidneys apparently suffered an injury, as was evidenced by the passing of blood shortly after the accident. The plaintiff was taken forthwith to a hospital, where she was given immediate and continuous aid. While there she suffered great pain, especially in breathing. She remained at the hospital until the 28th day of February, and then was taken home. Until March 5th it was necessary that she should have two nurses. Apparently she received the most attentive and most expert medical assistance, and the expenses of the treatment amounted to $2,127.18. Those special damages were hardly controverted by the defendant. At the time of the trial, four months after the accident, the plaintiff stated she was recovered except that she was more timid than formerly, and that she could not pick up small objects like pins, and she further stated and illustrated to the jury that the movement of her head was limited so that she could not turn her head to the right or to the left to the same extent that an ordinary person can do. Assuming, in support of the judgment, that the bill for special damages was allowed in full, it then follows that the jury allowed $9,872.82, the balance of the verdict, as for pain and suffering. The question addressed to us at this time, therefore, is: Was the sum so allowed for pain and suffering excessive? In its motion the appellant made the attack on the ground that the evidence was insufficient to justify the verdict; but it did not specify in its bill of exceptions any particulars in which the evidence was insufficient. The attack from this angle cannot be considered. Graybill v. De Young, 140 Cal. 323, 327, 73 Pac. 1067. The appellant also attacked the verdict on the ground that the same was excessive; the excess appearing to have been given under the influence of passion or prejudice. Code Civ. Proc. § 657, subd. 5. In reply to this attack the respondent cites and relies on the leading case in California, Aldrich v. Palmer et al., 24 Cal. 513, 516. In that case the Supreme Court said:

> "*Where the law furnishes no rule for the measurement of damages*, their assessment is peculiarly the province of the jury, and the court will never interfere with their verdict merely on the ground of excess. * * * The amount of the verdict is not suggestive of either passion or prejudice, or corruption. * * *" (Italics ours.)

The language used above by Mr. Chief Justice Sanderson was apparently carefully chosen from the authorities. In 1812 Mr. Chief Justice Kent was called upon to decide a similar question in Coleman v. Southwick, 9 Johns. (N. Y.) 45, 52, 6 Am. Dec. 253, 258. In his decision, probably the leading case in America, he stated:

> "In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; *for they have no standard by which to ascertain the excess.* These are the principles which have been laid down by the most eminent judges who have presided in the English courts since the year 1760, and by which they have uniformly governed themselves in cases in which the damages would appear to have been beyond all comparison, more excessive than in the present case. Leeman v. Allen, 2 Wils. 160; Boardman v. Carrington, 2 Id. 244; Wilford v. Berkley, 1 Burr. 609; Redshaw v. Brook, 2 Wils. 405; Bruce v. Rawlins, 3 Id. 60; Huckle v. Money, 2 Id. 205; Leith v. Pope, 2 W. Bl. 1327; Gilbert v. Burtenshaw, Cowp. 230; Duberly v. Gunning, 4 T. R. 651. In one case in an action for crim. con. the jury gave £5,000, and Lord Kenyon said he would have been satisfied if only nominal damages had been given, yet he knew of no case that would authorize the court to interfere, and he said he had not courage enough to make the first precedent. The doctrine contained in these cases has been acknowledged to be sound law, and has been adopted and sanctioned by the Supreme Court of Massachusetts, in the case of Coffin v. Coffin, 4 Mass. 1, 3 Am. Dec. 189, and by this court in the case of Tillotson v. Cheetham, 2 John. 63, 3 Am. Dec. 459." (Italics ours.)

Some of the American states have fixed the amounts by statute. We are not permitted to consider those amounts in determining such questions. Redfield v. Oakland C. S. Ry. Co., 110 Cal. 277, 285, 42 Pac. 822, 1063. By parity of reasoning we are not entitled to consider the amounts that have been approved or disapproved in the courts of other jurisdictions. We are bound, however, to confine our consideration to the record in each particular case. Doolin v. Omnibus Cable Co., 125 Cal. 141, 144, 57 Pac. 774. The record on its face does not show passion or prejudice.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

---

60 Cal. App. 744

SLEEPER v. BOARD of SUP'RS OF LAKE COUNTY et al. (Civ. 2536.)

(District Court of Appeal, Third District, California. Feb. 9, 1923.)

Mandamus ⚷13—Waters and water courses ⚷225—Proponents of water district must furnish board of supervisors with sufficient information as to purposes of creating such district.

Proponents of a water district sought to be organized under the County Water District Act must furnish the supervisors with sufficient information as to their purposes and objects to enable the supervisors intelligently to exercise the discretion vested in them in establishing the boundaries of a proposed district and excluding and including lands, and, failing to do so, proponents may not compel action by the board to establish the boundaries of such a proposed water district and to call an election to determine whether such district shall be incorporated.

Original application by J. M. Sleeper for writ of mandate to compel J. M. Adamson and others, as members of the Board of Supervisors of Lake County, to establish a county water district. Writ denied.

William Henion, of Lakeport, and Fred J. Harris, of Sacramento, for petitioner.

H. B. Churchill, Dist. Atty., of Lakeport, for respondents.

FINCH, P. J. Petitioner makes original application to this court for a writ of mandate requiring respondents to establish the boundaries of a proposed county water district sought to be organized under the County Water District Act approved June 10, 1913 (Stats. 1913, p. 1049), and to call an election "for the purpose of determining whether such water district shall be incorporated."

A petition for the formation of such district was presented to the respondents, and after due hearing the board found that "no lands situated in said proposed water district will be benefited by said district or the formation thereof" and denied the petition. The proposed district embraces a large territory. About one-fifth thereof is composed of a number of valleys around Clear Lake, and the remainder is mountainous. The petition is silent as to the purposes for which it is proposed to organize the district, except such as may be inferred from the law itself. The source of water supply is not stated. It is apparent that all of the lands of the proposed district cannot be irrigated, and the petition does not disclose where the water, if any, is to be applied. The evidence produced at the hearing before the board is as silent as the petition on the foregoing questions. The witness of proponents who appeared to be most familiar with the situation described several possible reservoir sites, widely separated, and testified on cross-examination by the district attorney:

> "If this was solely for irrigation, no land would be benefited except what was irrigated. They may not only irrigate, but they may develop power, and every bit of land can be benefited by development of power. Q. What is the proposed system of works of the water district? A. I don't know. Q. Do you know what the object of the proposed district is? A. For which? Q. The proposition of the formation of the various reservoir districts? A. I don't know; I can't answer you that, Mr. Churchill. Q. Before the board can determine the matter, it would be essential to know that fact, what their proposed system would be, and how they are going to be benefited by the district. A. No; because the law provides it may be organized for three things, irrigation, domestic use, or furnishing of power. It must be for one of those three things, or it may be for the protection of water rights. That would be a great thing, even though they did not irrigate. I look on this that it is a protection of the rights of the land around the lake. That would be the greatest benefit that could accrue. * * * Q. You would not object to having a man taxed in Upper Lake for land that was irrigated in Big Valley? A. I would not, because anything that develops any section of Lake county is a benefit to any other section."

A large number of landowners protested against the formation of the proposed district. One of them testified at the hearing before the board as follows:

> "Q. Have you ever been able to ascertain what these proponents propose to do after they have organized a district? A. No; I don't know what they intend to do. Q. Have you ever conversed or asked them what they proposed to do? A. Yes, sir. Q. What did they tell you? A. Just form a water district to keep somebody else from doing anything, that was about the way I was able to size up the question. Q. You have never been able to get a definite statement from any one of them as to what they proposed doing? A. No, sir; not one, and I have tried to do so."

Section 3 of the statute provides:

"On the final hearing said board shall make such changes in the proposed boundaries as may be deemed advisable and shall define and establish such boundaries. But said board shall not modify said boundaries so as to exclude from such proposed district any territory which would be benefited by the formation of such district; nor shall any lands which will not, in the judgment of said board, be benefited by such district, * * * be included within such proposed district."

The valleys included within the boundaries of the proposed district are on different sides of a large lake, and it is apparent that it would not be practicable to irrigate some of these valleys from a water supply available for the irrigation of others. The respondents were not informed as to the source from which a water supply, if any, was to be obtained. They were not given any information which would enable them to determine what lands would or what would not be benefited by the formation of the proposed district or to decide intelligently whether or not to exclude the lands of any of the protestants. If it be said that the statute does not require the petition to state the purposes of the proposed district or the source of its water supply, the law does contemplate that an intelligent judgment shall be given by the board upon the question of including and excluding lands, and the basis for that judgment must be found, if not in the petition, at least in the evidence produced at the hearing. Under this statute it is possible to organize a water district without the consent and against the protest of every landowner therein, and the landowners are entitled to be reasonably informed of the nature of the proposed works and the objects intended to be accomplished in order that they may show, if such be the fact, that their lands will not be benefited. In the absence of such information, both the landowners and the board of supervisors would be required to proceed in the dark, if petitioner's contentions be sound. If organized, the district would be authorized to incur indebtedness and issue bonds which would become a lien on all the lands of the district, even though some of the lands might receive no benefit from such district. It is reasonable to require the proponents of such a district to furnish the supervisors with sufficient information as to their purposes and objects to enable the supervisors to intelligently exercise the discretion vested in them in the matters of establishing the boundaries of the proposed district and excluding and including lands. Since the proponents failed to supply the respondents with such information, petitioner is not entitled to the writ prayed for.

The petition is denied.

We concur: BURNETT, J.; HART, J.

---

60 Cal. App. 661

PEOPLE v. KADY. (Cr. No. 924.)

(District Court of Appeal, Second District Division 1, California. Feb. 2, 1923. Rehearing Denied Feb. 27, 1923. Hearing Denied by Supreme Court, April 3, 1923.)

1. Arson 🔑37(1)—Evidence held to sustain conviction.

Evidence that the circumstances under which a fire occurred in a room, in which defendant had insured goods, indicated that the fire was of incendiary origin, and that defendant had stated before the fire that he had previously burned a stock of goods and collected insurance thereon and would do so again, *held* sufficient to sustain a conviction for arson.

2. Criminal law 🔑371(12)—Evidence of intention to burn building for insurance is admissible to show motive.

In a prosecution for arson, evidence that defendant had made proof of loss under insurance policies issued to him covering the insured goods which were in the building was admissible to show motive for burning them, though it also tended to show the commission of the separate offense of burning a building with intent to defraud the insurer.

3. Criminal law 🔑956(13)—Misconduct of jurors cannot be shown by affidavits made on information and belief based on jurors' statements.

Misconduct of jurors in making experiments out of court cannot be established by affidavits of counsel made upon information and belief, based upon statements of certain jurors made to counsel.

4. Criminal law 🔑957(1)—Verdict cannot be impeached by jurors' evidence except to show determination by chance.

The verdict of a jury may not be impeached by the evidence of the jurors themselves, with the single exception that it may be shown that the verdict was determined by chance.

Appeal from Superior Court, Santa Barbara County; John L. Hudner, Judge.

M. F. Kady was convicted of arson, and he appeals from the judgment of conviction and from an order denying his motion for a new trial. Affirmed.

Frank E. Dominguez and W. T. Helms, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

JAMES, J. Appellant, and one Farris, were charged by the information of the district attorney with the crime of arson, which was alleged to have been committed on or about the 16th day of November, 1921, in the county of Santa Barbara. That the crime charged was of the first degree was shown by appropriate allegations. The jury failed to agree as to the guilt of Farris, but found appellant to be guilty of the crime in the second degree. There was a motion for a new trial, which was denied, and the judgment of imprisonment followed. The appeal is taken from the order denying the motion and from the judgment.

[1] Appellant's principal contention is that the evidence produced by the prosecution failed to show that the fire which he was accused of having kindled was of incendiary origin; he claims that the contrary was established, and that it was made to appear by the evidence that the fire was caused by sparks emanating from a fireplace during his absence from the place. A statement of the facts as the evidence for the prosecution disclosed them to be will demonstrate that this contention is without merit.

Defendants were natives of Syria and were engaged as vendors of oriental stuffs, rugs, etc. They appeared in the city of Santa Barbara in September, 1921, and made inquiries of the custodian of a building looking to the renting of rooms. The building was used in part for office purposes and in part for living quarters of persons regularly residing there. For the most part, if not altogether, this appellant acted as spokesman for the two men. Rooms such as they wanted were not available in September. They returned again early in October and learned that two rooms would be vacated on the 1st of November. Appellant engaged the rooms, paying the November rental in advance. On the 1st or 2d day of November the two men appeared and took possession of the rooms, and in the course of the next few days brought in a few articles of furniture, a rug, cretonne curtains for the windows, and a number of boxes containing articles of wearing apparel. In one of the rooms was a fireplace, and in this room all of the merchandise was placed. Some wooden shelves were installed, and a rack upon which to hang clothing was erected. After the merchandise and furniture had been placed in the room, Farris requested the custodian of the building to introduce him to an insurance agent. The custodian referred him to an agent who had an office near by, and two policies of insurance were issued covering fire loss which might occur. The total amount covered by the policies was the sum of $5,150. About a week after the men had taken possession of the rooms, the custodian of the building observed this appellant carrying a sack of charcoal to the apartment. He expressed surprise that charcoal should be used in grates instead of coal, but was assured by appellant that charcoal was "the best to use." On the evening of the 16th of November a tenant in the building, noting the presence of smoke, investigated to determine its source, and found that it was emerging from the rooms occupied by the appellant and Farris. Neither of the latter were at that time about the premises and the door was locked. Upon entrance being effected, fire was found in the room, and charcoal was burning in the grate. There were evidences that articles of apparel had been destroyed. Some of the charcoal remaining in a bag was burned in a grate by the custodian of the building some days after the fire occurred, and it was found that, upon being ignited, the charcoal threw sparks for a distance of several feet into the room away from the grate. This fact furnishes a basis for the argument of appellant that the fire must have been caused by these sparks from the charcoal during the absence of the defendants. In view of certain testimony given by other witnesses, it may strongly be inferred that, in choosing the charcoal as fuel, appellant sought either to use it as a means of igniting inflammable material placed near the grate, or to aid a defense of accident after he had purposely set on fire the merchandise which he had stored in the room. We revert now to the testimony of witness Boury. This witness was a fellow Syrian, a missionary priest, who had been acquainted with the two defendants for more than a year. He had purchased merchandise from them and had been visited in a social way by the defendants. On an occasion about a year before the date of the commission of the crime charged, defendants were visitors at the priest's house. The latter had some Syrian newspapers published in America in which he had observed accounts relative to bankruptcy proceedings affecting other Syrian residents in the United States. Boury testified that appellant told him it was all "bluff" about those Syrian men having lost their goods through bankruptcy. The narrative may be continued in the language of the witness as used on the stand:

> "He (Kady) says, 'I know every state, and I know the different Syrian people there.' He said: 'That is all bluff. I was doing that myself.' I said, 'How?' He told me he was in San Francisco, and near San Francisco, a little place by Oakland, I think, and a man he have a business store, by the name of Ayoube —I think the fellow is a relative of Mr. Kady; the wife of Mr. Ayoube and Mr. Kady are cousins, and this man has a good name. He took the goods from him and shipped it to Salt Lake, and 'at Salt Lake,' he said, 'I have a fire.' I said, 'How you have a fire, and you get out that way?' He says: 'I know how. I never was caught in my life.' I said, 'How you do it?' He said, 'I dig a little hole in the place and I put the charcoal, and the charcoal—nobody know it, and it take the charcoal the time to be burned out, and 10 or 11 o'clock I have the fire, and I collect from the insurance,' he said, 'between fifteen and eighteen thousand,' something like that; I don't remember. Q. Was Charles Farris present all of that time? A. Charles Farris with him, and my housekeeper too. Q. And did Charles Farris make any denial of those statements? A. He said: 'I am satisfied, Father Boury. We know it, how we do.' Q. Was anythhing else said by either of them on that occasion? A. After that he said he was going to open a store in Santa Barbara. I said: 'How you can open a store? You have no goods.' He

said, 'Wait and you will see,' and he goes and walks in the room, and he said, 'In 60 days you will see my pocket full of money.' I said, 'How is that?' He said: 'I will have that stuff; it isn't more than $200, you can see before your eye.' I said, 'Yes, I see that.' He said, 'We have about $200,' and he says: 'You will see about five or ten thousand coming into our pocket. I will put that in the store, and do the same thing, and the charcoal, and do the same fire I been doing in Salt Lake.'"

This testimony was admitted without objection, and it established clearly a premeditated design on the part of the defendants to commit a crime involving acts such as were charged against them. The statements made by appellant to witness Boury were not confessions in any sense; they were revelant as showing motive and intent and, taken in connection with other circumstances proved in the case, furnished logical evidence of guilt. The testimony of the witness Boury as to the statement made by Kady of the plan to get money by burning insured property was corroborated by the housekeeper employed by the priest, who was present and heard the statements made. There was evidence given by other witnesses as to the location of burned spots in the room, from which we must assume the jury might have inferred that the fire was of incendiary origin. Some of this testimony was illustrated by gestures and other explanatory means to the jury, but as to the effect produced by such means of illustration we cannot determine from the transcript. In such a case we may assume that the explanation of the witnesses was illuminating to the jury on the important question being considered, even though the pages of the record do not so disclose it. The tenant who gave the alarm of fire upon discovering the smoke was satisfied that the fire had been purposely kindled among the merchandise. He was allowed to express his opinion in this regard without objection, but he also gave reasons for the opinion. Perhaps the strongest expressions of the witness, indicating his observation and opinion respecting the incendiary nature of the fire, were brought out by the cross-examination of defendant's counsel. A portion of the testimony so given will show its nature:

"Q. You were sure it had been set on fire, before you talked with the fire chief? A. Yes, absolutely. I did not talk with the chief, as I remember, at all. Q. How long had you been in that room before you concluded it was so, absolutely? A. About five minutes. Q. And you are sure now it was set on fire? A. Yes. Q. What led you to believe it was set on fire? A. Simply because this window was burned there, and not a slight indication of fire down here. This was the same; the window sill was burned, the curtains burning, the glass broken; no evidence of fire here; not the slightest. The same here. No negligence of fire on this floor. The side of the walls, the curtains, were burned, and the window broken."

[2] It was shown in evidence that defendant Farris made proof of loss under the policies which had been issued to him, and attached to the documents was an inventory of the property alleged to have been destroyed. This proof of loss was offered and received in evidence. The only objection made was that the evidence tended to show the commission of a separate offense, to wit, the offense of burning a building with intent to defraud an insurer. This objection was untenable. The fact that merchandise stored in the room where the fire occurred had been previously insured was revelant for the purpose of showing motive on the part of the defendants. "On a charge of arson, it is relevant to show that the accused insured the building, and that he was insolvent; or that the securing of the insurance money was his motive for burning certain buildings." Wharton's Criminal Evidence, vol. 2 (10th Ed.) § 880. If the tendency of such evidence was to prove a different and distinct offense from that charged, it would not be error to admit it. "The test of the admissibility of evidence of other offenses than the one charged, is the connection between the offenses in the mind of the criminal. When such a connection is shown, evidence of the others is admissible for the purpose of establishing identity in developing the res gestæ, or in making out the guilt of the defendant by a chain of circumstances connected with the crime for which he is on trial." People v. Cunningham, 66 Cal. 668, 6 Pac. 700. The cross-examination of appellant, respecting the taking of an inventory of the property prior to the time of the fire, furnishes no ground for the claim of error which counsel make, for that examination was not met by any objection except that appellant's counsel did make objection to the language used by the district attorney in framing certain questions. As to that matter we find no reason to conclude that the district attorney's language was such as to prejudice the case for the defendant.

[3, 4] One of the grounds upon which the motion for a new trial was based was that of misconduct of the jury, consisting, first, in an alleged experiment made by one of the jurors while the trial was in progress to determine how long it would take a box, similar to those in which merchandise of the defendants had been placed, to burn after being ignited. The sole evidence offered in support of this ground was an affidavit of the attorney for the appellant. While this affidavit contained the preliminary phrase that the affiant offered the same "based upon his personal knowledge of the facts therein contained," at the hearing of the motion it was admitted by said counsel that he had no actual knowledge of the facts, but that the latter were intended to be stated upon information and belief from statements made

by the jurors. The district attorney very properly objected to a consideration of the affidavit on the ground that the law required direct proof of the facts sought to be presented, and that any statement made solely upon information and belief would not be proper evidence. The position of the prosecutor on that question is fully sustained by the decisions. People v. Findley, 132 Cal. 301, 64 Pac. 472; Gay v. Torrance, 145 Cal. 144, 78 Pac. 540. Defendant asked leave to call the jurors to the witness stand to require them to testify as to the alleged misconduct, to which procedure the court properly sustained objection. Nothing in our law is more firmly established than that the verdict of the jury may not be impeached by the evidence of the jurors themselves, with the single exception that it may be shown by the jurors that the verdict was determined by chance. The early cases are reviewed and the rule restated in People v. Azoff, 105 Cal. 632, 39 Pac. 59, to which citation may be added People v. Findley, supra, and the case of People v. Chin Non, 146 Cal. 561, 80 Pac. 681.

A careful examination of the record demonstrates that it is barren of any substantial error which would justify a reversal of the order and judgment.

The judgment and order are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

---

61 Cal. App. 48

PEOPLE v. THAL. (Cr. 1108.)

(District Court of Appeal, First District, Division 1, California. Feb. 20, 1923. Hearing Denied by Supreme Court April 19, 1923.)

1. Criminal law 🔑1134(3)—Error in permitting filing of amended information not considered as respects count on which appellant was acquitted.

Error, if any, in permitting the filing of an amended information will not be considered so far as it relates to a count on which appellant was acquitted.

2. Criminal law 🔑1031(4)—Objection that defendant was not arraigned on amended information to which he filed no demurrer or other objection not considered on appeal.

An objection made on motion in arrest of judgment that defendant was not arraigned and did not plead to a charge contained in an amended information will not be considered on appeal, where he filed no demurrer or other objection when the motion for leave to file such amendment was made, but announced himself as ready for trial, and only requested that both informations be read to the jury, which was done with his former plea of not guilty.

3. Criminal law 🔑1144(1)—Evidence at preliminary examination assumed to have shown commission of offense alleged in amended information on which appellant was convicted.

In the absence of the evidence at defendant's preliminary examination, the appellate court will assume, in support of a judgment of conviction on an amended information charging an offense embraced in that originally charged, that such evidence showed commission of the offense charged in the amended information.

4. Indictment and information 🔑161(5)—Amended information for passing fictitious check held proper in action for obtaining property under false pretenses by such method.

In a prosecution for obtaining property under false pretenses by passing a fictitious check, the court did not abuse its discretion under Pen. Code, § 1008, in permitting the filing of an amended information charging violation of section 476 by passing a fictitious check with intent to defraud, though such crime was not expressly charged in the first information.

5. Criminal law 🔑970(7), 1032(5)—Mere uncertainties in information not available on motion in arrest or on appeal, in absence of demurrer.

Mere uncertainties in the information are not available on motion in arrest of judgment or on appeal in the absence of a demurrer.

6. False pretenses 🔑49(4)—Evidence held sufficient to show that purported drawer of check on bank's branch had no account in bank or branch.

Testimony of the paying teller of a bank's branch on which an alleged fictitious check charged to have been passed with intent to defraud in violation of Pen. Code, § 476, was drawn, that the purported drawer had no account with the bank when the check was dated, passed, and presented at the branch, and that he turned down the check because the branch had no account with the bank, *held* sufficient evidence that such drawer had no account with either the bank or the branch.

7. False pretenses 🔑49(1)—Evidence held sufficient to show that purported drawer of check was fictitious person.

Testimony that the purported drawer of an alleged fictitious check, charged to have been passed in violation of Pen. Code, § 476, had no account with the bank on which it was drawn, *held* prima facie evidence of the nonexistence of such drawer, and sufficient, with defendant's statement to the arresting officer that he knew no such person and had never seen the check or the person to whom he delivered it, to show that such drawer was a fictitious person.

8. Criminal law 🔑829(18)—Refusal of instruction on reasonable doubt held not error in view of instruction given.

In a prosecution for passing a fictitious check with intent to defraud, where the jury were instructed that the burden was on the prosecution to prove every element of the offense charged beyond a reasonable doubt, refusal to instruct them to acquit unless the prosecution proved certain allegations beyond all reasonable doubt was not error.

9. False pretenses ⚷49(1)—Evidence that purported signer of check had no account with bank on which drawn prima facie evidence of fictitious character.

Evidence that no such person as the purported signer of a check had any account with the bank, banker, or depository on which it was drawn, at the time of making, drawing or uttering it, is prima facie evidence of the fictitious character thereof.

10. Criminal law ⚷823(2)—Instruction held not erroneous as charging as to effect of particular witness' testimony in view of other instructions.

An instruction that evidence that no such person as the purported signer of a check had any account with the bank, banker, or depositor on which it was drawn, at the time of making, drawing, or uttering it, is prima facie evidence of the fictitious character thereof, *held* not erroneous as instructing the jury that the testimony of a bank's paying teller was prima facie evidence of the fictitious character of a check drawn on such bank, especially where the court elsewhere instructed the jury that they were the exclusive judges of the witnesses' credibility and the weight of the testimony.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Justin Thal was convicted of passing a fictitious check, and he appeals. Affirmed.

J. J. Sullivan and Jas. F. Brennan, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

RICHARDS, J. The defendant herein was convicted of the crime of violating the provisions of section 476 of the Penal Code, by making, passing, uttering, and publishing a fictitious check, with intent to defraud one Michel Marclescu. The information upon the second count of which he was tried and convicted was an amended information in two counts which had been presented by the district attorney and filed by leave of court on the day upon which the defendant's case was called for trial and prior to the impaneling of the jury in the cause. The charge in the original information against the defendant was that of obtaining property under false pretenses. It was in a single count, but set forth in detail the transaction out of which the charge arose, which was alleged to consist in obtaining from one Michel Marclescu the possession of said property, to wit, wood alcohol, by the false and fraudulent representation that he, the defendant, had a deposit in the Bank of Italy in excess of $1,000 available for withdrawal by check, and by then and there drawing and presenting to said Michel Marclescu his check for the sum of $1,000, representing the same to be good and valid and receiving therefor said property, the said Marclescu accepting said check therefor believing said false representations to be true, whereas in truth and fact said representations were utterly false and untrue. To this information the defendant pleaded not guilty, and the cause was set for trial. The district attorney on the morning of the trial moved the court for leave to file the amended information "to meet the proof which was introduced in the lower court." The first count in said amended information charged the defendant with obtaining money under false pretenses. It varied from the original information in the respect that it stated that the property which the defendant obtained from said Marclescu by false pretenses was glycerine. It also varied in the statement of the false representations in respect to the check offered and received for such property, the amended information stating that it was the check of one John R. O'Connor drawn upon the Market Street Branch of the Bank of Italy, in which the defendant falsely represented said O'Connor as having an account exceeding the amount of said check, whereas he was a nonexistent person having no account at said bank, which the defendant well knew. The second count in said amended information charged the defendant with the uttering and passing of said fictitious check in violation of section 476 of the Penal Code. The defendant objected to the introduction of the second count of said amended information as prejudicial to the rights of the defendant, but consented to the amendment of the original information as to the first count. The motion for leave to file the amended information was granted. The defendant presented no demurrer or other objection at that time, but announced himself as ready for trial and only requested that both informations be read in full to the jury, which was done by the clerk, together with the defendant's former plea of not guilty. The trial then proceeded, and at its close the court, at the request of the district attorney, instructed the jury to return a verdict of not guilty upon the first count of said amended information upon the ground of the failure of proof. The defendant was convicted upon the charge embraced in the second count in said amended information. After his conviction he made a motion for a new trial upon all the statutory grounds. He also made a motion in arrest of judgment, upon the ground that he had not been arraigned, nor did he plead to the amended information or either count thereof, and upon the further ground that the amended information contained a separate and specific offense from the offense attempted to be alleged in the original information, and also in the first count of the amended information, and on the further ground that the amended information was not an amendment of the original information for the reason that it set forth an entirely separate and distinct offense than that contained in the original information. Both of these motions were denied by the trial court, and the defendant was thereupon sentenced to be punished by imprisonment in the state's prison, whereupon he took and now prosecutes this appeal.

[1, 2] The first and main contention which the appellant makes upon this appeal is that it was error of the trial court in permitting the filing of the amended information. So far as this objection relates to the first count of said amended information, it has ceased to be vital, since as to that count the defendant has been acquitted under the instruction of the court and at the request of the prosecution. The contention of the appellant must therefore be confined to the second count in said amended information. By this count the defendant was for the first time charged with a violation of the provisions of section 476 of the Penal Code. His objection made upon motion in arrest of judgment that he was not arraigned and did not plead to this charge is not insisted upon upon this appeal, but, had it been so, it would have been sufficiently answered, we think, by the decision of this court in the case of People v. Tomsky, 20 Cal. App. 672, 130 Pac. 184.

[3, 4] The contention of the appellant now relied upon is that, since by the original information the only offense with which he was charged was that of obtaining property under false pretenses, said second count in the information charging another and different offense cannot be held to be an amendment of the original information within the meaning of section 1008 of the Penal Code, permitting the amendment of informations. It is true, as claimed by the appellant, in the original information the offense expressly charged against said defendant was that of obtaining property under false pretenses; but when we look to that information we find that, in pleading the gravamen of said offense with the particularity required in such cases, the defendant was alleged to have also, and as the particular false and fraudulent pretenses by which he obtained said property, committed the further crime of uttering and passing a fictitious check. These two crimes are thus made to appear by said information as a part of the same transaction, out of which the charge of obtaining property under false pretenses arose. This being so, we are of the opinion that such matter in the second count of the amended information was proper matter for the amendment of the original information, even though it charged the defendant with the commission of another crime not expressly stated in the charging part of the first information. Section 1008 of the Penal Code, providing for the amendment of informations after plea, permits by implication at least such amendments to be made, charging such offenses as are shown by the evidence taken at the preliminary examination to have been committed. We have not the evidence taken at the preliminary examination before us on this appeal, and hence in support of this judgment we must assume that the evidence there taken was such as to show the offense to have been committed as charged in the second count of this amended information. The motion to amend was in fact made by the district attorney upon that express ground. The fact that another or additional offense was thus charged is not of itself sufficient to justify us in holding that the addition of this charge was not the proper subject of the amendment or that the trial court abused its discretion in permitting it to be made. We are cited to no authority which would sustain such a conclusion. On the other hand, we are referred to the case of People v. Chober, 29 Cal. App. 627, 157 Pac. 533, which holds that under section 1008 of the Penal Code it is within the discretion of the trial court to permit a change in the charge against the defendant where the new or additional crime charged was included within the original offense as stated in the first information. That would seem to be precisely the present case. According to the original information, the defendant, in committing the crime of obtaining property by false pretenses, did so through the commission of the further crime of uttering and passing a fictitious check. Upon the authority of the case above cited, we therefore hold that the appellant's objection to the order of the trial court permitting the filing of the amended information in this case is not well taken.

[5] The next contention of the appellant is that the second count in said amended information upon which he was convicted was fatally defective in that it failed to state a public offense. We shall not follow out in detail the argument upon which the appellant attempts to support this contention, since we are satisfied from the reading of this count in the amended information that, at most, the objections which the appellant aims at said count amount to mere uncertainties therein which must have been taken advantage of by demurrer, and which cannot be availed of either upon motion in arrest of judgment or upon appeal, in the absence of such demurrer. People v. Welton (Cal. Sup.) 211 Pac. 802.

[6] The next contention of the appellant is that the evidence is insufficient to justify the defendant's conviction under said second count of the said amended information. This contention is chiefly founded upon appellant's claim that the evidence adduced on the part of the prosecution failed to show that John R. O'Connor, the purported signer of the check which the appellant undertook to pass as genuine, did not have an account in the "Market Street Branch of the Bank of Italy."

The witness Radovich, an employee of the Bank of Italy and paying teller of the Market Street Branch of the Bank of Italy at the time, testified that John R. O'Connor had at the time said check was dated passed and presented no account with the Bank of Italy. The appellant contends that there is no sufficient evidence that the Bank of Italy and the "Market Street Branch" of the Bank of Italy are the same institution. There is no merit in this contention. The name of the latter institution itself indicates that it is a part of the former, of which it is a "branch." The evidence of the witness Radovich shows that he was at one and the same time the employee of one and paying teller of the other. These facts are sufficient in our opinion to show such interconnection between the two institutions as to justify the conclusion that, if John R. O'Connor had no account with the Bank of Italy, he had no account with the Market Street Branch of the Bank of Italy. In addition to this, however, the testimony of the witness Radovich shows that in his capacity of paying teller of the Market Street Branch of the Bank of Italy he turned down the check of John R. O'Connor at said branch bank for the reason that said branch had no account with the Bank of Italy. The inference is irresistible that he had no account at either place.

[7] The appellant's next contention is that there is no sufficient evidence that John R. O'Connor was or is a fictitious person. It has, however, been uniformly held to be prima facie evidence of the nonexistence of the drawer of a check claimed to be fictitious that no such person has an account with the bank upon which the check is drawn. People v. Eppinger, 105 Cal. 36, 38 Pac. 538; People v. Bernard, 21 Cal App. 56, 130 Pac. 1063; People v. Walker, 15 Cal. App. 401, 114 Pac. 1009. In the instant case this prima facie showing was supplemented by the statement of defendant himself, testified to by the arresting officer, that he never knew such a person as John R. O'Connor and had never seen either the check or the person to whom he was charged with having delivered it.

[8] The final contentions of the appellant relate to alleged errors of the trial court in instructions to the jury. It is first contended that the trial court erred in omitting from an instruction asked by the defendant the italicized portion thereof:

> "I instruct you that, before you can find the defendant guilty, it is incumbent upon the prosecution to prove three essential things: First, that the check was fictitious; second, that there was no such person in existence at the time as John R. O'Connor; and, third, that the defendant knew that the check was fictitious, and that there was no such person as John R. O'Connor in existence at the time. *Unless the prosecution proves these three allegations beyond all reasonable doubt, it will be your duty to find the defendant not guilty.*"

The answer to this contention is that the court had already instructed the jury that—

> "The burden is upon the prosecution to prove every element of the offense charged beyond a reasonable doubt."

It was not necessary to repeat this instruction in connection with each or any of the instructions requested by the defendant.

[9, 10] The next instruction which the defendant assigns as error is the following:

> "You are instructed that, in a case where a check is drawn upon some bank, banker, or depository for money, purporting to be signed by an individual, evidence that no such person as the one whose name purports to be signed to such check had any account with said bank, banker, or depository for the payment of money at the time of making, drawing, or uttering of such check is prima facie evidence of the fictitious character of the check."

The alleged vice in this instruction, according to the appellant's claim, is that it singles out the testimony of Radovich and practically instructs the jury that the testimony must be taken by him to have established prima facie the fictitious character of the check in question. We do not find this instruction to be subject to the vice which the appellant attributes to it. It is an instruction drawn in the abstract and correctly states the law. The court elsewhere instructed the jury that they were the exclusive judges of the evidence, of the credibility of the witnesses, and of the weight of the testimony. The instruction assailed was therefore not only correct in law, but proper in form. People v. Kehoe, 123 Cal. 224, 55 Pac. 911, 69 Am. St. Rep. 52.

No other points being urged as error, the judgment is affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

190 Cal. 727

SVOBODA v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

(S. F. 10396.)

(Supreme Court of California. April 5, 1923. Rehearing Denied May 5, 1923.)

1. Reformatories 🔑11—Parent financially able may be required to reimburse county for maintenance of his child committed to industrial school, though deprived of his custody; "other persons liable for support."

Under Juvenile Court Law, § 11, as amended by St. 1921, p. 803, § 3, dealing with a ward of the juvenile court, and requiring the parent, parents, guardian, "or other person liable for support" to reimburse the county for support and maintenance of a ward after commitment to the Preston School of Industry, the juvenile court may direct a parent, financially able, to reimburse the county for expense of maintenance, though such parent was deprived of his custody in divorce proceedings, and Civ. Code, § 196, provides for support of a child by the parent entitled to his custody, the words quoted from the statute of 1921 not relating back to the preceding words, but relating to such persons as stand in loco parentis to the ward, as trustees of a fund for the support of the minor or persons who may have adopted the child.

2. Divorce 🔑324—Superior court held to have general jurisdiction to require divorced husband to reimburse county for maintenance of child committed to industrial school, though previous divorce decree awarded custody of child to wife.

The superior court, sitting as a juvenile court, has general jurisdiction in proceedings requiring a parent to reimburse the county for maintenance expense of his minor child, committed to the Preston School of Industry, though a previous divorce decree awarded the custody of such child to the other parent.

In Bank.

Application for writ of review by Frank Svoboda to annul an order of the Superior Court in and for the County of Alameda and E. C. Robinson, Judge thereof, ordering payment by a parent for support of a minor confined in Preston School for Industry. Order affirmed.

George D. Collins, Jr., of San Francisco, for petitioner.

Ezra W. Decoto, Dist. Atty., Earle Warren, Deputy Dist. Atty., and Frank Mitchell, Jr., all of Oakland, for respondents.

WASTE, J. Petitioner seeks by this proceeding in certiorari to annul an order of the superior court in and for the county of Alameda, sitting as a juvenile court, requiring him to pay the sum of $20 per month as reimbursement to the county for the expense of support and maintenance of his minor child. He admits that "the juvenile court in the proper exercise of its jurisdiction adjudged the minor child a ward of the court and committed him to the Preston School of Industry, where he is now detained," but challenges the authority of the court to direct him to reimburse the county for the maintenance of the ward while at the school.

Petitioner and his wife were divorced. The community property was divided between them, and the custody of the minor child was awarded to the mother. The decree, which has not since been modified, did not in terms impose any obligation on the father to support the child. Subsequently petitioner filed a complaint in the respondent court, wherein he alleged that the minor was an incorrigible youth, within the meaning of the law, and praying he be adjudged a ward of the juvenile court. Thereafter such proceedings were had that the commitment issued, and the order directing the father to reimburse the county was made.

[1] Respondents' first answer to the petition is that an appeal lies from the order, and therefore certiorari will not lie. Whether or not this is so need not be determined, for the contention of the petitioner is obviously based on a misconception of law, and is untenable. He contends that, under the statute, the power and jurisdiction of the juvenile court to make an order requiring the father of a delinquent minor to contribute to his support while in the Preston School of Industry under commitment is limited to cases where the father is made liable by law for the minor's support, and that where the care and custody of the minor have been previously awarded the mother by a decree of divorce, remaining in full force and effect up to and at the time the juvenile court adjudged the minor a ward of the court, the law makes the mother, and not the father, the parent liable for such support and maintenance.

This contention is predicated on section 196 of the Civil Code, which provides that "the parent entitled to the custody of a child must give him support and education suitable to his circumstances"; emphasis being laid on the words "entitled to the custody of a child." There are cases holding that where there has been a decree of divorce, and such decree vests the custody of the minor children in the mother, the father is under no obligation to provide for such children any support or education beyond that which may be directed by the court which has granted the divorce, either in its decree or by subsequent modification, and that the obligation of the father so deprived of the custody of the child, under a divorce decree which made no provision for its support, is one to be enforced by the court which granted the divorce, and in the divorce action itself. It was so held in a separate action by a child against his father to compel him to furnish support and education. Lewis v. Lewis, 174 Cal. 336, 163 Pac. 42. It was also held that, under section 196, supra, and section 204 of the Civil Code, which declares that the authority of the parent ceases "upon the appointment, by a court, of a guardian of the person of a child," the father could not be proceeded against in a criminal action where the mother had been awarded the custody of minor children in a divorce proceeding, and had also been appointed their guardian. Matter of McMullin, 164 Cal. 504, 129 Pac. 773. This court has since held, however, "that, as between parent and child, the father is" not "absolved from his legal duty to provide support to his minor child who has no other source of maintenance, because, on account of his own fault, he has been deprived of the custody of such child. Both a legal and moral obligation rest upon a father to support his minor children. And while, as between himself and third parties, that obligation may be shifted in proceedings of divorce or guardianship, and he may by misconduct forfeit his right to the custody of his child, it may be doubted if by such proceedings, to which he is not a party, a minor can be deprived of his natural right to turn to his father for maintenance, if the substituted source of supply fails." Pac. Gold Dredging Co., v. I. A. C., 184 Cal. 462, 466, 194 Pac. 1, 3 (13 A. L. R. 725).

The rule relied upon by petitioner has no application to the present case. He admits that the juvenile court law, which was enacted long after the passage of section 196 of the Civil Code, in dealing with the subject of the commitment and support of minors sent to the Preston School of Industry, supersedes all other laws on the subject. Section 11 of that act (Stats. 1921, pp. 798, 803) provides that:

> "Any order providing for the care and custody of a ward of the juvenile court in such case where it is necessary that provision be made for the expense of support and maintenance of said ward, must direct that the whole expense of such support and maintenance of said ward, up to the amount of twenty dollars per month, shall be paid from the county treasury of the county, and in such case shall state the amount to be so paid from the county treasury of the county, the amount so ordered to be paid not to exceed, in the case of any one ward, the sum of twenty dollars in any one month.
>
> "At the time of making any order providing for the suport and maintenance of a ward of the juvenile court, said court shall inquire into the earnings, property or estate of said ward, and into the ability of the parent, parents, guardian of said ward, or other person liable for the support and maintenance of said ward, to pay for the expense of support and maintenance of said ward. * * *
>
> "Said court shall further order, and direct that the county for its expense of support and maintenance of any such ward shall be reimbursed, either in whole or in part, from the earnings, property or estate of said ward, or by the parent, parents, guardian of said ward, or other person liable for the support of said ward, if it is found that there are earnings, property or estate of said ward sufficient therefor, or that said parent, parents, guardian of said ward, or other person liable for the support of said ward, is able to pay, either in whole or in part, for such expense of support and maintenance of said ward, and for the purpose of said reimbursement may order and direct payments to be made to the probation officer from the earnings, property or estate of said ward, or by the parent, parents, guardian of

said ward, or other person liable for the support of said ward, the amount of which payments shall be determined by said court and which said payments shall be paid by said probation officer in turn to the county treasurer of said county on account of said reimbursement."

There is no language in the section which expressly, or by implication, limits the power of the court to direct the parent "liable for the support and, maintenance of said ward," or who is "entitled to the custody of the child," to pay for the expense of such support and maintenance at the school. If the phrase "liable for the support and maintenance of said ward" related back to and modified the word "parent," or "parents," it might be argued that until the duty of the father to maintain his child, which has been taken from his custody by divorce proceedings, has been established in a proper proceeding in the divorce action, the juvenile court is without power to make an order requiring the father to support such minor. We have examined the statutes relating to the Preston School of Industry, including and since its establishment, and the juvenile court law first adopted and as amended, with a view of ascertaining the proper construction to be given to that portion of section 11 providing who may be required to reimburse the county for the expense of support and maintenance of a ward after commitment. This examination confirms the view, borne out by the plain reading of the present statute, supra, that the court may direct the parent, or parents, of such ward, financially able to do so, to reimburse the county, regardless of whether or not he, she or they may have been deprived of the custody of the child in any previous divorce proceeding. The words in the section, "or other person liable for the support and maintenance of said ward," do not modify or relate back to the words "parent, parents, guardian of such ward." They relate to a class of persons, such as those who stand in loco parentis to the ward, as trustees of a fund for the support of the minor, or persons who may have adopted the child. It follows, therefore, that the respondent did not act in excess of its jurisdiction in requiring the petitioner to reimburse the county of Alameda for the expense of the support and maintenance of his minor child at the Preston School of Industry.

[2] That respondent had general jurisdiction in the matter is well settled. In Dupes v. Superior Court, 176 Cal. 440, 168 Pac. 888, this court held that the fact that the superior court, in an action for divorce, had made an order providing for the custody of the minor children of the litigants did not deprive the juvenile court of jurisdiction to dispose of such children in any manner it might deem best for their welfare.

The order made by the respondent is affirmed.

We concur: WILBUR, C. J.; LENNON, J.; MYERS, J.; SEAWELL, J.; KERRIGAN, J.; LAWLOR, J.

190 Cal. 723

NEWBERT v. McCARTHY et al.

(S. F. 10282.)

(Supreme Court of California. April 4, 1923.)

1. Work and labor 🔑7(1)—Relative receiving services of another not presumptively bound to pay reasonable value.

It is a general rule that a person receiving the services of another is presumptively bound to pay the reasonable value of same, but this rule is not controlling as between near relatives where the inference is not that the services were rendered in expectation of remuneration, but that they were spontaneous acts of courtesy and kindness.

2. Work and labor 🔑4(2)—Liability of recipient of services from another determined by intent of parties.

Whether one receiving the services of another is bound to pay the reasonable value for the same is determined by the intention of the parties in the particular case, and, if the services were reasonably intended to be gratuitous, they cannot be converted into a pecuniary demand.

3. Executors and administrators 🔑221(5)—Finding that services rendered sister since deceased were intended to be gratuitous held warranted.

In an action against executors to recover the reasonable value of services rendered to decedent, where plaintiff and decedent were sisters, evidence that decedent had frequently visited plaintiff in her home for periods of two or three weeks, during which time the services were rendered, and that during such periods plaintiff owed decedent a sum on a promissory note, which was allowed to outlaw, and was subsequently bequeathed to plaintiff, together with a cash legacy of $500, *held*, that a finding that the services rendered were intended to be gratuitous was warranted.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Margaret Newbert against George W. McCarthy and Frank R. Enright, executors under the last will and testament of Elizabeth Enright, deceased. Judgment for defendants, and plaintiff appeals. Affirmed.

Edward J. Lynch, of San Francisco, for appellant.

John T. Thornton, of San Francisco, and D. M. Burnett, of San Jose, for respondents.

LENNON, J. [1] In this action the plaintiff sued to recover a judgment against the estate of her deceased sister in the sum of $750 as compensation for personal services alleged to have been rendered by the plaintiff to the deceased during her lifetime. The defendants, the executors of the estate of the deceased sister, had judgment in the court below. In support of plaintiff's appeal from that judgment it is contended that, inasmuch as the rendition of the services in suit was an admitted fact in the case, the judgment should have gone for the plaintiff because of the general rule that a person receiving the services of another is presumptively bound to pay the reasonable value of the same. Ordinarily this is the rule. Moulin v. Columbet, 22 Cal. 509; Crane v. Derrick, 157 Cal. 667, 109 Pac. 31; Estate of Rohrer, 160 Cal. 574, 117 Pac. 672, Ann. Cas. 1913A, 479. This presumption, applicable as it may be to transactions between persons unrelated to one another, is not pertinent to nor can it prevail over the facts of the instant case.

In the instant case the plaintiff and decedent were sisters, and all of the services in suit were rendered by the plaintiff while the decedent was visiting her at her home in San Francisco. In such a situation the natural inference is not that the services were rendered in expectation of remuneration, but, on the contrary, that they were spontaneous acts of courtesy and kindness, prompted by the natural affection of one sister for another. This being so, the presumption ordinarily prevailing that the services were to be paid for cannot be invoked and applied in favor of the plaintiff's case.

[2] The question in all cases of this character is one of intention. If at the time the services were originally rendered they were intended to be gratuitous, prompted by friendship, kindness, and the relation existing between the parties, and were tendered without any expectation of remuneration, they cannot later be converted into a pecuniary demand. Moulin v. Columbet, 22 Cal. 509, 511.

As was said in Murdock v. Murdock, 7 Cal. 511:

> "All the circumstances of the case must be considered, to ascertain what were the expectations of both of the parties existing while the relation continued." It is "incumbent upon the plaintiff 'to show that at the time, it was expected by both parties that he should receive such compensation, or that the circumstances under which the services were performed, were such that such expectation was reasonable and natural.'"

To authorize compensation, therefore, for services rendered by one relative to another, it is necessary that the circumstances be such as to reasonably warrant the inference that it was the expectation of both of the parties that compensation should be made by the recipient of the services. Crane v. Derrick, supra; Gjurick v. Fieg, 164 Cal. 429, 129 Pac. 464, Ann. Cas. 1916B, 111; Ruble v. Richardson (Cal. Sup.) 204 Pac. 572.

[3] In the instant case the trial court found, in the light of all the circumstances, that it was not the expectation of the parties at the time the services in suit were rendered that they should be compensated, but to the contrary found that said services were rendered "voluntarily and gratuitously and of plaintiff's own motion, and were intended to be gratuitous." This was, we think, the natural implication from all of the facts and circumstances arising from the situation of the parties at the time the services were rendered.

In the case of Smith v. Riedele (Cal. App.) 213 Pac. 281, the implication that the services of one friend living in the home of another were intended to be gratuitous was sustained. This applies, of course, with even greater force to cases of blood relationship. Murdock v. Murdock, supra; Friermuth v. Friermuth, 46 Cal. 42; Gjurick v. Fieg, supra. In such cases the relationship existing between the parties, as parent and child, stepparent and stepchild, brother and sister, and the like, is itself strong negative proof that no remuneration was intended. Hall v. Finch, 29 Wis. 278, 9 Am. Rep. 559; Price v. Price, Ex'r, 101 Ky., 28, 39 S. W. 429. Furthermore, there are the corroborating circumstances that, although the decedent had for many years visited her sister, the plaintiff, at frequent intervals, and had remained two and three weeks at a time, no payment was ever requested or required by plaintiff for her services during such period. And the services rendered were of the character which one would ordinarily expect one sister to render to another. During the whole of this period there was a promissory note due from the plaintiff to the decedent which was permitted by the decedent to outlaw, and was subsequently bequeathed to the plaintiff. And in addition to this debt which was forgiven her sister by decedent plaintiff was left by the terms of the other's will a legacy of $500 in cash.

True, there is in the record testimony of one witness, a daughter of the plaintiff, to the effect that deceased tendered a check for $750 to the plaintiff by way of a gift for the services rendered and sued for. The tender of the check, however, may be eliminated from consideration inasmuch as this testimony was evidently disbelieved by the trial court. The daughter, who testified as a witness for the plaintiff, admitted that she had personally filled out the check, and that there were three other checks signed in blank in the check book of the decedent. She also testified that at the same time she had, at the request of her aunt, the decedent, filled out a check for $100 to one George McCarthy. Evidence was introduced by defendants to show that the only check received by McCarthy from the decedent was one filled out for her by another niece, Annie Canelo. In these circumstances the trial court was justified in believing that the check above referred to was never tendered to the plaintiff by the deceased for the purpose stated by the witness or for any other purpose.

Upon the whole we are satisfied that the evidence supports the findings of the trial court, and that the findings in turn support the judgment.

Judgment is accordingly affirmed.

We concur: WILBUR, C. J.; WASTE, J.; LAWLOR, J.; MYERS, J.; SEAWELL, J.

---

190 Cal. 741

DE COU v. HOWELL et al.

HOWELL v. LILLIE et al.

(L. A. 7307.)

(Supreme Court of California. April 6, 1923.)

1. Wills 🔑93—Evidence established validity of escrow deed to take effect on grantor's death.

Evidence *held* to establish an instrument as a valid deed, delivered by grantor in escrow, to take effect at time of her death, and not as testamentary in character.

2. Appeal and error 🔑1010(1)—Finding sustained, if supported by substantial evidence.

The finding of the trial court as to the validity of a deed delivered in escrow will be upheld on appeal, if sustained by substantial evidence.

3. Appeal and error 🔑1047(3)—Failure to strike witness' answer, but permitting its equivalent to remain, held not harmful; "unconditionally;" "no strings to it."

Where a witness stated that an escrow deed was delivered to him unconditionally and "without any strings to it," and no objection was made to the use of the term "unconditionally," the failure to strike the expression "no strings to it" was not harmful, the expressions being used synonymously, and unconditionally being permitted to remain.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unconditional.]

4. Appeal and error 🔑1047(3)—Trial 🔑91—Failure to strike answer suggested by question unobjected to held not harmful.

Where defendant was forewarned by a question that the answer would be a conclusion, and no objection was made thereto, the failure to strike the answer was not error, and, in view of the court's instruction to the witness to describe what was done and state what was said, which was in effect a withdrawal of both question and answer, the error was not harmful.

5. Trial 🔑395(6)—Findings held not too indefinite to support judgment.

Where findings that none of defendant's denials are true could be made definite by specific reference to the pleadings, and which denials were on material issues and were not misleading, they were sufficient to support the judgment.

6. Evidence 🔑269(2)—Subsequent declarations of grantor admissible to show intention at time deed was made.

Where a deed was delivered in escrow, to take effect at grantor's death, subsequent declarations and acts of grantor are admissible to show intention at the time the deed was made.

7. Appeal and error 🔑533(1), 717—Opinion of trial court not part of record, and may not be looked to.

The opinion of the trial court is not a part of the record, and cannot be considered on appeal, as indicating what operated on its mind in coming to a conclusion as to the ultimate facts of a case.

8. Appeal and error 🔑716—Findings of fact and conclusions of law constitute decision which is final.

The deliberations of the court are conclusively merged in the judgment, and the findings of fact and conclusions of law constitute the decision, which is the final, deliberate expression of the court.

In Bank.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action of interpleader by Helena De Cou against H. G. Howell, as administrator of the estate of Elizabeth E. Sitton, deceased, and others, in which defendant H. G. Howell filed a cross-complaint against plaintiff, defendant Lois E. Lillie, and other defendants. Judgment for plaintiff, and defendant Howell appeals. Affirmed.

Manning & Thompson and O. M. Gipson, both of Los Angeles, for appellant.

Adair & Winder, of Riverside, for respondent.

De Cou, Sarau & Thompson, of Riverside, for plaintiff.

SEAWELL, J. Plaintiff, Helena De Cou, initiated this action in the superior court of Riverside county, primarily to compel conflicting claimants to interplead and litigate between themselves their several claims and rights to receive payments due and to become due from her under a contract for the purchase of a 9-acre tract of land of the value of about $4,000, situate in said Riverside county, which she had made with the record owner thereof, Elizabeth E. Sitton, since deceased. The parties claiming an interest in the subject-matter, all of whom are defendants, subsequently interpleaded.

The whole case depends upon a decision of the question whether or not the alleged delivery of a deed made and executed by Elizabeth E. Sitton to her niece, Lois E. Lillie, was a sufficient delivery as to have vested title in the latter.

A brief statement of the case becomes necessary to make clear the relations that the principal actors sustained to each other and the circumstances attending the execution and delivery of said deed.

On December 18, 1915, Mrs. Elizabeth E. Sitton visited the office of John P. Kuhns, a conveyancer and notary public, for the purpose of engaging him to prepare for her a deed conveying title to the property which forms the basis of this action, to her niece, Lois E. Lillie. After advising with Kuhns, she executed a grant, bargain, and sale deed in favor of said niece, and delivered it to Mr. Kuhns with instructions to hold it in his custody until her death, thereupon to be delivered to said niece.

On October 9, 1919, she entered into a contract with plaintiff, Helena De Cou, agreeing to convey to her at the price of $4,000, payable on terms, the same property she had previously conveyed to said Lois E. Lillie. In compliance with the terms of said contract, $50 was paid forthwith, and the further sum of $500 was paid a short time before December 1, 1919. The contract provided for the payment of the remainder, both principal and interest, at stated periods, the details of which are not here important. At the time of the execution of the agreement of purchase and sale, plaintiff, Helena De Cou, had no knowledge whatsoever of the execution or existence of the deed dated December 18, 1915, and delivered into the custody of Kuhns. On February 15, 1920, said Elizabeth E. Sitton died intestate, and thereafter her brother, H. G. Howell, was appointed administrator of her estate.

To settle the conflicting claims made by H. G. Howell, as administrator of said estate, that all future payments arising out of or accruing upon said contract of sale and purchase should be paid to him as such administrator, and the asserted counterclaim of Lois E. Lillie that all of said payments belonged to her as the grantee of said Elizabeth E. Sitton by deed dated December 18, 1915, and for the reason that plaintiff was ignorant of and uncertain as to the rights of said respective parties, she brought this action to have determined by a decree of court which one of said defendants was entitled to receive the payments due and to become due under said agreement of sale.

The trial court decreed that the deed was valid in all respects, and vested Lois E. Lillie with title, and that the only interest left thereafter in Elizabeth E. Sitton was a life estate.

[1] Appellant makes the claim here, as he did in the court below, that there was no delivery of the deed and that the transaction was but an attempted testamentary disposition of property, which did not divest Mrs. Sitton of title. In this particular it is urged that the court's findings are not supported by the evidence. Other objections of minor importance will be noticed latterly.

We have read the record attentively and cannot agree with appellant's claim that the evidence fails to support the findings. If the testimony of John D. Kuhns, the conveyancer who prepared the deed and assisted in its execution, was believed by the court, as it undoubtedly was, inasmuch as it was the only testimony offered in the case that bore immediately and directly on the questions of execution and delivery, and was undoubtedly indicative of the wish and intention of Mrs. Sitton, as shown by language and conduct during the moments of execution and delivery, his testimony alone would be amply sufficient to sustain the court's finding on this important issue.

Mr. Kuhns, whose business was that of a conveyancer, notary public, real estate and insurance agent, had known Mrs. Sitton for a period of 35 years and had transacted business for her at intervals during their long acquaintanceship. His credibility is not attacked, and his testimony seems to be free from criticism. In brief, he testified that Mrs. Sitton came to his office on December 18, 1915, without previous appointment, to advise with him about the legal method of conveying the property described in the deed to Mrs. Lillie. She said "she wanted to convey that property to Mrs. Lois E. Lillie and that she wanted me to hold that deed as custodian, and at her death instructed me to deliver it to Mrs. Lois E. Lillie." The witness further stated that Mrs. Sitton said nothing about having the right to repossess the deed because the witness had advised with her and told her what he understood the law to be in that respect. Mr. Kuhns further told her that to make a legal delivery she should leave the deed with him unconditionally, as the lawyers put it, "without any strings to it." After explaining to her that there must be an unconditional delivery of the deed, Mr. Kuhns prepared the deed, and Mrs. Sitton signed and acknowledged it and delivered it to the witness, and he placed it in his deposit box, which was kept at the Consolidated Bank at Elsinore, where it remained until after the death of Mrs. Sitton. It is very apparent from the questions propounded and the answers given as they appear from the record that Mrs. Sitton was fully informed as to the effect of a delivery such as she made, and that it was her purpose and desire to invest her niece with title and retain for herself a life estate. The deed was subsequently delivered by Kuhns to Mrs. Lillie. Neither Kuhns or Mrs. Sitton ever spoke about the deed thereafter. Mrs. Lillie was never informed by either Kuhns or her aunt that the latter had made a deed in her favor. A week after the death of Mrs. Sitton, Mrs. Lillie obtained the deed from Kuhns. She and her husband had been told by Mrs. Sitton some years prior to her death that should "anything happen" to her at any time she would find papers with Mr. Kuhns. She had often told her niece and said to others that everything she had was to go to her and her husband. It was because of the directions given to Mrs. Lillie by her aunt that she inquired of Kuhns if her aunt had left with him any papers or documents.

We find nothing in the testimony of Kuhns which would lead us to question the purpose of Mrs. Sitton. In fact, the execution and delivery of the deed was a very natural disposition of her property. Mrs. Lillie had lived with her aunt when a child for a number of years. The marriage ceremony with her husband was celebrated at the home of her aunt. After marriage and for 16 or 17 years immediately preceding the death of Mrs. Sitton she lived in a house of two rooms constructed at her cost, but which was built on the property of the niece and husband, and stood near to the door of their house. Mrs. Sitton, during this long period of time, took her meals with her niece and the latter's husband. There is no evidence that a disagreement ever occurred between them. Mutual love, respect, and a tender consideration for the comfort of each seemed to have been the rule of the household. F. C. Lillie was extremely kind to his wife's aunt; she reposed full confidence in his integrity and judgment and advised with him freely. In fact, Mrs. Sitton made him her attorney in fact, with full and absolute power to manage and dispose by sale of the property in question. It is true that later Mrs. Sitton made a contract with plaintiff by which she agreed to convey to her the same property described in said deed. Kuhns, who then held the Lillie deed in his deposit box, drew the contract. Lillie, the advisor of Mrs. Sitton, was present. He, of course, had no knowledge that a deed conveying the property to his wife had been previously made or he doubtless would have mentioned the fact to her that she was bargaining away property deeded to his wife. Kuhns says that the matter did not occur to him during the negotiations. It is also true that Mrs. Sitton had shortly before this transaction listed her property with a real estate agent for sale.

At the time of this transaction she was pressing her sixty-sixth anniversary. Whether the attempt to dispose of her property subsequent to the delivery of the deed of 1915 is to be accounted for on the theory of lapse of memory, or whether it was the result of importunity on the part of others, or whether she concluded that she needed the proceeds to meet her necessities, fancied or real, or, finally, whether she regretted the step she had taken in 1915 and sought to evade the effect of it, are questions which we are not required to determine. This much is true, however, that shortly after she had entered into the contract to dispose of her property to Helena De Cou she made reference to it by stating that she intended to assign the contract to her niece.

Witnesses were produced by the respective parties to prove statements made by Mrs. Sitton in affirmance and also in disaffirmance of her intent at the time she executed said deed. Also her conduct and treatment of the property subsequent to the execution of said deed is shown. This class of testimony is not persuasive as against the testimony of the character given by witness Kuhns. Mrs. Sitton's intention was clearly indicated at the very time of the transaction, and whatever she may have done or said thereafter does not carry sufficient strength to overturn her evident desire and purpose as expressed on December 18, 1915. That she paid the taxes on the property subsequent to the delivery of said deed, spoke of it as her property, improved it, and stated that her niece would come into everything she should leave upon her death cannot separately or collectively prevail against the statements and acts heretofore referred to. It would be but natural for a person under the circumstances related to make reference to property standing of record in his or her name in a sense of proprietorship. Expressions suggestive of testamentary intention, when disassociated from the central purpose, are also to be expected. Doubtless she treated and used her property as she would have had she been the absolute owner. The evidence in the case, independent of the witness Kuhns, is quite convincing that it was the wish and intention of Mrs. Sitton that her niece should come into the possession of all the property upon her death. In fact, she approved the plan of disposing of property by deed in a conversation had with Mrs. Anida Perry, a neighbor, in 1918, in which conversation the most satisfactory method of disposing of property in view of death was the particular subject of discussion. In this connection Mrs. Sitton said she wanted Mr. and Mrs. Lillie "to have" everything she possessed. Mrs. Zora Dell Teeters, a niece of Mrs. Sitton by marriage, testified that Mrs. Sitton, in the fall of 1919, in speaking to her of Mr. and Mrs. Lillie, said:

> "We certainly are repaid for all we do in this life. No son could ever be more devoted to a mother than Claire has been to me. * * * Lois has repaid me for everything I have done for her in love and affection. No mother could have children who would love her more than Lois and Claire."

To the same effect is the testimony of Mrs. Clare H. Lowman.

[2] Upon the bare record as it comes to us we are satisfied that the validity of the deed in question has been established by the evidence. The trial court, however, occupied a superior advantage over us in this respect and, even if the case appeared upon the record to be a close one from an evidentiary viewpoint, we would be constrained under the well-established rule to uphold its finding, if there was any substantial evidence tending to sustain it.

While it is a fact to be regarded that H. G. Howell, the administrator, was a brother of Mrs. Sitton, it is also true that he shared to some extent in his sister's bounty, as his unpaid promissory notes found among her papers show.

[3, 4] Complaint is made that the court failed to strike out a part of an answer made by witness Kuhns in reply to an interrogatory as to what he said to Mrs. Sitton by way of instructing her as to the method of conveying title by deed to be held in escrow. The answer was: "That in order to make a legal delivery she should leave it with me unconditionally, as lawyers put it, 'without any strings to it.'" Mr. Manning: "We move to strike that out, unless it is understood that he [witness] said the words, 'without any strings to it.'" No action was taken by the court. There are three answers to appellant's objection: First, it appears that the witness used the words "no strings to it" in the conversation with Mrs. Sitton which he was then relating; second, if counsel regarded the language as uncertain he had an opportunity to clear it up on cross-examination; third, the word "unconditionally" and the phrase " no strings to it" were used as synonymous expressions. No objection was made or could have been made to the use of the word "unconditionally." Surely, no harm was done by a failure to strike out a few words and permit the equivalent to remain. Objection is also made to a failure of the court to strike out an affirmative answer given by Kuhns to the question as to whether or not Mrs. Sitton "assented" to his instructions in a certain particular. Admitting that the answer was a conclusion, counsel was forewarned that it would be such by the question propounded. Both were in the following form: "Q. Did she assent to that? A. She did." Appellant should have objected to the question. Moreover, the testimony sets out in detail the conversation and conduct of the parties, and no possible injury was done defendant by the questions and answers complained of. The court immediately interceded and instructed the witness to describe what was done and state what was said. The court's suggestion was accepted by Mrs. Lillie's attorney, which in effect was a withdrawal of both question and answer.

[5] Objection is also made to finding No. 2, on the ground that it is indefinite and is not a specific finding upon a material issue. The first complaint is directed to the following language:

> "2. That none of the denials set forth by the defendant, H. G. Howell, in the first clause of paragraph 2 of his answer are true."
>
> "That none of the denials of said defendant set forth in the second clause of paragraph 2 of the said answer are true."

Paragraphs 1 and 2 of said answer contain admissions and denials respectively separately stated. The paragraphs are brief, and there is nothing to confuse or mislead by the reference made in the findings to the respective paragraphs of said answer. We experience no difficulty whatever in ascertaining what was intended and surely the matter contained in appellant's pleading should be as clear to him as it is to us. The case of Krug v. F. A. Lux Brewing Co., 129 Cal. 322, 61 Pac. 1125, presents a situation entirely different from the one before us. The answer in that case contained both denials and affirmative allegations, and a general finding that all of the allegations of the answer, so far as they are inconsistent with the allegations of the complaint, are true could not support a judgment for the plaintiff. In Johnson v. Squires, 53 Cal. 37, an indefinite, general finding was made, and the court properly held it to be too indefinite and insufficient to support a judgment. In the case at bar the findings are made definite by specific reference to the pleadings. They are upon material issues, and are not misleading.

[6] Appellant, Howell, administrator, caused to be inserted in the clerk's transcript a copy of the opinion of the trial court, giving its reasons for its conclusion. The purpose of incorporating the opinion is to show by its language that it disregarded material evidence offered by appellant to prove certain statements, declarations, and acts made and done by the grantor subsequent to the execution of the deed, which are claimed to be inconsistent with the contention that Mrs. Sitton divested or intended to divest herself of title. Appellant was permitted to offer evidence to show that Mrs. Sitton exercised acts of ownership over her property and referred to it as her ranch, received the income therefrom, paid taxes thereon, and entered into a contract to convey it. This testimony was

not stricken out, and constitutes a part of the record. The court in its opinion misstated the law as shown by the following observations:

> "The law of this state seems to be settled by our Supreme Court decisions that only such evidence as will confirm the title in the grantee is proper for consideration; that declarations against such title so conveyed of the grantor are not admissible in evidence for the purpose of showing a different intent."

[7] The law is clearly settled that subsequent declarations and acts of the grantor are admissible to show the intention of the grantor at the time the deed was made. The issue in this class of cases is whether or not the grantor delivered his deed with the intent that it should convey title. In such cases the acts and declarations, in short, the conduct of a deceased grantor, may be given in evidence either in confirmance of delivery or in disproof thereof. Williams v. Kidd, 170 Cal. 631, 151 Pac. 1, Ann. Cas. 1916E, 703; Donahue v. Sweeney, 171 Cal. 388, 153 Pac. 708; Moore v. Trott, 162 Cal. 268, 122 Pac. 462; Tweedale v. Barnett, 172 Cal. 271, 156 Pac. 483; Rice v. Carey, 170 Cal. 748, 151 Pac. 135. The law is definitely settled in this state by a long line of decisions that the opinion of the trial court is not a part of the record and cannot be considered by an appellate court as indicating what operated upon its mind in coming to a conclusion as to the ultimate facts of the case. It has been directly held that the opinion, though printed in the transcript, is no part of the record on appeal, and cannot be considered by the court in any manner or for any purpose. Estate of De Laveaga, 165 Cal. 607, 133 Pac. 307; Goldner v. Spencer, 163 Cal. 317, 125 Pac. 347; Estate of Kendrick, 130 Cal. 360, 62 Pac. 605; Wilson v. Wilson, 64 Cal. 92, 27 Pac. 861; People v. Quong Sing, 20 Cal. App. 26, 127 Pac. 1052; Bouchard v. Abrahamsen, 4 Cal. App. 430, 88 Pac. 383; Spencer v. McCament, 7 Cal. App. 84, 93 Pac. 682.

[8] The deliberations of the court are conclusively merged in the judgment. The findings of fact and conclusions of law constitute the decision which is the final, deliberate expression of the court. To hold that oral or written opinions or expressions of judges of trial courts may be resorted to to overturn judgments would be opening the door to mischievous and vexatious practices. Neither a juror nor a judge is permitted to impeach his verdict or judgment.

We have, however, given full consideration to the evidence which appellant insists was disregarded or minimized in the opinion of the court, and we are satisfied, after giving such evidence full consideration, that the conclusion reached by the court below is sustained by the evidence.

The order and judgment appealed from are affirmed.

We concur: WILBUR, C. J.; LENNON, J.; LAWLOR, J.; KERRIGAN, J.; MYERS, J.; WASTE, J.

---

61 Cal. App. 182

PEOPLE v. DOMINGUEZ. (Cr. 928.)

(District Court of Appeal, Second District, Division 2, California. Feb. 27, 1923. Hearing Denied by Supreme Court April 26, 1923.)

1. Criminal law 🔑1169(5) — Erroneous admission of subsequently stricken confession of codefendant held harmless.

The erroneous admission of the confession of a codefendant *held* harmless, in view of the action of the court in granting a motion to strike the confession from the evidence and admonishing the jury to disregard it and to attach no weight thereto, it being assumed on the appeal that the jury obeyed the admonition.

2. Criminal law 🔑1037(2)—Prosecutor's misconduct not available on appeal, in absence of formal assignment of misconduct and request for admonitory instruction.

An appellate court will not consider a claim of misconduct on the part of a prosecutor, unless defendant's counsel at the time made a formal assignment of misconduct and requested an admonitory instruction.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Frank Dominguez was convicted of robbery, and, from the judgment of conviction and from the order denying his motion for a new trial, he appeals. Affirmed.

Charles R. McCarty and Robert Black, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. Appellant was convicted of the crime of robbery. He appeals from the judgment and from an order denying his motion for a new trial, urging, as grounds for the appeal, that the court's error in admitting in evidence the confession of a codefendant prejudiced his cause, and that he likewise was prejudiced by misconduct on the part of the deputy district attorney.

[1] The confession was first admitted and then stricken out. When granting the motion to strike, the court admonished the jury to disregard the confession and to attach no weight to it. We must assume that the jury obeyed the admonition, and that therefore appellant's cause was not prejudiced by the erroneous admission of the confession.

[2] On rebuttal, the deputy district attorney improperly propounded to a witness for the people certain questions which might well have met with a stern rebuke. But ap-

pellant's counsel made no assignment of misconduct. It is well settled that an appellate court will not consider a claim of misconduct on the part of a prosecutor, unless defendant's counsel at the time make a formal assignment of misconduct and request an admonitory instruction. People v. Babcock, 160 Cal. 537, 545, 117 Pac. 549; People v. Ong Mon Foo, 182 Cal. 697, 705, 189 Pac. 690; People v. Steelik, 187 Cal. 361, 377, 203 Pac. 78.

Any prejudice which may have been caused by misconduct on the part of the prosecuting attorney during his argument to the jury was removed by the court's prompt admonition to disregard the improper remarks.

The judgment and the order denying a new trial are affirmed.

We concur: WORKS, J.; CRAIG, J.

---

61 Cal. App. 229

ARTHUR R. BRIGGS ESTATE v. BARR.
(Civ. 4425.)

(District Court of Appeal, First District, Division 1, California. March 1, 1923. Hearing Denied by Supreme Court April 30, 1923.)

1. Waters and water courses ⚷158½(1)—**Evidence held to sustain finding that defendant agreed to reserve plaintiff's rights in pumping plant.**

Where plaintiff and defendant erected, on defendant's land, a pumping plant to be used for irrigation purposes, each party contributing one-half of the cost, and it was understood that, if defendant sold the land, plaintiff's rights were to be reserved, but such agreement was not put in writing, and defendant in fact did sell the land without reserving plaintiff's rights, in an action by plaintiff as for money had and received, evidence *held* to sustain a finding that defendant agreed to reserve plaintiff's rights.

2. Money received ⚷6(4)—**Action held to lie to recover money spent in construction of pumping plant.**

Where plaintiff and defendant installed a pumping plant for irrigation purposes on defendant's land, each paying one-half of the cost, defendant agreeing to protect plaintiff's right in case of sale of the land but failing to do so, in an action for money had and received to recover one-half of the cost paid by plaintiff, *held*, that plaintiff was entitled to recover in such form of action, the subject-matter of the action not being the right to use the ditch across the land formerly owned by defendant, but the amount advanced by plaintiff toward construction of the plant.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Arthur R. Briggs Estate against Thomas A. Barr. Judgment for plaintiff, and defendant appeals. Affirmed.

Harris & Hayhurst, of Fresno, for appellant.

Lindsay & Conley, of Fresno, for respondent.

ST. SURE, J. Plaintiff and defendant owned adjoining 40-acre tracts of land. Under the terms of an executed oral agreement, they installed on defendant's land a pumping plant to be used, and which was used, in irrigating both tracts. Each party contributed $700, or one-half of the costs of the pump and its installation. A written agreement incorporating the terms of the executed oral agreement was contemplated, and it was understood that, should defendant sell his land, he would reserve to plaintiff a perpetual right in the plant and the use thereof. Defendant thereafter sold his land and failed to reserve to plaintiff any rights. When this was discovered by plaintiff it was called to the attention of defendant, and an effort was made by the latter to remedy his obvious neglect, but without success. Plaintiff thereafter demanded of defendant that it be restored to its rights in the plant, or compensation for such refusal. Receiving neither, and having, as the evidence shows, made reasonable effort to obtain amicable adjustment, and being finally compelled to install a new pump on its land, this suit resulted. The trial court gave plaintiff judgment for $700 and costs. Defendant appeals from the judgment and the order denying his motion for a new trial.

[1] Defendant's first contention is that the trial court's finding to the effect that an agreement was had between the parties that defendant should, on a sale of his land, reserve to plaintiff its rights in the plant, is not supported by the evidence. We are of the opinion that the finding is based upon evidence from which such an inference was properly drawn. The undisputed facts show that defendant fully understood plaintiff's rights in the premises and appreciated that he had agreed with plaintiff that should he sell his land he was to protect the rights of plaintiff by making proper reservation in his deed of conveyance. Defendant admits this in his testimony, and his counsel state it as a fact in their opening brief.

[2] The next contention of defendant is that plaintiff, having entered upon defendant's land to install the plant, acquired an easement or irrevocable license to maintain the pump and conduct the water therefrom by means of a ditch to its land; and that, as plaintiff acquired either an easement or an irrevocable license in defendant's land, of which it has not been divested, it has mistaken its remedy and should be relegated to an action to quiet title or "some other proper and appropriate proceeding." The pleadings present a cause of action in the nature of a

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

suit for money had and received. The prayer of the complaint asks for judgment against defendant for the sum of $700. The subject-matter of the action is not the right to use the ditch across land formerly owned by defendant, but is the sum of $700, one-half of the cost of purchase and installation of the pumping plant which was paid by plaintiff to defendant, and which defendant admits he received. Plaintiff's rights in and to the plant and its use were lost through the fault of defendant. Clearly the plaintiff is entitled to have his money returned. The findings are supported by the evidence. Such being our view, discussion of the further points made by defendant is unnecessary.

The judgment is affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

61 Cal. App. 56

CRANDALL et al. v. SHAY, Sheriff.

(Civ. 3932.)

(District Court of Appeal, Second District, Division 1, California. Feb. 21, 1923.)

Records 🔑9½, New, vol. 12A Key-No. Series—Lien on automobile held superior to interest acquired by purchaser to whom registration certificate was issued after attachment.

Under Motor Vehicle Act, § 8, as in force May 12, 1921, providing that title to an automobile shall not be deemed to have passed until transferee has received and signed a certificate of registration from the Motor Vehicle Department, an attachment created a lien superior to any interest acquired by one to whom the car was transferred prior to levy where compliance with registration law was not made until after levy.

Appeal from Superior Court, San Bernardino County; Rex B. Goodcell, Judge.

Action by G. L. Crandall and another against W. A. Shay, as sheriff of the County of San Bernardino. Judgment for plaintiffs, and defendant appeals. Reversed.

G. C. De Garmo and H. B. Cornell, both of Los Angeles, for appellant.

Lester G. King, of San Bernardino, for respondents.

JAMES, J. This action was brought by the plaintiffs to recover possession of an automobile, or its value, which latter was alleged to be the sum of $800. The judgment which was entered required the defendant to deliver to the plaintiffs the automobile described in the complaint, and awarded recovery of certain money as damages for detention, also costs. Defendant has appealed from the judgment.

On the 12th day of May, 1921, defendant as sheriff, under writ theretofore duly issued, attached the automobile as the property of Abraham Marks. Prior to April 27, 1921, the automobile had been registered with the state vehicle department in the name of the said Marks, who was represented in the certificate of registration as being the legal owner thereof. On said last-mentioned date Marks caused a transfer of registration to be made to show ownership in his wife, Tillie Marks, and the vehicle remained so registered up to and including the time when the attachment was levied by the defendant sheriff at the instance of creditors of Abraham Marks. On May 11, 1921, there was filed with the state automobile department a request by Tillie Marks that registration be transferred from her name to that of plaintiff Fortier. Agreeable to this last request for transfer, the state vehicle department issued to Fortier under date of May 13, 1921, a certificate of registration covering the automobile in question. We observe, then, that at the time the attachment was levied, the registration in the state vehicle department had not been changed from that which showed Tillie Marks, the wife of Abraham Marks, to be the owner of the automobile. It was the claim of the plaintiff Crandall, as evidenced by testimony offered and received, that on April 27th he agreed with Mrs. Marks to accept the automobile in lieu of the payment of $800 on the purchase price of a lot; that she added $100, making the initial payment the sum of $900; that he then arranged to sell the machine to plaintiff Fortier on a lease contract and delivered to the latter possession of the machine. It was the trial court's view, as evidenced by its findings that plaintiff Crandall acquired title to the machine by virtue of the sale to him by Tillie Marks and that Fortier was entitled to have his possession undisturbed by reason of his contract with Crandall.

Defendant sheriff cites provisions of the state vehicle act as supporting his contention that no title had passed from Tillie Marks up to the time the attachment was levied, and argues that, as Tillie Marks is not asserting claim of ownership in the machine, defendant had the right to hold it and sell whatever interest Abraham Marks might be shown to have in it. In investigating the question presented, we have not been aided by either oral argument or briefs from counsel for respondents. Section 8 of the Motor Vehicle Act, as it was in force at the time material to this action (Deering's Supplement, Codes and General Laws, 1917–1919, act 2331b), contained specific provision as to acts required to be done by vendor and vendee in the making of the transfer of registration of a motor vehicle upon sale thereof. The law provides that, after receiving a certificate with the proper indorsements made thereon, the motor vehicle department shall issue a new certificate of registration to the transferee. The following provision then occurs:

> "Until said transferee has received said certificate of registration and has written his name upon the face thereof in the blank space provided for said purpose by the department, delivery of said motor vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose."

Giving effect to this provision according to the import of the language used, we must conclude that appellant is correct in his position, and that at the time the attachment was levied it created a lien which was superior to any interest acquired by plaintiffs in the vehicle. As to whether the transfer from Abraham Marks to his wife was bona fide and effectual to vest title in her, free from the claims of creditors, is not involved. It is to be remarked, however, that no evidence was offered tending in any wise to show that money with which the original purchase of the automobile was made by the Markses was other than community funds, and, if the latter, of course the property would be subject to claims of the husband's creditors.

Appellant's counsel has cited Boles v. Stiles (Cal. App.) 204 Pac. 848, which fully supports his argument. It should be noted, however, that a rehearing was granted by the Supreme Court in that case, and that in the decision on rehearing (204 Pac. 848) the effect of the motor vehicle statute on the question of when title passed where a sale was intended to be made was not the pivotal point upon which the decision was made to turn.

In our opinion, the trial judge was in error in holding that there had been a valid transfer of title to plaintiff Crandall prior to the time defendant sheriff made his levy under the writ of attachment.

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.

---

61 Cal. App. 38

CINCOTTA v. CATANIA. (Civ. 4384.)

(District Court of Appeal, First District, Division 2, California. Feb. 19, 1923.)

1. Sales 🔑391(1) — Buyer cannot recover down payment without showing breach or mutual rescission.

Where buyer's complaint was in form a common count for money had and received to recover his part payment of the purchase price, he could not recover without showing breach by defendant of his contract to deliver the goods or a mutual rescission.

2. Sales 🔑404—Form of pleading by buyer to recover part payment stated.

Where buyer had paid a part of the purchase price, his complaint in action against the seller, in form a common count for money had and received, was proper, if his theory was that there was a mutual rescission of the contract of purchase or an abandonment thereof, but, if he claimed that the defendant had breached the contract and rendered himself liable in damages, plaintiff should have pleaded the facts or have adopted the common count as for quantum meruit.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Action by Santoro Cincotta against Santo Catania. Judgment for plaintiff, and defendant appeals. Reversed.

George G. Graham, of Fresno, for appellant.

Ohannesian & Ohannesian, of Fresno, for respondent.

STURTEVANT, J. The plaintiff was awarded a judgment by the trial court in the sum of $1,015.45, and the defendant appealed under section 953a of the Code of Civil Procedure. The plaintiff's complaint is in form a common count for money had and received. The defendant filed an answer in which he denied the material allegations of the plaintiff's complaint, and in addition thereto he presented a cross-complaint. In view of the conclusions which we have reached regarding the cause of action pleaded by the plaintiff, it will not be necessary for us to consider the questions presented regarding the cross-complaint.

The uncontradicted testimony shows that on or a short time before the 18th day of October, 1920, the defendant had sold, of the 1920 crop, to Mr. Guccione, a carload of ripe olives which was thereafter to be cured by salting, etc., and then delivered on board of the cars at Fresno. When the plaintiff heard of that sale, he went to the defendant and purchased a carload to be cured and shipped, and agreed to pay 12 cents a pound. A carload of olives amounts to 12 tons or thereabouts. The purchase so made by the plaintiff was oral, and no time for the delivery was specified. But the defendant did state that, after he had filled the order for Mr. Guccione, he would then fill the plaintiff's order. At the time of the purchase the plaintiff wrote out and delivered to the defendant his check in the sum of $1,000 as a part of the purchase price.

[1, 2] On the trial of the case the plaintiff did not introduce any evidence that he did at any time, except once, demand of the defendant a delivery of the olives. However, he did testify that on the 15th day of November, 1920, he asked the defendant to deliver

to him some olives to place in a car which he was loading with grapes to ship to the East, and that the defendant did not comply with such request. The plaintiff did not introduce any evidence that 30 days or less time is reasonable time within which to procure, pack, and ship two carloads of olives, of the current season, in the neighborhood of Fresno during the months of October and November. Furthermore, the record does not even purport to show that the contract of purchase had been rescinded by mutual consent. In the absence of a mutual rescission, there can be no recovery by the vendee under such circumstances. Tomboy Gold & Copper Co. v. Marks, 185 Cal. 336, 339, 197 Pac. 94. We do not understand that as for a breach of contract it is even claimed that the plaintiff was entitled to recover under a common count as for money had and received. McConnell v. Corona City Water Co., 149 Cal. 60, 65, 85 Pac. 929, 8 L. R. A. (N. S.) 1171. But, be that as it may, the evidence introduced was not sufficient to show a breach of contract on the part of the defendant. As the case must go back for a new trial, it is proper to suggest that the plaintiff, did, under the facts proved in this case, adopt an improper form of pleading. Barrere v. Somps, 113 Cal. 97, 45 Pac. 177, 572. He thereby caused a material variance between his pleading and his proof. If it is his theory that there was a mutual rescission of the contract of purchase, or an abandonment of the contract of purchase, the plaintiff may stand on a complaint as for money had and received. Bray v. Lowery, 163 Cal. 256, 261, 124 Pac. 1004; Tomboy Gold & Copper Co. v. Marks, supra. But, if he claims that the defendant has breached his contract of purchase and has rendered himself liable to damages, then the plaintiff should have pleaded the facts or have adopted the common count as for quantum meruit. McConnell v. Corona City Water Co., supra; Pabst Brewing Co. v. E. Clemens Horst Co., 229 Fed. 913, 916, 144 C. C. A. 195.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

---

61 Cal. App. 69

PEOPLE v. RODRIGUEZ. (Cr. 652.)

(District Court of Appeal, Third District, California. Feb. 23, 1923.)

1. Conspiracy 🔑47—Evidence held to sustain conviction for conspiracy to burglarize.

Evidence *held* to warrant a conviction for conspiracy to burglarize under Pen. Code, §§ 182, 184, as amended by St. 1919, p. 170.

2. Indictment and information 🔑110(10), 119—Allegation of conspiracy to burglarize in statutory language sufficient, and statement of attempt to pick lock held surplusage.

A conspiracy to commit burglary is sufficiently charged in the language of the statute, and the means employed for that purpose is not material and need not be alleged, and an allegation that defendant attempted to pick a lock was mere surplusage, under Pen. Code, §§ 182, 184, as amended by St. 1919, p. 170.

3. Conspiracy 🔑27—Attempt to open door an overt act.

An attempt to open a door of an office, whether by picking it or otherwise, is an overt act sufficient in a prosecution for conspiracy to burglarize under Pen. Code, §§ 182, 184, as amended by St. 1919, p. 170.

4. Conspiracy 🔑41—Act of one act of all.

The act of one conspirator to burglarize in attempting to enter an office was the act of all the conspirators, under Pen. Code, §§ 182, 184, as amended by St. 1919, p. 170.

5. Criminal law 🔑511(4)—Testimony of accomplice sufficiently corroborated.

Suggestion in a letter from one alleged conspirator to another that witness for state was the originator of the crime was sufficient corroboration of such witness' testimony as to the crime, assuming that he was an accomplice under Pen. Code, § 1111.

6. Criminal law 🔑37—No consent on theory of instigation and entrapment.

Where one who had been asked to join a conspiracy to burglarize a mine reported the matter to the mine owners, who did not object to his offer to take part in the burglary for the purpose of bringing the criminals to justice, *held*, that there was no tacit consent to the burglary or a wrongful entrapment of the defendant.

7. Criminal law 🔑519(9)—Confession held not improperly brought about.

A confession made because of the advice of one thought to be a coconspirator, but who only took part in the conspiracy for the purpose of bringing the criminals to justice, was admissible in evidence, where the advice was not given under circumstances that would lead the accused to believe that it had the sanction of any person in authority or having power to extend leniency in the matter of punishment.

8. Criminal law 🔑1169(12)—Admission of confession in evidence held not prejudicial.

It was not prejudicial error to admit a confession in evidence where the accused took the stand and substantially repeated the confession.

9. Criminal law 🔑822 (1)—Instructions should be considered together.

Instructions to determine their sufficiency should be considered together.

10. Criminal law 🔑823(10)—Instruction as to sufficiency of evidence held properly given.

It was not error in a prosecution for conspiracy to burglarize to give an instruction in the language of Pen. Code, § 184, as amended by St. 1919, p. 170, when followed immediately by an instruction substantially in the language of Pen. Code, § 1104, that "defendant cannot be convicted unless one or more overt acts are alleged in the information, nor unless one of the acts alleged is proved," as against the objection that it told the jury that any overt act which they might find from the evidence was done by defendant and his confederates in furtherance of the conspiracy would be sufficient, even though not charged in the information.

11. Criminal law 🔑806(1)—Repetition of instructions need not be given.

It was not error to refuse part of an instruction which was practically a repetition of the part given.

12. Criminal law 🔑810—Instructions in conspiracy to commit burglary held not inconsistent.

In prosecution for conspiracy to burglarize, an instruction that a defendant in case of conspiracy under Pen. Code, § 182, as amended by St. 1919, p. 170, cannot escape conviction merely because the party designed to be affected or injured thereby or his agents, by laying a trap or otherwise, have facilitated the accomplishment of the purpose of the conspiracy, or because such party or his agents have appeared to co-operate with the originator of the conspiracy in order to detect the conspirators, *held* not inconsistent with an instruction that, where there exists a suspicion that a crime is about to be committed, while it is proper to employ detectives or agents to watch and discover the persons proposed to perpetrate it, still, if the agents or detectives so employed suggest the commission of the crime to the suspected persons or mingle with the latter, and while so doing "induce, urge or instigate such suspected persons," etc., there can be no prosecution and conviction.

13. Conspiracy 🔑48—Instruction permitting conviction of part of those charged proper.

In a prosecution for conspiracy to burglarize, there was no error in charging that a conviction could be had if accused conspired with one of two other persons, though the information charged that four persons entered into the conspiracy.

14. Indictment and information 🔑174—No material variance where only part of defendants are shown guilty.

The rule as to a material variance between the pleading and the proof has no application where two or more persons are jointly charged with the same crime, and the evidence may be such as to justify the conviction of some of the defendants only and to require the acquittal of the others.

15. Criminal law 🔑829(1)—Covered instructions properly refused.

It was not error to refuse requested instructions where every principle sought to be stated therein was covered by the court's charge.

16. Criminal law 🔑742(1)—Whether conspirator was detective or agent of the party robbed for jury.

In prosecution for conspiracy to burglarize a mining company, whether witness for state, who took part in the attempted burglary, was an agent or detective of the mining company, *held* for the jury.

17. Criminal law 🔑877—Acquittal of one not an acquittal of all.

Where four persons were charged with conspiracy, acquittal of one of them did not require the acquittal of the others.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Segundio Rodriguez was convicted of conspiracy to commit burglary, and appeals. Affirmed.

W. E. Wright, of Nevada City, and Russell P. Tyler, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was convicted of conspiracy to commit the crime of burglary (section 182, Pen. Code, as amended by the Legislature of 1919 [Stats. 1919, p. 170]) upon an information charging:

> That he "on or about the 16th day of March, 1922, * * * willfully, unlawfully, and feloniously did conspire and agree with C. Silbelo, Vincent Alvarez, and Albert Greenwald to commit the crime of burglary, to wit, by then and there feloniously to burglarize the office of the North Star Mines Company, a corporation, and the said Segundio Rodriguez, in pursuance and furtherance of said conspiracy, and to effect the object thereof, did attempt to pick the lock of the door of the office of the said North Star Mines Company to enter and consummate the purpose of said conspiracy," etc.

The alleged conspirators, with the exception of Greenwald, who was a feigned accomplice, were given separate trials. The defendant appeals from the judgment and the order denying him a new trial.

The legal integrity of the verdict is assailed on several different grounds, the first of which is that Albert Greenwald, charged in the information as a coconspirator, was the agent of the North Star Mines Company, and as such was employed and directed to originate a scheme whereby the other alleged conspirators would be inveigled and so entrapped into an attempt to burglarize the office of said company for the purpose of abstracting therefrom and stealing a large quantity of bullion stored therein. In other words, it is the contention that the conspiracy charged was, in pursuance of an agreement previously made between said Greenwald and the officers of said company, originated by the former, and that he led the other defendants into the scheme and in an attempted execution thereof; that therefore the arrest, the prosecution, and the conviction of the defendant were the result of an "entrapment," as that term is in criminal law understood, and that, for that reason and for the further reason that the scheme was concocted and sought to be carried out with the consent of the officers of the mining company, no crime was committed, and also the conviction of the accused is opposed to public policy, and consequently void. It is further contended that the verdict should be set aside because of certain errors committed in rulings upon certain evidence, and also because of errors in the giving of and refusing to give certain instructions.

It appears from the evidence that Albert Greenwald is a machinist by trade and an expert locksmith; that he maintained a machine shop in the town of Grass Valley, in Nevada county; that in January, 1922, while engaged in doing some work in a restaurant in Grass Valley, he met the defendant, and that they then engaged in a conversation in the kitchen of said restaurant; that during the course of the conversation defendant stated to Greenwald that he at one time was engaged at working in a mine in Montana, that he had seen there some high-grade ore, and that he had tried to open the lock, but could not, "and that if he knew how to open Yale locks he would never work again"; that he subsequently met the defendant on three or four different occasions and conversed with him, and that the latter on one occasion asked him how much he would charge to teach a friend of his (defendant's) to open Yale locks. Greenwald asked the defendant what his purpose was in having his friend learn how to open Yale locks, to which the defendant replied that "there is so much easy money to be gotten all over the country, and if I had a partner, a friend who could open Yale locks, I would never work any more." Greenwald tried to dissuade the defendant from engaging in any such business, as "practically he would be plotting against government property"; the defendant having in the conversation named a number of places, including postoffices, that could be easily entered and money taken therefrom if some one of experience in the opening of Yale locks would undertake the work with him. The defendant was insistent upon having Greenwald teach his friend how to open Yale locks and wanted to know what the latter would charge for so instructing his (defendant's) friend. Greenwald finally said that he would charge the sum of $200 for instructing the party referred to as to the method of opening such locks. Greenwald testified that in the month of February he closed his shop in Grass Valley and removed his mechanical equipment to Rocklin; that before departing from Grass Valley the defendant requested him (Greenwald) to leave his address with the defendant; and that, having done so, he later received from the defendant a letter in which it was stated that his (defendant's) friend would soon be in Rocklin for the purpose of taking lessons in the business of opening Yale locks. Shortly after Greenwald received the letter referred to, Vincent Alvarez (sometimes referred to in the testimony as Alvarez Rodriguez), one of the alleged coconspirators named in the information, made his appearance at the former's shop in Rocklin and introduced himself as the party of whom the defendant had spoken and written to him (Greenwald) as desiring to learn something about opening Yale locks. Greenwald gave Alvarez some instructions as to how to manipulate Yale locks so as to open them, but testified that he did not impart sufficiently explicit information in that particular to Alvarez to enable him to completely open such locks. A short while after the time just referred to Greenwald moved back to Grass Valley, and on the 2d day of March again met the defendant and in the company of Alvarez. It was on this occasion that the defendant proposed to rob the Empire and North Star mines, Alvarez being present, but not taking any special part in the conversation. The scheme was elaborately discussed by the defendant and he asked Greenwald to join in the criminal enterprise, but Greenwald at this time neither gave his assent to nor expressed dissent from the proposition. It was first suggested by the defendant that they take the bullion from the truck which is employed in conveying the same at certain intervals of time from the mines to the railroad station to be shipped. Greenwald would not agree to this suggestion. The defendant thereupon suggested that the bullion be taken from the train, but as to this Greenwald expressed no opinion. The defendant, Alvarez, and Greenwald met on several subsequent days, and on each of these occasions the proposition of robbing the mines was renewed by the defendant. Finally it was agreed that they would go to the office of the North Star mines, break into it, and steal the bullion.

On the 8th of March, 1922, Greenwald called on a Mr. Nobs, general manager of the Empire Mines Company, and gave him the full details of the proposed scheme of the defendant and Alvarez to rob the Empire and the North Star mines. Nobs in turn communicated the information thus received to Mr. Foote, the general manager of the North Star Mines Company, and these two told Mr. R. H. Bedford, the general superintendent of the North Star Mines Company, of the proposed robbery. Mr. Nobs stated that, when Greenwald first told him of the proposed robbery, he was rather skeptical about it for the reason that many other such reports had frequently come to them theretofore and proved to be groundless; that in those instances such reports were made by persons who desired to secure money from the mining companies for giving them the information and before producing results. He said, however, that after consulting with the officers of the North Star mines and further questioning Greenwald, who appeared at the offices of the mining companies three or four times before the robbery was attempted, he came to the conclusion that there was some foundation for the story. The services of a Mr. De Pue, of San Francisco, a noted finger print expert and investigator of crimes, were brought into requisition by the officers of the North Star mines, and the matter was placed in his hands. On his arrival at Grass Valley and at the office of the North Star mines, Greenwald was sent for, and, in the presence of Mr. Nobs, De Pue questioned Greenwald very fully as to the details of the proposed robbery. De Pue thereupon reached the conclusion that Greenwald was acting in good faith and was truthful in the story he told relative to the proposed robbery. Greenwald was asked by Mr. Nobs how much he wanted for furnishing the information, to which Greenwald replied that what he wanted first was to prove that what he had told them was true; that the defendant and his coconspirators were bent upon robbing the North Star Mines Company office and securing the bullion therein deposited; that, if he succeeded in proving the truth of what he had told them, the mining company could pay him whatever it thought his services were worth. Thereupon De Pue stated that, if the story he had told them proved to be well founded, it would be worth at least $1,000 to receive such information and Mr. Nobs assented to that proposition.

After Greenwald first imparted information to the authorities of the mines of the proposed robbery, Silbelo, also charged as a coconspirator, was brought into the affair by the defendant, the latter having previously told Greenwald that he had another friend, referring to Silbelo, who would enter into the conspiracy. Defendant stated that he had "tried out" said Silbelo, "and that he wouldn't stop at anything, and that he wanted him to go in with them on the holdup." After Silbelo put in an appearance as a member of the confederation, the matter of the robbery was freely and fully discussed by the defendant, Alvarez, Silbelo, and Greenwald, the latter finally agreeing to become a party to the commission of the proposed crime. In this connection, it should be stated that, when Greenwald first told the officers of the mining companies of the intended robbery, he stated that the conspirators had asked him to join them in the scheme, and that he intended doing so for the purpose of assisting in their detection and apprehension. He was advised by the officers of said companies to go ahead and do what he could towards bringing the conspiracy to light and capturing the criminals, if such they were.

The time fixed for the execution of the conspiracy was the night of the 16th of March, 1922. Greenwald so informed the officers of the North Star Mines. The latter had several deputy sheriffs in addition to the regular watchman of the mine stationed inside the building on the night of the 16th for the purpose of frustrating the accomplishment of the conspiracy and capturing the conspirators. On that night the attempt to rob the mine was made. Greenwald accompanied the other three parties to the office of the mine. They were all armed with weapons which, during the period of time the conspiracy was under discussion between the parties, were purchased by the defendant and Silbelo at a hardware store in the city of Auburn, Placer county. When they arrived at the mine, the defendant, who had constituted himself the leader in the scheme, assigned each of the conspirators to certain particular duties. Two were to be stationed at different points near the building so as to give alarm if any one should put in an appearance. Two of them were to go to the office door and undertake to open it. Greenwald testified that this arrangement was carried out. The defendant stationed himself near a tree which was close to the building, and Silbelo was at another point not far distant from where the defendant stood. The latter ordered Silbelo "not to stop at anything" if any one should appear on the scene while they were engaged in the robbery. Alvarez and Greenwald went up to the office door; Alvarez being the first one to get to the door and to take hold of the knob and attempt to open it. Greenwald followed and turned the knob and made a noise with a pick that he put in the door. A noise from another source was also heard. Greenwald was not certain whether it was produced by some one inside the office or by one of the conspirators. Greenwald then returned to where the defendant stood and stated that "the building was bolted on the inside, and I couldn't open the door," and referred to the noise he had heard. A suggestion was then made that they desist in any further attempt to break into the office that night, but the defendant, notwithstanding that he was told by Greenwald that he had heard a noise which might have come from the office or the inside of the building, proposed that they break the window and thus make an entrance into the office. It was, however, finally agreed that they would not make any further attempt to burglarize the office that night, and they returned to Greenwald's shop.

Nobs and Bedford positively testified that Greenwald, prior to the time at which he first gave them information relative to the proposed robbery, was not employed by either the Empire Mines Company or the North Star Mines Company in any capacity; that at no time did they authorize him to lead the defendants into a scheme to rob the mines or to accompany the conspirators to the mines for the purpose of robbing the same. They admitted that, after he had told the story to them and had stated that the other parties desired him to go with them to the mine for the purpose of robbing it, they advised him to "go ahead." This is positively all that was said to Greenwald in regard to the matter, so they testified. They had no contract with him whereby he was to receive any particular sum of money for his services, except any agreement which might be implied from the suggestion of Mr. De Pue, with the acquiescence of Mr. Nobs, that the services of Greenwald would be worth $1,000 if it proved to be true that a conspiracy had been formed by and between the defendant and his coconspirators to burglarize the office of the North Star mines for the purpose of stealing the bullion therein stored. In fact, both Nobs and Bedford positively testified that at no time could they get Greenwald to say how much he wanted for his services; that Greenwald, in reply to the question as to how much he would charge for his services, would invariably say that he had no price to fix; that what he desired, above all other considerations, was to show that the defendants Alvarez and Silbelo had suggested and formed a conspiracy to rob the mines and to have them apprehended in the act. It was admitted by Mr. Bedford that, on the suggestion of Mr. De Pue, he gave Greenwald $25 to be used for defraying any expense to which he might be required to go in bringing about the apprehension of the conspirators if they attempted to carry out the object of the conspiracy.

De Pue testified, in response to questions on cross-examination, that he did not instruct or direct Greenwald to accompany the other men to the mine on the night of the 16th; that there was no necessity for him doing so because Greenwald had himself said that he intended to go with the men upon his own initiative, so that he could prove to the satisfaction of the mining company that he had told the truth regarding the conspiracy.

The defendant and his coconspirators, including Greenwald, were placed under arrest by Sheriff Martin, of Nevada county, in the locksmith shop of Greenwald in Grass Valley on the evening of March 29, 1922. It seems that there was not room enough in the Nevada county jail to hold the prisoners, and they were taken to the county jail at Auburn, Placer county, to remain pending their preliminary examination and trial. While they were confined in said jail the defendant made a statement to Mr. De Pue in the presence of Sheriff Gum, of Placer county, R. C. O'Connor, and Greenwald, in which he admitted that he, Alvarez, Silbelo, and Greenwald had entered into the conspiracy to rob the North Star and Empire Mining Companies, and that they undertook to carry out the conspiracy on the night of the 16th of March, 1922, as explained by Greenwald in his testimony. De Pue, Gum, and O'Connor positively testified that the defendant at no time during the course of his confession stated that Greenwald planned the conspiracy or was the instigator thereof. These witnesses testified that the defendant said that they had taken Greenwald with them because he was an expert locksmith and could be of service in opening the locks of the office and the vault in which the bullion was kept.

The defendant, testifying in his own behalf, admitted that he and the other parties named in the information conspired together for the purpose of robbing the North Star and Empire mines; that they undertook to carry out the conspiracy on the night of the 16th of March, 1922, but, as Greenwald testified, they heard some noises which put them in fear that they were being watched, and thereupon withdrew from the premises of the North Star mines without having entered the office, or, as he stated, without attempting to rob it. The defendant stated that he first met Greenwald in February, 1922, in a restaurant which he (defendant) was conducting in Grass Valley; that they met several times thereafter, and that Greenwald frequently complained of the fact that his business (that of a machinist and locksmith) was not paying him as well as he would like, and, on one occasion, suggested to the defendant that, if he (defendant) had any friend who desired to learn the business of a locksmith or how to open locks, he would teach him the art for the sum of $50; that, when Greenwald left for Rocklin, he gave his address to the defendant, with instructions to send any one to him who might desire to learn how to open Yale locks; that he did later send Alvarez to Greenwald at Rocklin with a letter stating that Alvarez desired to learn how to open Yale locks; that, upon his return to Grass Valley from Rocklin, Greenwald again met the defendant, and, after considerable conversation about "hard times," so far as his business was concerned, and also asking where Alvarez was at that time, made a proposition to the defendant to rob the North Star and Empire mines. This conversation occurred, so defendant stated, between the 8th and 10th of March, 1922, in the room of

Greenwald in Grass Valley. Thereafter, proceeded the defendant, he Alvarez, Silbelo, and Greenwald again met and fully discussed and finally completed the plans for robbing the North Star mines; Greenwald being the man who suggested and arranged for the carrying out of the scheme. The defendant admitted that, as a part of the preparation for executing the object of the conspiracy, he and Silbelo bought several revolvers to be used by them on the night of the robbery. These revolvers were purchased at a hardware store in Auburn, so the defendant testified, and so testified the owner of the hardware store, who identified the weapons as those sold to two strangers on the day on which the defendant admitted that they were purchased.

Alvarez, one of the alleged confederates of the defendant, was called to the stand to testify in behalf of the defendant, but, having been informed by the court of his rights as a codefendant, refused to testify on the ground that his testimony would tend to incriminate him.

[1] 1. There can be no doubt but that the evidence clearly warranted the jury in finding that the crime of conspiracy, as defined by our statute, was consummated. See section 182, Pen. Code, supra. Section 184 of said Code, as amended by the Legislature of 1919 (Stats. 1919, p. 170), provides:

> "No agreement amounts to a conspiracy, unless some act, beside such agreement, be done within this state to effect the object thereof, by one or more of the parties to such agreement and the trial of cases of conspiracy may be had in any county in which any such act be done."

[2] The indictment alleges that the defendant attempted to pick the lock of the door of the office. This, of course, charged an act in furtherance of the execution of the conspiracy, as required by section 184 of the Penal Code. As seen, the evidence shows that Alvarez, one of the coconspirators, went to the door and got hold of the knob. There is no direct testimony that he actually attempted to pick the lock; yet the evidence shows he had with him lock picks and passkeys, and it seems to us that the jury were, from this fact and the fact that he took hold of the knob of the door, authorized to infer and conclude that he did actually pick the lock or do some other like act for the purpose of opening the door. But, after all, since the gravamen of the offense as charged in the information is the formation of the conspiracy and the attempt to enter the office of the mining company, the allegation that the conspirators attempted to pick the lock of the door of the office merely involves a statement of the means employed by them to effect such entrance, and, in a rational view, amounts only to an allegation that they attempted to open the door for the purpose of facilitating their entrance into the office. Indeed, the allegation that the conspirators attempted to pick the lock of the door would be meaningless if it were not used in the information for the purpose of expressing the idea or thought that they thus attempted to make an entrance into the office. Any attempt on the part of the conspirators to enter the office and to "consummate the purposes of the conspiracy," which is the language of the information, whether the attempt was made by breaking the door or a window or picking the lock of the door or by attempting to open the door by means of a passkey, would constitute the overt act charged in the information as in furtherance of the conspiracy. To be more explicit, in charging the crime of burglary it is sufficient to allege that the accused unlawfully, etc., entered a certain building or structure with the intent to commit grand or petit larceny or any felony, without stating the means employed by him to effect an entrance, and an attempt to commit that crime is sufficiently charged in like language —that is, in the language of the statute. And it follows, therefore, that the means employed for that purpose is not material, and need not be alleged. It is mere surplusage. With the allegation as to the picking of the lock omitted from the information, the charge would thus be sufficiently stated:

> "* * * Did conspire * * * to commit the crime of burglary, to wit, by then and there feloniously to burglarize the office of the * * * company and the said [defendant], in pursuance and furtherance of said conspiracy and to effect the object thereof, did attempt * * * the office of * * * company to enter and consummate the purpose of said conspiracy."

Thus, in effect or substantially, does the information here charge the offense, and it was therefore sufficient, in order to meet the allegation of that pleading as to the overt act, to wit, the attempt to enter the office of the mining company, to prove that the conspirators did make such attempt; the means resorted to by them for that purpose being unimportant and immaterial.

[3, 4] In the recent case of People v. Beck (Cal. App.) 213 Pac. 61, the question as to what constitute overt acts which are required to be shown before the crime of conspiracy is established is reviewed, and many cases cited in which are to be found illustrations of different acts which are in furtherance of the execution of the object of a criminal conspiracy, or which, if done, would effect or tend to effect the object of the conspiracy. But there cannot, of course, be any question but that an attempt to open the door of the office, whether by picking it or otherwise, is an overt act. Manifestly the act of Alvarez in attempting to enter the of-

fice was the act of all the conspirators, since it was made for the purpose of accomplishing the object of the conspiracy.

[5, 6] 2. There is a conflict between the testimony of the defendant and that of Greenwald upon the question whether the conspiracy was originated by the latter or by the former and the other alleged conspirators. There is, however, some evidence corroborative of the testimony of Greenwald that the conspiracy was instigated by the defendant, and not by him. While both the defendant and Silbelo were in jail awaiting trial, the defendant wrote and sent to Silbelo a letter in which he suggested that he (Silbelo) admit his guilt, but, in making his confession to the officers, to state that Greenwald was the originator of the scheme to rob the mine and induced the defendant, Silbelo, and Alvarez to join him in the formation and execution thereof. This story, need not have been put in the mouth of Silbelo by the defendant if the truth was that Greenwald originated the conspiracy, and therefore the suggestion in said letter that Silbelo should say to the officers that Greenwald was the originator of the crime is a very strong circumstance tending to support Greenwald's testimony that the defendant was the prime mover or instigator of the conspiracy. This, we think, was sufficient corroboration of Greenwald's testimony as to that matter, assuming that he was a real accomplice, and that it was necessary that his testimony in that particular be corroborated as required by section 1111 of the Penal Code.

There is no evidence and no claim that Greenwald was an officer of the law or anything other than a mere private citizen, and also it is clear that there is abundant support to the implied finding of the jury that Greenwald did not, in the transaction involving the formation of the conspiracy and the attempted execution thereof, act as a detective for or the agent of either the North Star or the Empire Mines Company, and that the officers of neither company consented to or urged either the formation or the execution of the conspiracy. As to the part taken by the officers of the North Star Company in the transaction, we are justified in saying that there is no evidence whatever that those in authority over said company ever suggested or advised the formation of the conspiracy. Indeed, from the evidence it is clear that the officers of the company knew absolutely nothing of any scheme being in progress to rob the company until Greenwald communicated information of the proposed robbery to them, and that they did not then consent to the commission of the burglary, but merely consented to anything Greenwald might find it necessary to do to expose the conspiracy and to capture the conspirators. At the time they received information of the formation of the conspiracy there was wanting in the consummation of the crime charged in the information but one element, to wit, some overt act or acts on the part of the conspirators in furtherance of the object of the conspiracy; and the evidence does not show that the officers of the mine, or any one having authority in the matter of the investigation of the proposed robbery, induced or requested Greenwald to proceed in confederation with the other parties with the execution of the object of the conspiracy or to do any act in furtherance thereof. It will be remembered that the officers testified that Greenwald stated to them that he had been invited by the defendant and his confederates to join them in the conspiracy and to accompany them to the office of the company for the purpose of carrying out the object thereof. It is true the officers made no objection to the proposition of Greenwald to join the conspirators in the actual attack upon the property of the company, and this, it may be conceded, may be considered as a tacit consent on the part of the officers that he should do so: but this does not amount to consent in law. It merely means (in view of the evidence generally) that, having been informed that certain criminals had fixed upon a determined purpose to rob them of their property, they were willing that their informant should pursue any course that would prevent the accomplishment of the designed result of the criminal combination and to bring the criminals to justice. In 25 Cyc. p. 44, the rule is stated as follows:

> "The fact that an agent of the owner acts as a supposed confederate of the thief is no defense to the latter, provided the original design was formed independently of such agent. So, where a detective employed by the owner acts with the thief, the taking is none the less larceny. And so, where a person approached by the thief as his confederate notifies the owner or the public authorities, and, being authorized by them to do so, assists the thief in carrying out the plan, the larceny is nevertheless committed."

In State v. Currie, 13 N. D. 655, 102 N. W. 875, 69 L. R. A. 405, 112 Am. St. Rep. 687, it was held, quoting the résumé of the opinion as given in footnote to State v. Smith, 30 L. R. A. (N. S.) 951:

> "It was held no defense to a prosecution for burglary that one present with and assisting defendant in the burglary was a detective, if the detective did not instigate the crime, and it was committed, as to every ingredient of it, by the defendant, nor that the owner of the building, to whom the detective disclosed that it was probably about to be burglarized by the defendant with the feigned assistance of himself, acting for the purpose of securing evidence of the intended burglary and other crimes, did not take steps to prevent the crime, but passively allowed it to go on."

The rule is stated succinctly in City of Chicago v. Brendecke, 170 Ill. App. 25, as follows:

> "It is not unlawful entrapment for police officers to afford to a person an opportunity to voluntarily and deliberately do what they had reason to believe he would do if opportunity offered."

The case of State v. Smith, 33 Nev. 438, 117 Pac. 19, is strikingly similar in the facts to the case at bar. The defendant was charged jointly with other persons with the crime of grand larceny in the stealing of gold amalgam from a mining company in the state of Nevada. He and his confederates attempted and thought that they had succeeded in inducing the watchman of the mine, one Zimmerman, to join them in the conspiracy to commit the crime. Zimmerman, however, reported the proposed larceny to the officers of the company, and they advised him to pretend to stand in with the conspirators in the perpetration of the crime. Zimmerman did as he was so instructed, and the attempt to rob the mine was made. The defendant and his confederates were apprehended in the act, placed under arrest, and prosecuted for, and convicted of, the crime. On appeal the point was made that the offense was committed with the consent of the owners of the mine through their agent, Zimmerman, but the Supreme Court held that the defense was not well taken. The court in its opinion reviews many cases covering the proposition of entrapment and the commission of offenses with the apparent assistance of feigned confederates, who were the agents of the owners of the property upon which the criminal trespass was designed to be made, and we refer to those cases as opposing the claim herein made by the appellant that the proposed robbery of the mine was with the consent of the owners thereof, in the sense that they were parties to or instigators of or induced the commission or the attempted commission of the crime. See People v. Bunkers, 2 Cal. App. 197, 209, 84 Pac. 364, 370.

Obviously, if the officers in authority over the North Star Mines Company had actually consented to the formation and the attempted carrying out of the conspiracy, then the element of criminal trespass would have been absent and no crime committed. But, as is clear from the evidence, this is not such a case. Nor does the case here come within the rule of that class of cases of which the case of People v. Collins, 53 Cal. 185, is an exemplar. In that case the defendant asked one Parnell to enter a certain building for the purpose of stealing therefrom a sum of money which he (defendant) knew to be concealed therein and proposed that the money should be divided between them. Parnell, before accepting or acting upon the proposal, communicated the fact of its having been made to him to the sheriff, who, after consultation with the district attorney, advised Parnell to pretend to the defendant that he accepted the proposition and would carry out the enterprise. The understanding between Parnell and the sheriff was that the former, upon taking the money, should mark it with acid, so it could be identified, and when he delivered the money to the defendant a signal should be given by Parnell upon which the sheriff would arrest the defendant with the marked money in his possession. Parnell, it seems, entered the building and secured the money, the defendant remaining on the outside, and, when Parnell gave the money to the defendant, he at the same time gave the signal agreed upon and the sheriff thereupon arrested the defendant with the marked coins in his possession. Manifestly, since the gist of the crime of burglary is the entering of a building with intent to commit certain crimes, and Parnell not having entered the building with such intent, the crime of burglary could not be consummated. The Supreme Court so held and reversed the case. Here Alvarez, one of the conspirators, was himself the first to attempt to enter the office.

[7] 3. The particular criticism of the court's rulings as to the evidence involves the action of the court in allowing to go before the jury the confession of the defendant. The ground upon which the objection was urged below and is pressed here against the propriety of this testimony is that, prior to the making of the confession, Greenwald had attempted to induce the defendant to confess and had said to him that it would be better for him if he would tell the truth about the matter. The claim is that it was under the stress of the advice so given to the defendant that the confession to the officers was brought about, and that it was, therefore, not a free and voluntary admission of guilt. There is some conflict as to whether the confession was thus superinduced. It is very clear, though, that any advice given by Greenwald to the defendant to admit his guilt was not in the presence of any officer or person in authority. Nor does it appear that the circumstances under which Greenwald is supposed to have advised the defendant to tell the truth were such as would have led him (defendant) to believe that such advice was given with the sanction of any person in authority or having power to extend leniency to him in the matter of punishment in case he did confess. In the case of People v. Luis, 158 Cal. 185, 191, 110 Pac. 580, 582, considering the ruling of the trial court admitting in evidence a confession made by the defendant upon the advice of a third party, who was not an officer or in authority, that it would be better for him to do so, the Supreme Court says:

> "We are aware of no case holding that a confession should be excluded merely because it

was induced by the advice of a third person to the effect simply that it would probably be better to tell the truth, given in the absence of any officer or person in authority, and not given under such circumstances as to lead the accused to suppose it was given with the sanction of any such person. The mere fact that the accused secretly hoped that the effect of making a complete statement showing his guilt would be to lighten his punishment and make it better and easier for him could not operate to render the statement inadmissible if that hope was not improperly induced. It is manifest that the statement may be free and voluntary notwithstanding the existence of such a hope."

See U. S. v. Stone (C. C.) 8 Fed. 232, 260; People v. Piner, 11 Cal. App. 549, 105 Pac. 780.

The record shows that the defendant's confession to the officers was not made under the influence of any threats or promise of leniency or reward by said officers. Before making his confession the defendant was informed of his rights by the officers and explicitly told that any incriminating statement he might make with reference to the charge against him would be used at the trial for the purpose of supporting the allegations of the information.

[8] But it is unnecessary further to consider this point, since it appears, as we have shown, that the defendant himself took the witness stand and repeated substantially before the jury the confession made by him to the officers in the county jail at Auburn. In other words, he admitted on the witness stand that he was a party to the conspiracy, and that he, with his coconspirators, went to the office of the North Star Mines Company on the night of the 16th of March, 1922, for the purpose of burglarizing it and taking therefrom any gold bullion which they might find deposited therein. In view of this testimony by the defendant himself, the ruling of the court allowing testimony of his confession, even if erroneous, is without prejudice.

4. The assignments of error as to the action of the court in the giving of and the refusal to give certain instructions are so numerous that all of them cannot be specifically noticed herein. We will therefore give special attention to such only of these assignments as it is thought should thus be noticed. The first objection is against an instruction which, so far as it goes, is in the language of section 31 of the Penal Code. It involves a correct statement of the law in the abstract, and manifestly covers a principle which is pertinent to any criminal case in which two or more parties are jointly charged with the commission of the same offense.

[9, 10] Instruction No. 16 is in the language of section 184 of the Penal Code, hereinabove reproduced. The objection to it is that thereby the court in effect told the jury that any overt act which they might find from the evidence was done by the defendant and his confederates in furtherance of the conspiracy would be sufficient, even though such act was not the overt act specifically charged in the information. The instruction is, of course, a correct abstract statement of the rule; but, even if it were necessary to concede that, taken alone, it is obnoxious to the objection thus made against it, when it is considered, as it should be, in connection with the given instruction (No. 17) immediately following it, the reason for the objection is at once dissipated. Instruction 17 is substantially in the language of section 1104 of the Penal Code, and is as follows:

> "Upon a trial for conspiracy, the defendant cannot be convicted unless one or more overt acts are alleged in the information, nor unless one of the acts alleged is proved."

The instruction in the case of People v. Johnson, 22 Cal. App. 362, 366, 134 Pac. 339 cited by the defendant, is entirely at variance with the instruction here criticized, viewed in connection with the succeeding instruction. In the Johnson Case, the court told the jury that it was sufficient "if you find * * * that one or more of the defendants entered into an agreement with another defendant * * * to obstruct and impede the trial of said action, and that in pursuance of said agreement some act was done by one of them toward carrying the agreement into effect." The Court of Appeal, by Mr. Justice James, very properly held that the phraseology of the instruction was such that the jury could therefrom have deemed themselves at liberty to find that an overt act other than any of those charged in the information was sufficient to meet the requirements of a verdict of guilty.

[11] Instruction 18, proposed by the defendant, was given in part and refused in part. The part given, in effect, declared that, where there exists a suspicion that a crime is about to be committed, while it is proper to employ detectives or agents to watch and discover the persons proposing to perpetrate it, still, if the agents or detectives so employed suggest the commission of the crime to the suspected persons or mingle with the latter, and while so doing "induce, urge, or instigate such suspected persons to take part in the commission of the crime or to commit some overt act for the purpose of convicting them, there can be no prosecution and conviction under such circumstances." The refused part of the instruction was practically a repetition, but involved a less accurate statement in concrete form of the principle stated in the portion given. There was no error in modifying the instruction as indicated. At least, the defendant could not have been prejudiced thereby.

[12] There is no merit to the claim that instruction No. 19 is in conflict with or contradictory to instruction No. 18, last above considered. No. 19 is to the effect that a defendant in a case of conspiracy under section 182 of the Penal Code cannot escape conviction merely because the party designed to be affected or injured thereby or his agents, by laying a trap or otherwise, have facilitated the accomplishment of the purpose of the conspiracy, or because such party or his agents have appeared to co-operate with the originator of the conspiracy in order to detect the conspirators in any attempt they might make to accomplish the object of the conspiracy. The instruction, when reasonably viewed, is not inconsistent with instruction No. 19, nor is it objectionable in any sense. It is true, as the instruction in effect says, that an acquittal in such a case is not justified merely because the party against whom or whose property the conspiracy is aimed, having received information of its formation and that it is in process of execution, and not being the instigator of the criminal scheme, makes such preparation for frustrating the accomplishment thereof and the detection of the conspirator as may be conceived to be required for that purpose. In this connection we cite, in addition to the cases cited above as supporting this proposition, the following: Hummelshime v. State, 125 Md. 563, 93 Atl. 990, Ann. Cas. 1917E, 1072; State v. Dougherty, 86 N. J. Law, 525, 93 Atl. 98; Commonwealth v. Wasson, 42 Pa. Super. Ct. 38. The instruction is to be considered, as presumptively the jury so considered it, in connection with other given instructions bearing upon the question of entrapment and in view of the evidence. As so considered, its true meaning—the meaning which is here ascribed to it—if not, when the instruction is considered by itself or alone, plainly apparent, could not be misapprehended by any intelligent man or woman.

[13, 14] Instruction No. 26, proposed by the people, was given after having been modified by the court by eliminating therefrom the name of Greenwald. The instruction, as so modified, stated that, where a conspiracy among two or more persons to commit a crime is proved to exist, "any act in furtherance of the conspiracy done by one of the conspirators is the act of all the conspirators, and all are bound by it." The instruction then proceeds to say that, if the jury were satisfied beyond a reasonable doubt that, on the day on which it is alleged the burglary was attempted, an agreement existed between the defendant "and either C. Silbelo or Vincent Alvarez [Greenwald's name here stricken out] to commit the crime of burglary, as charged, * * * and you are further satisfied * * * that, on the same date, * * * while such agreement was in existence, in furtherance of said agreement, * * * either the defendant, or C. Silbelo, or Vincent Alvarez [Greenwald's name here eliminated] attempted to enter the office of * * * with intent to commit grand or petit larceny or felony therein, then you should find the defendant guilty, as charged," etc. The principal ground upon which the legal soundness of said instruction is impeached is that it does not state the conspiracy charged because the name of Greenwald was omitted therefrom, or in other words, while the information alleges that four persons joined in the conspiracy, the instruction declares that the defendant could be convicted if the proof satisfactorily showed that the conspiracy to do the act charged was entirely between him and either Silbelo or Alvarez. The objection thus urged against the instruction, as well as some others not necessary to mention, is without legal force. If a dozen persons had been charged with being members of the conspiracy, the jury could have properly found two guilty and the remainder not guilty, assuming that the evidence warranted such a course, and the court was authorized so to instruct the jury, which was in effect no more than the court did by the instruction in question. The rule as to a material variance between the pleading and the proof has no application where, in a criminal case in which two or more persons are jointly charged with the same crime, the evidence may be such as to justify the conviction of some of the defendants only and to require the acquittal of the others.

[15, 16] The defendant complains that the court seriously prejudiced his rights by refusing to give to the jury some 18 different instructions which he proposed. We have examined these proposed, but rejected, instructions with painstaking care, and thus have been convinced that every principle sought to be stated therein was covered by the court's charge to the jury. There was no necessity for repeating a principle or rule of law which was embraced in the court's charge. Besides, some of the instructions referred to were objectionable in that they referred to Greenwald as "the agent" and "the detective" of the North Star Mines Company in the transaction involved herein. It was for the jury to say from the evidence whether Greenwald was a detective or an agent of the mining company in said transaction.

[17] Defendant's instruction No. 18, which was among those rejected by the court, does not state the law in so far as this case is concerned. It was to the effect that the acquittal of Greenwald or the act of the district attorney in dismissing the information as to him would entitle the defendant to an acquittal, inasmuch as "the acquittal of one defendant in an alleged conspiracy is an acquittal of all the defendants in the alleged conspiracy, whether such acquittal is by consent, design, or after trial," etc. As support-

ing the propriety of the instruction, counsel for the defendant cite the case of State v. Dougherty, 88 N. J. Law, 209, 96 Atl. 56, L. R. A. 1916C, 991, Ann. Cas. 1917D, 950, in which there were only two persons involved in the alleged conspiracy, one of whom was a feigned accomplice, and therefore there could be no conspiracy. Indeed, in such a case the charge of conspiracy would be inappropriate.

We have discovered no just reason for disturbing the verdict, and the judgment and the order appealed from are accordingly affirmed.

We concur: FINCH, P. J.; BURNETT, J.

---

61 Cal. App. 92

PEOPLE v. SILBELO. (Cr. 651.)

(District Court of Appeal, Third District, California. Feb. 23, 1923.)

1. Criminal law 🔑1144(17)—Presumed that commitment was for crime charged.

Where on appeal there is no record of a motion to set aside the information (Pen. Code, § 995), and hence nothing to show the nature of the commitment or what the evidence upon which the commitment was based showed, the presumption is that the commitment was for the crime charged in the information.

2. Indictment and information 🔑161(5)—Amendment of information held not erroneous.

An amendment of an information for conspiracy to burglarize mining properties merely relating to or affecting an allegation in the information as to the means employed by the conspirators to commit the overt act, or attempt to effect an entrance, *held* to involve only a matter of form, and not of substance, and to charge the identical offense, and could not have misled the accused.

3. Conspiracy 🔑28—Gist of offense of conspiracy to burglarize.

The gist of a conspiracy to burglarize consists of the conspiracy, and an attempt to enter in pursuance and furtherance of the conspiracy and the particular manner or means by which the attempt, the overt act, was made is wholly immaterial.

4. Indictment and information 🔑110(10)—Information for conspiracy to burglarize held to comply with requirements of statute.

An indictment for conspiracy to burglarize *held* to correspond with the requirements of Pen. Code, § 950, subd. 2, and section 952, subds. 2 and 3, the first ingredient of the crime being alleged in clear and concise language, and the second ingredient, the overt act, or the fact of entering a building, or attempt to do so, being stated in the language of section 459, describing the crime of burglary.

5. Criminal law 🔑1186(4)—Failure to instruct as to corroboration of accomplice held not prejudicial.

Failure to give an instruction addressed to the question whether witness was a real accomplice, assuming that it was the duty of the court to give such an instruction on its own motion, was not prejudicial and did not result in a miscarriage of justice (Const. art. 6, § 4½), where there were plenty of corroborative circumstances, and the evidence was convincing as to the guilt of the accused.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

C. Silbelo was convicted of conspiracy to commit burglary, and appeals. Affirmed.

W. E. Wright, of Nevada City, and Russell P. Tyler, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was, by information filed in the superior court of the county of Nevada, jointly charged with Segundio Rodriguez, Vincent Alvarez, and Albert Greenwald with the crime of conspiracy, under section 182 of the Penal Code, as amended by the Legislature of 1919 (Stats. 1919, pp. 170, 171).

The jury found him guilty as charged, and he appeals from the judgment and the order denying him a new trial.

The information as originally filed alleged that the parties just named and the defendant, on or about the 16th day of March, 1922, in the county of Nevada—

> "unlawfully and feloniously did conspire and agree * * * to commit the crime of burglary, to wit, by then and there feloniously to burglarize the office of the North Star Mines Company, * * * and the said Silbelo, *in pursuance and furtherance of said conspiracy and to effect the object thereof, did attempt to pick the lock of the door of the office of the said North Star Mines Company to enter and consummate the purposes of said conspiracy*," etc.

Subsequently to the trial and conviction of the defendant's coconspirator, Segundio Rodriguez, in whose case an opinion by this court upholding the result arrived at in the court below has this day been filed, and after the defendant had entered his plea to the information as originally filed, the court allowed the district attorney, upon motion, to amend the information by striking out the words above italicized and inserting in lieu thereof the following:

> "And that on said 16th day of March, A. D. 1922, at and in the county of Nevada, * * * the said C. Silbelo, in execution of said last-mentioned premises, and in pursuance and furtherance of said conspiracy, combination, confederation, and agreement with Vincent Alvarez, Segundio Rodriguez, and Albert Greenwald, and to effect the object thereof, did attempt to unlawfully, feloniously, and burglariously enter said building, to wit, said office of the North Star Mines Company, * * * with the intent then and there to commit the crime of grand larceny, a felony," etc.

The action of the court in permitting the information to be amended as indicated presents the first point submitted here for decision.

The authority for the amendment of indictments and informations is to be found in section 1008 of the Penal Code, which provides:

> "An indictment or information may be amended by the district attorney, without leave of court, at any time before the defendant pleads. Such amendment may be made at any time thereafter, in the discretion of the court where it can be done without prejudice to the substantial rights of the defendant. An indictment cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination."

[1] There is no record here of a motion to set aside the information (Pen. Code, § 995); hence there is before us nothing to show the nature of the commitment or what the evidence upon which the commitment was based showed. The presumption is, in that state of the record, that the commitment was for the crime charged in the information.

[2, 3] Nor does the information, as amended, state a different offense from that set forth therein as the same was originally filed. The information, as amended, as it did prior to the amendment or as it was originally filed, charges that Silbelo and his confederates entered into and formed a conspiracy to burglarize the office of the North Star Mines Company, and in pursuance of said conspiracy attempted to enter said office. The amendment merely relates to or affects the allegation as to the means alleged in the information, as it was originally filed, as having been employed by the conspirators to commit the overt act or attempt to effect an entrance into the office. See People v. Rodriguez (Crim. No. 652) 214 Pac. 452, opinion filed this day. As is said in that opinion, the gist of the offense as charged originally consisted of the conspiracy to burglarize the office and the attempt to enter the same in pursuance and furtherance of the conspiracy, and therefore the particular manner in which or means by which the attempt (the overt act) was made is wholly immaterial. Since, therefore, the offense charged in the amended information is the identical offense charged in said information as it was originally filed, it cannot, of course, be held that the allowance of the amendment was prejudicial to the substantial rights of the accused. The amendment involved a matter of form, and not of substance. The defendant was not called upon by the amendment to prepare for any different defense from that which he could have made had the information been allowed to remain as it was originally drafted and filed. Because of the amendment he could not have been misled as to the nature of the charge which he was required to meet or prepare to meet. In other words, any defense which he might have prepared for the purpose of introducing in impeachment of the allegations of the information as it was originally filed would be equally as pertinent to the allegations of the information as it was amended. See People v. Webber, 44 Cal. App. 120, 186 Pac. 406; People v. Liberty, 39 Cal. App. 360, 178 Pac. 863; People v. White, 47 Cal. App. 400, 190 Pac. 821; People v. Rippe, 32 Cal. App. 514, 163 Pac. 506; People v. Wilhite, 49 Cal. App. 246, 193 Pac. 151.

[4] But it is vigorously contended that the information as amended is defective in that it does not correspond with the requirements of subdivision 2 of section 950 and subdivisions 2 and 3 of section 952 of the Penal Code. There is no merit in this contention. Section 950, subd. 2, provides that an indictment or an information shall contain "a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." Section 952, subds. 2 and 3, provides that the indictment or information must be direct and certain as to the offense charged and the particular circumstances of such offense, when they are necessary to constitute a complete offense. The amended information meets all these requirements. The first ingredient of the crime of conspiracy as alleged in the information is stated in clear and concise language, or so that it can readily be understood what is meant thereby, or in language such as to enable a person of ordinary intelligence to understand what was meant to be charged. The second ingredient of the offense, to wit, the overt act or the fact of entering the building or the attempt to do so, is stated in the language of section 459 of the Penal Code describing the crime of burglary, which is legally sufficient to state the offense to commit which the conspiracy was formed.

The facts of this case are substantially the same as those brought out in the case of People v. Segundio Rodriguez (Crim. No. 652) 214 Pac. 452. In the opinion in that case they are given in extended detail. There is, therefore, no necessity for repeating them herein. The defendant did not testify in the case, and Alvarez, although he was called to the stand, refused to testify on the ground that his testimony would tend to incriminate him. The story as told by the witness Greenwald in the Rodriguez Case of the circumstances leading to and characterizing the formation of the conspiracy and the attempt to put it into execution was retold by him in this case. There is no substantial variance between the story told by him in the Rodriguez Case and that told in this case concerning the transaction. In this case, however, Greenwald described a little more fully the actions of Alvarez in his attempt to open the door of the office of the mining company. He stated that Alvarez opened the screen door and then got hold of the knob of the main door and tried to open it. Greenwald repeated that no directions were given to him by the officers of the mining company as to the part that he should play in the transaction. He also told of the procurement of the revolvers, several sacks in which to carry the bullion, which he said were procured by the defendant here, rubber shoes, and rubber gloves to be used by the conspirators; the use of all those articles in the execution of the conspiracy having been suggested by Segundio Rodriguez. The rubber gloves were to be used for the purpose of preventing finger prints being left on the door or other parts of the building upon which the party attempting to enter the office might place his hands.

[5] In this case it is stated that the reason that no special instructions were requested in the cases of Segundio Rodriguez and the defendant here was because:

> "It had not developed to a moral certainty that the alleged coconspirator, Albert Greenwald, would not be also brought to trial; * * * that the jury were led to believe that it was the theory of the prosecution that Greenwald was a real conspirator and would be prosecuted."

We do not understand the purport of the argument thus essayed. It would seem obvious that it could make no difference what the intention of the district attorney was as to the disposition that was to be made of the case against Greenwald. The nature of the "special instructions" which defendant would have proposed had it been known to his counsel that Greenwald was not to be prosecuted is not indicated in the briefs. An instruction, however, based on section 1111 of the Penal Code, to the effect that "a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense," was not, but should have been, given in this case, since the question, whether Greenwald was a feigned or an actual accomplice was one for the jury to determine. Such an instruction was properly given in the Case of Rodriguez (Crim. No. 652), at the request of the defendant therein; but no such instruction was proposed by counsel for the defendant in this case. There was, though, plenty of corroboration of the testimony of Greenwald as to the attempt to carry out the conspiracy. In fact, the defendant confessed to Mr. Nobs, in the presence of two other parties, that he, with Segundio Rodriguez, Alvarez, and Greenwald, went to the building of the mining company on the night of the 16th of March, 1922, for the purpose of entering the office and stealing the bullion. At the same time he stated that the party who first proposed the robbery to him was Segundio Rodriguez. There were other corroborative circumstances which it is unnecessary to repeat herein. Indeed, there is no dispute in this case, nor was there any in the Rodriguez Case, that the four parties named in the information as the conspirators went to the mining company office on the night of the 16th of March, 1922, for the purpose of breaking into the office and stealing the bullion. It follows that it makes little if any difference whether Greenwald was a feigned or a real accomplice. The corroboration referred to was also corroborative of the fact of the formation of the conspiracy, since the fact that the four men met together or at the same time at the building and made an attempt to enter the office is convincing evidence of the fact that there had been a prearranged agreement or understanding between the parties to commit the crime as charged in the information. Failure, therefore, to give an instruction addressed to the question whether Greenwald was a real accomplice, assuming that it was the duty of the court to give such an instruction on its own motion, cannot be held to have been prejudicial or to have resulted in a miscarriage of justice. Const. art. 6, § 4½.

The charge of the court in this case, except in a few immaterial particulars, was the same as that given in the Case of Rodriguez. The criticisms of the instructions given herein are the same as those aimed at the charge of the court in the Rodriguez Case. There is, therefore, no necessity for reviewing in this opinion these assignments.

The same may be said as to the instructions proposed by the defendant and rejected by the court. With one or two exceptions the refused instructions are the same as those offered by the defendant and rejected by the court in the Rodriguez Case. In the opinion in that case we have disposed of these assignments, and it is not necessary to review them herein. The principles sought to be stated in all the rejected instructions in this case, including the one or two added to those offered and refused in the Rodriguez Case, were covered by the charge of the court.

For the foregoing reasons, and upon the authority of the case of People v. Rodriguez (Cr. No. 652) 214 Pac. 452, the judgment and the order are affirmed.

We concur: FINCH, P. J.; BURNETT, J.

61 Cal. App. 797

PEOPLE v. RODRIGUEZ. (Cr. 653.)

(District Court of Appeal, Third District, California. Feb. 23, 1923.)

Criminal law 🔑1134(2)—No examination of record necessary where case submitted upon briefs in other cases.

A case having been submitted upon the briefs in other cases, the appellate court is not required to examine the record for the purpose of determining whether the points made in the other cases, when applied to the case in question, have sufficient legal force to warrant a judgment returning the case for retrial.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Vincent Alvarez Rodriguez was convicted of conspiracy to commit burglary, and appeals. Affirmed.

W. E. Wright, of Nevada City, and Russell P. Tyler, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant, Segundio Rodriguez C. Silbelo and Albert Greenwald were charged with the crime of having conspired and confederated together for the purpose of feloniously and burglariously entering the office of the North Star Mines Company to commit the crime of grand larceny. Each of the alleged conspirators, with the exception of Greenwald, who was a mere feigned accomplice, and not tried at all, was given a separate trial. Opinions affirming the judgment and the orders in the cases of Segundio Rodriguez (Crim. No. 652) 214 Pac. 452, and C. Silbelo (Crim. No. 651) 214 Pac. 462, have this day been filed.

Counsel for the defendant here have submitted his case upon the briefs on file in the former cases. From this we assume that the points made for a reversal here are the same as those upon which reversals in the other cases were urged. At all events, the case here, having been submitted upon the briefs in the other cases, we are not required to examine the record herein for the purpose of determining whether the points made in the other cases, when applied to this, have sufficient legal force to warrant a judgment returning the case for retrial.

One point, however, which was considered in the case of People v. Silbelo may be referred to, and it is this: That the information was amended as indicated in the opinion in the case of People v. Silbelo, and upon the information as so amended the defendant here was tried. In the Silbelo Case it was suggested that the court transcended its authority by allowing the amendment. It was also contended that the information as amended does not conform to the requirements of subdivision 2 of section 950 and subdivisions 2 and 3 of section 952 of the Penal Code. What we have said in the Silbelo Case with regard to the action of the court in allowing the district attorney to amend the information and with regard to the information as amended, of course, has direct application to this case and is decisive of the points so made against the contentions of the defendant.

Upon the authority of the cases of People v. Rodriguez and People v. Silbelo, supra, the judgment and the order herein are affirmed.

We concur: FINCH, P. J.; BURNETT, J.

---

67 Cal. App. 146

FATE v. GROSS et al. (Civ. 4409.)

(District Court of Appeal, First District, Division 1, California. Feb. 27, 1923.)

1. Appeal and error 🔑1010(1)—Judgment affirmed if there is substantial evidence to support findings.

Where the sufficiency of the evidence is the only question presented on appeal, the judgment must be affirmed if there is substantial evidence in the record to support the findings.

2. Municipal corporations 🔑705(4)—Automobile driver held negligent in turning automobile so as to proceed in opposite direction without compliance with statutes.

Automobile driver who collided with motorcycle which had been following his automobile, in attempting, while in a public street, to turn the automobile around so as to proceed in the opposite direction, without compliance with Motor Vehicle Act, § 20, subd. "q," making it unlawful to turn an automobile around so as to proceed in the opposite direction in a business district, except at an intersection on the public highway, and subdivision "h," providing that, before turning, stopping, or changing the course of an automobile, the driver shall ascertain if there is sufficient space for such movement to be made in safety and shall give a signal of his intention to turn, *held* negligent.

3. Municipal corporations 🔑705(10)—Motorcycle rider traveling behind automobile held not a person in charge of an "overtaking vehicle" within Motor Vehicle Act.

Motorcycle rider who followed an automobile at a lawful rate of speed and maintained a reasonable and lawful distance behind the automobile, but who was injured in a collision with the automobile when automobile driver, after giving a signal indicating his intention of turning to the right to park, suddenly and without warning turned to the left in front of the motorcycle, *held* not a person "in charge of an overtaking vehicle" within Motor Vehicle Act, § 20, subd. "h," making it the duty of such person to sound audible and suitable signal for passing a vehicle proceeding in the same direction.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

4. Municipal corporations ⚷706(6)—Failure of motorcycle rider following automobile to signal that it intended to pass automobile held not proximate cause of collision as matter of law.

Where motorcycle rider who was maintaining a reasonable and lawful distance behind an automobile traveling in the same direction, and was traveling at a lawful rate of speed, collided with the automobile when the automobile driver, after giving a signal indicating his intention of turning to the right to park, suddenly and without warning turned to the left directly in front of the motorcycle, any negligence on the part of the motorcycle rider in not sounding a warning that he was about to pass automobile did not, as a matter of law, constitute a proximate cause of the collision.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Lewis A. Fate against H. M. Gross and another. Judgment for plaintiff, and named defendant appeals. Affirmed.

John J. Jones, of San Jose, and Barry J. Colding, of San Francisco (Theodore Hale and J. E. Pemberton, both of San Francisco, of counsel), for appellant.

John W. Sullivan, of San Jose, for respondent.

PER CURIAM. The defendant H. M. Gross appeals from a judgment rendered against him in an action brought by the plaintiff, Lewis A. Fate, for damages on account of personal injuries sustained by the latter as a result of a collision between the defendant's automobile and plaintiff's motorcycle. The action against appellant's codefendant H. M. Gross and Todd Protectograph Company, a corporation, was dismissed on a motion for a nonsuit.

[1] The trial was had before the court sitting without a jury, and the court found that the defendant was, and that the plaintiff was not, guilty of negligence. The question of the insufficiency of the evidence is the only one presented on this appeal, and therefore, if there is substantial evidence in the record to support the findings, the judgment must be affirmed.

The collision occurred on North First street, in the city of San Jose, at a point nearly opposite the steps of the courthouse, at the hour of 5:40 on the evening of March 31, 1921. Defendant was traveling in an automobile northerly on the right-hand side of North First street, at a rate of speed of about 10 miles an hour. The plaintiff was riding on a motorcycle, and was traveling behind, but in the same direction with, defendant, at a rate of speed of about 15 miles an hour.

The evidence on the part of plaintiff shows that, when defendant reached a point opposite the St. James Hotel, which was about 75 feet south of the place where the collision occurred, and at which time plaintiff was approximately 30 feet behind defendant's machine, the defendant slackened his speed, changed his course a little to the right, and gave a hand signal indicating his intention to park his machine at the curb. He moved toward the curb until within 3 or 4 feet of it, and then, without giving any other or additional warning or signal, he turned his machine sharply to the left, following the line of a circle, evidently intending to turn around at that point in the street. By doing so he collided with the plaintiff, throwing the latter to the pavement and fracturing both bones of the right leg between the knee and the ankle.

[2] We are satisfied that the evidence above narrated is sufficient in law to sustain the finding of the trial court that the defendant was negligent. The Motor Vehicle Act of California provides that no vehicle except those operated by the police or fire departments shall, in a business district or closely built up territory, be turned so as to proceed in the opposite direction except at an intersection of the public highway. Subdivision "q," § 20, Motor Vehicle Act (Stats. 1919, p. 215). It is also provided that, before turning, stopping, or changing the course, the person in charge of a vehicle shall first see that there is sufficient space for such movement to be made in safety, and, if the movement or operation of other vehicles may reasonably be affected by such turning, stopping, or changing of course, shall give plain, visible signal of his intention so to turn, stop, or change his course, etc. Subdivision "h," § 20, Motor Vehicle Act. All of these plain provisions of the statute were violated by the defendant.

The main contention of appellant is that plaintiff was guilty of contributory negligence because it is admitted by plaintiff that he did not at any time give a warning or signal of his approach. In support of this contention appellant cites and relies upon subdivision "h" of section 20 of the Motor Vehicle Act, which reads:

> "It shall be the duty of the person operating or in charge of an overtaking vehicle to sound audible and suitable signal before passing a vehicle proceeding in the same direction."

[3, 4] In view of the circumstances disclosed by the record, we are unable to agree with appellant that plaintiff has been brought within the provisions of the section of the law last above quoted. The evidence is to the effect that plaintiff was following defendant's machine up the street, maintaining a reasonable and lawful distance behind it, and was traveling at a lawful rate of speed, when the defendant, after giving a signal indicating his intention of turning to the right to park, suddenly and without

warning, turned to the left directly in front of and collided with the plaintiff. Under such circumstances it cannot fairly be held, we think, that plaintiff was "in charge of an overtaking vehicle," or that he attempted to pass defendant's machine. And, even if it be assumed that it was plaintiff's duty under the circumstances to give warning of his approach, we are not prepared to say as a matter of law, in view of the finding of the trial court to the effect that plaintiff was not guilty of contributory negligence, that the failure to give such warning contributed proximately to plaintiff's injuries, or that, if such signal had been given, the collision would have been averted. As above stated, the evidence shows that plaintiff kept 30 feet to the rear of defendant's machine until defendant slackened his speed and gave a hand signal indicating his intention to park; that, when defendant reduced his speed and indicated his intention to park, plaintiff's motorcycle was brought within 15 feet of the rear of defendant's machine; and that while plaintiff was in that position the defendant, contrary to the signal he had given, suddenly turned to the left directly in front of plaintiff. The evidence further shows that, when defendant made the sudden turn to the left, plaintiff did everything possible to avoid a collision by turning his motorcycle sharply to the left within the circle made by defendant's machine. Whether or not plaintiff, while in that situation and under those circumstances, could have saved himself or prevented the collision by sounding a warning or giving a signal was a matter for the trial court to decide from all the evidence before it.

In the case of Carlson v. Leonard (Cal. App.) 200 Pac. 40, it is said:

> "It is well settled by recent decisions of the Supreme Court and of this court that the conclusion of the trial judge as to whether a given state of facts does or does not amount to negligence as a mater of law will not be disturbed upon appeal, in the absence of a clear showing of abuse of discretion. Mayne v. San Diego E. R. Co., 179 Cal. 173, 175 Pac. 690; Diamond v. Weyerhauser, 178 Cal. 540, 174 Pac. 38; Scharves v. S. F. O. T. Rys. [30 Cal. App. Dec. 477], 186 Pac. 154; Genta v. Illingsworth [33 Cal. App. Dec. 33] 192 Pac. 1041; Spring v. Tawa [33 Cal. App. Dec. 37] 192 Pac. 1051."

The trial was held in the courthouse opposite the scene of the collision. By the record it is shown that upon cross-examination plaintiff was requested to go to the window of the courtroom and point out certain locations about which he had testified. The trial court was therefore in a position to view, and was doubtless quite familiar with, all of the physical conditions as they existed at the time of the collision, and from those circumstances concluded that plaintiff was not guilty of contributory negligence. In reaching that conclusion we do not find that there was an abuse of discretion.

Judgment affirmed.

---

61 Cal. App. 239

Ex parte ADAMS. (Cr. 957.)

(District Court of Appeal, Second District, Division 1, California. March 2, 1923.)

1. Statutes 🔑114(6)—Title of act adopting Volstead Act held sufficient.

The Wright Act, adopting the Volstead Act as the law of the state, entitled "An act to enforce the provisions of article eighteen of the amendments to the Constitution of the United States; prohibiting all acts or omissions prohibited by the Volstead Act; imposing duties on courts," etc., *held* a sufficient compliance with Const. art. 4, § 24, as to expressing the subject in the title.

2. Fines 🔑12—Court may order imprisonment in satisfaction of fine.

Though, under Volstead Act, tit. 2, § 29, which by adoption is a part of the state law, the only penalty that can be imposed for a first offense in unlawfully possessing intoxicating liquor is a fine not exceeding $500, nevertheless the court may, under Pen. Code, § 1446, direct that defendant be imprisoned until the fine be satisfied in the proportion of one day's imprisonment for every dollar of the fine.

3. Criminal law 🔑991(2)—Defendant, improperly sentenced to imprisonment, may be lawfully held and again arraigned for judgment.

Though, after conviction for a first offense against the Prohibition Law, defendant has been improperly sentenced to imprisonment, he is not, because such sentence was illegal, entitled to an absolute discharge from custody, but may be lawfully held as prior to the judgment, subject to be again arraigned when the court is competent to act; nor is the situation changed because the void judgment was entered by a police court rather than a court of record.

Application by Charley Adams for a writ of habeas corpus. Prisoner remanded.

Cooper, Collings & Shreve, of Los Angeles, for applicant.

W. D. McConnell, City Prosecutor, J. Friedlander, Asst. City Prosecutor, J. D. Taggart, Deputy City Prosecutor, and S. W. Odell, Associate Counsel, all of Los Angeles, for respondent.

CONREY, P. J. In the police court of the city of Los Angeles a complaint was filed, whereby petitioner was charged with a violation of the act commonly known as the "Wright Act," being chapter 80 of the Laws of 1921 (Stats. 1921, p. 79), in that he did willfully and unlawfully have in his possession in the city of Los Angeles certain alcoholic and intoxicating liquors for beverage purposes, containing more than one-half of 1 per cent. by volume of alcohol, contrary to the provisions of the Volstead Act (41 Stat. 305). He pleaded guilty, and the judgment provided that he be imprisoned in the city jail of the city of Los Angeles for a term of 180 days. Being held in custody under that judgment, he applied for and obtained a writ of habeas corpus, returnable before this court. Return having been made, showing the facts above stated, the matter is now submitted for decision.

Petitioner claims that the commitment is void because the offense charged against petitioner was a first offense, and under title 2, § 29, of the Volstead Law the only punishment which can be inflicted for the illegal possession of liquor as a first offense is a fine of not more than $500. Petitioner further contends that the Wright Act violates section 24, article 4, of the Constitution of California, which provides that "every act shall embrace but one subject which subject shall be expressed in its title. * * *"

[1] The Wright Act is entitled:

> "An act to enforce the provisions of article eighteen of the amendments to the Constitution of the United States; prohibiting all acts or omissions prohibited by the Volstead Act; imposing duties on courts, prosecuting attorneys, sheriffs and other officers, and extending their jurisdiction; and providing for the disposition of fines and forfeitures."

We think that the first clause of this title is alone sufficient to cover all of the contents of the statute. Moreover, section 5 of the act defines the phrase "Volstead Act," by referring it definitely to title 2 of the act of Congress enacted October 28, 1919. In the Matter of Frank Burke, 212 Pac. 193, the Supreme Court has held that, where there is no constitutional provision which forbids it, it is proper to declare that any law of the United States, or of another state, shall be the law of this state, and that there is no constitutional provision in this state which forbids such action. In that case the Wright Act was sustained as against the contention that the act is void because it purports to enact into the law of this state all of the penal provisions of the Volstead Act.

[2] Under section 29 of the Volstead Act, which by adoption is now a part of the Wright Act, the only penalty that can be imposed for a first offense, such as that of which the petitioner has been convicted, is a fine of not more than $500. There can be no sentence to imprisonment. Nevertheless, in accordance with section 1446 of the Penal Code, the court, in imposing the fine, may direct that the defendant be imprisoned, until the fine be satisfied, in the proportion of one day's imprisonment for every dollar of the fine.

[3] The judgment in this case is void because it imposed a penalty not authorized by law. Counsel for respondent concede that this is true and they ask that the petitioner be remanded for proper sentence. Petitioner objects to this suggestion and insists upon an absolute discharge from custody. He claims that because the police court is a court of limited jurisdiction, it follows that when the petitioner has been illegally sentenced, the police court is now without power to enter any judgment at all. We do not think that, for the purposes of this question relating to the consequences of the rendering of a void judgment, there is any distinction in law between a police court and a court of record. If the judgment was void for the reason that it attempted to impose a kind of punishment for which the law does not provide, then it is void for all purposes, and the prisoner is lawfully held now as he was held prior to the judgment, and subject to be again arraigned for judgment at any time when the court is competent to act. Matter of Smith, 152 Cal. 566, 568, 93 Pac. 191. In the Smith Case the judgment in question was a purported judgment of the superior court, but we think that the proposition stated would have been equally applicable to a judgment of a justice's court or police court.

Prisoner is remanded to custody to await the further action of the justices' court in the pronouncement of a judgment of sentence according to law.

We concur: JAMES, J.; HOUSER, J.

---

61 Cal. App. 259

PEOPLE v. SMITH. (Cr. 940.)

(District Court of Appeal, Second District, Division 1, California. March 5, 1923. Hearing Denied by Supreme Court May 5, 1923.)

1. Homicide 🔑254—Evidence held sufficient to sustain conviction for murder in second degree.

Evidence of threats by accused against deceased, and a quarrel concerning another woman, of whom accused was jealous, which resulted in the killing, *held* sufficient to sustain a conviction for murder in the second degree.

2. Witnesses 🔑372(2)—Objection to question whether deceased's paramour, of whom accused was jealous, was living with him at the time of the homicide held properly sustained.

In a prosecution for murder growing out of a quarrel between accused and one living with her concerning another woman, of whom accused was jealous, *held*, that an objection to cross-examination asking such third person while a witness whether at the time of the difficulty she was living with deceased, for the purpose of showing interest, was properly sustained.

3. Criminal law 🔑404(2)—Bullet and piece of flooring held admissible though discovered more than seven months after homicide.

In a prosecution for murder, where there was evidence that five bullets had been fired, only four of which were accounted for, where there was evidence that more than seven months after the shooting police officers had visited the room and discovered a hole in the flooring, beneath which, lying on the plastering below, they found a bullet, comparing in size to the others found in deceased's body, *held*, that a piece of the flooring containing the bullet hole, and the bullet itself, were admissible in rebuttal, under Pen. Code, § 1105, notwithstanding the remote date of its discovery.

4. Criminal law 🔑1144(15)—Jury assumed to have comprehended and considered entire charge.

It must always be assumed that the jury comprehended and considered the entire charge of the court in passing upon the sufficiency of a particular instruction.

5. Criminal law 🔑822(8)—Instruction concerning continued shooting by accused after deceased had fallen not error.

In a prosecution for murder, an instruction that, if accused fired a shot into deceased's body after he was lying on the floor, and after all necessity for the use of a deadly weapon in self-defense had ceased, she would not be justified, *held* to correctly state the law when considered with other qualifying terms in the body of the same instruction.

6. Criminal law 🔑823(6)—Instruction concerning evidence that deceased was violent, quarrelsome, and dangerous, held not error.

An instruction that evidence as to the character of deceased as being a violent, quarrelsome, and dangerous man was to be considered only as a circumstance, illustrating the facts of the homicide, and indicating the aggressor and the nature of the aggression, *held* not error in view of other instructions, though not particularly lucid.

7. Criminal law 🔑730(7)—Conduct of district attorney in illustrating his argument by facts from another case held not prejudicial error.

Conduct of district attorney in using facts taken from another case within his knowledge as illustrative of an argument sought to be impressed on the jury, though not the better practice, *held* not prejudicial, in view of a plain and pointed instruction that the jurors should be guided solely by evidence introduced at the trial, and by the instructions.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Fay Alma Smith was convicted of murder in the second degree, and she appeals. Affirmed.

E. Burton Ceruti, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of murder in the second degree, and has appealed from the judgment of imprisonment and from an order denying a motion for a new trial.

On the 14th of February, 1922, defendant shot and killed Arthur Bell, using a .38-caliber revolver, from which she fired five shots at close range, all of which entered the body of the deceased. Both defendant and the deceased were of the negro race, defendant being at the time of the shooting 27 years of age and the deceased 31. Defendant had formerly been married to a man named Smith, from whom she claimed to have been divorced. For a large portion of the 6 years immediately preceding the tragedy she had lived with the deceased, although not married to him. During the time that she sustained the relation indicated toward Bell there had been many quarrels between the two, due (according to defendant's assertion) to attentions which Bell bestowed upon other women. It was because of this alleged propensity of Bell that the quarrel was precipitated, which resulted in Bell's death on the date charged in the information.

On the night in question an inmate of the small rooming house which was being conducted by defendant and Bell in the city of Los Angeles heard the couple, as he said, "fussing"; he heard defendant scream, and immediately thereafter heard shots fired. On going to the room occupied by the two, he called out, asking what the trouble was, and defendant replied, "we were fighting in here." The witness entered the room, and saw Bell lying on the floor, with the defendant standing near by, and close to a dresser, upon which a revolver lay. The witness departed in search of a physician. Another witness, who came to the room immediately after the person last mentioned had departed, found the door closed. At his call the door was unlatched by the defendant, who appeared with a revolver in her hand. Bell was lying on the floor, the witness stated, and called for water. The witness testified that the defendant remarked: "He is dressing to go to see that bitch. Let him go now!" Officers and attendants with an ambulance from the city hospital soon arrived. To an inquiry made in the room as to who had done the shooting, defendant replied, "I did." Before the arrival of ambulance and officers, defendant had replaced the five empty shells in the revolver with loaded cartridges. The injured man was conveyed to the hospital, where he died the same night from the effects of his wounds.

A witness who was at a bootblack stand on the street opposite the building in which the defendant and deceased were heard the shots; he testified that the first three shots came in quick succession; that an interval of time then ensued, which the witness stated was of about a minute's duration, and then the last two shots were heard. The time elapsing, according to the witness, between the third and the fourth shots was sufficient to allow him to walk from the bootblack stand two doors south. Another witness, who was also at the bootblack stand, and heard the shots, testified that the first three shots were fired within a space of five seconds; that there was an interval of 12 or 15 seconds between the third and fourth and of 25 or 30 seconds between the fourth and fifth.

Of the five bullets which caused wounds in the deceased's body but four were found, assuming that the bullet which was discovered in the floor in the September following was one of these. The hospital attendants found two of the leaden pellets in the clothing of the deceased when they removed them, and the physician who performed the autopsy found one bullet imbedded under the skin. The wounds showed that all of the bullets had passed completely through the body of the deceased except the one last mentioned. Three of the bullets had entered the front of the body; two at the left side or hip. One of the bullets, which did great damage, entered the abdomen, slightly at the right of the navel, took a downward course of about 45 degrees, and emerged at the back. One of those entering at the left hip took an upward course of an equal number of degrees, also perforating the abdominal section. This one emerged, and was taken from the skin close to the left breast. It would appear from the testimony of the autopsy physician that either of the two wounds which have been referred to as taking a downward and an upward course of 45 degrees necessarily would have resulted fatally, while the others might not have had such a result.

On the next day defendant was interviewed at the police station, where she made a statement covering details of the occurrence which immediately preceded the shooting. She told also of her relations with the deceased, and of the quarrels that had occurred between them. She stated that on the night of the shooting, after she returned, as will later appear, at about 9:30 or 10 o'clock, Bell was there, and remained about the place until after 12 o'clock, when he started to dress himself. She stated that she asked him where he was going at that time of night, and he told her it was none of her business, and that she was "getting too ——— ——— sly, anyway." She then proceeded with the following narrative:

> "I said, 'Because a woman doesn't let a man make a ——— ——— fool out of you she has to be sly.' To show me that I was too sly he made a pass at me, and I ducked it and he hit at me, and I dodged again, and rushed to the dresser and grabbed the gun, and started shooting. We had been quarreling all along in the week before. He had beaten me because I had gotten after him about this girl. So I said I was not going to let him beat me up any more about some one just because I asked him about her. * * * He had on his pants, a little sweater coat; and when we first started to quarreling he had just got through combing his hair, and I think he still had on his house slippers. He had got through combing his hair, and we were quarreling during that time, and then the argument began to get hotter and hotter, and then he struck me while I was standing near the corner of the foot of the bed; so I dodged this blow, and he made another pass, and hit me a glancing blow while I was going towards the dresser; and then I was near enough to pull the drawer open and get the gun out. Then I started to shooting, and just kept shooting, and did not know if I hit him or not. * * * I don't think he fell until after I went out of the room. I ran out into the hall. The drawer was still open where I got the gun out, so I grabbed some more bullets and ran out into the hall, as I didn't know if he was going to run after me or not, and I was going to keep shooting him, because I was afraid of him, as he had fought me time and again. By an Officer: Q. How long have you been living with him? A. Six years. Q. About how many quarrels have you had during that time? A. Really, I do not know just how many. Once in Oxnard we had a big quarrel when he brought this girl, Baby, down, * * * and I caught them together, and gave her a good beating. We have quarreled about different women at different times, but specified times I do not remember. * * * Q. Then he really only struck you once, did he not, last night? A. That was the only chance he got to hit me. He hit at me once, and I dodged one blow, and then grabbed the gun out of the dresser. * * * Q. Well, now, this quarrel you were having was of the same nature as other quarrels you have had previously, was it not? A. Yes, sir. Q. Has he ever cut you or shot at you or anything? A. No; he has hit me with his hands and chairs and things like that."

In this statement made by defendant on the day following the shooting she did not claim that she had been struck, injured, or bruised in any manner by her last encounter with deceased, and there was no evidence to show any bruises appearing upon her body. At the trial, however, she made a statement that Bell had thrown a bottle at her which struck her on the head; that he grabbed her by the throat and shook her, and started to pick up a chair to strike her, when she got away, secured the revolver, and began to shoot. As referring to Bell's position when the different shots were fired, she did not, even at the trial, claim that he remained confronting and threatening her until the shooting ceased. Her testimony given on that point was in part as follows: "Q. Is it not a fact that when those shots were fired that Bell was either in the act of falling over, or was already on the floor?" to which she replied, "I don't remember; * * * I don't remember how I fired. I just pulled the gun, kept shooting." She was asked also the direct question as to whether she did not fire a shot while Bell was lying on the floor, to which she replied that she did not, adding "Not as I remember." Again the question was asked of her, "Will you say you didn't fire a shot while he was almost on the floor, falling over?" to which she replied, "As far as I remember, I don't remember that I did. I just grabbed it and shot, was all."

The woman whose alleged friendship with Bell was the cause of the fatal quarrel was named Jimmie Seigler. She was produced at the trial, and told of a visit made to her on February 5th—12 days before the shooting—by the defendant. She testified that defendant entered her house, and said that Arthur Bell had sent her to tell the witness "not to be sending him any more messages"; that the witness had responded, "I haven't sent any messages," and that the defendant said, "Well, I just want to let you know, if you have you had better stop, because I am Arthur's lawful married wife; if I ever catch you and Arthur together I am going to kill both of you; I am going to put an end to you;" that defendant then "went on and told about different girls she had beat up about him—two or three other girls she beat up about Arthur"; that, when defendant was ready to go, she repeated, "I mean that; if I catch you together that is going to be the end of you; I am going to kill both of you."

Early in the evening on the night of the tragedy defendant requested a male acquaintance to drive her to a railway depot, where she made inquiry as to the time trains would depart for Arizona points. (It afterwards appeared that she had understood that Jimmie Seigler had requested Bell to meet her [Seigler] at the depot before the departure of a train.) When the party returned to a point near the place where defendant and Bell lived, defendant, for the purpose of ascertaining whether Bell was at home, dispatched one of the party with instruction to make inquiry of Bell as to the whereabouts of a woman, which woman in fact was at the time with defendant in the automobile. The defendant then went to a point near the place of residence of Jimmie Seigler, and, placing herself by or behind some billboards, despatched a young man, whose services she had impressed for the purpose, to the house with instruction to tell Jimmie Seigler that Arthur Bell was waiting around the corner to see her. The message was delivered, but had no effect in the direction of inducing the Seigler woman to leave her home, and, after waiting for a little time by the billboard, defendant departed. She finally returned to the lodging house, where she changed her clothes.

Wagner, the young man who had delivered the message to the Seigler home, stated that, after defendant returned to the automobile and the machine had started, she said to him: "I am going home. I don't want to kill him. I am going home and give him a good beating, because I don't want him making no damn fool out of me. I know he is scared of me. That is the reason I am not going to do anything but give him a good beating." Several friends were at the house when defendant returned, and they left at about 12 o'clock.

[1] The point is first urged that the evidence is not sufficient to justify the verdict. From the summary which has been made of the most important of the evidence, introduced mainly on behalf of the prosecution, it must be apparent that a case was presented which warranted the jury in returning the verdict that it did. Defendant admitted freely that she had frequently quarreled with deceased, which quarrels were prompted by her objection to the attentions which he paid to other women; those quarrels all had similar accompaniments, she upbraiding Bell and he (as she testified) striking her or throwing things at her. As illustrating the animus which was aroused in her by reason of Bell's attentions to other women was her own statement of how she had "beaten up" a girl at Oxnard. The testimony of Jimmie Seigler that defendant threatened to kill both her and Bell if she ever found them together showed that the idea of doing violence toward both of those parties was present in defendant's mind before the tragedy. While the revolver with which the shooting was done was the property of Bell, it was usually kept in the top drawer of the dresser in the room where the shooting occurred, and defendant was well acquainted with that fact. It appears by her own statements that defendant had full reason to know that a return to the ever-bitter subject would precipitate a quarrel, as a result of which one or both of the participants might suffer bodily injuries. Knowing all this, and acting outside of the protection of any right growing from a marriage relation, she renewed the dangerous discussion—in effect, deliberately precipitated the quarrel. In making this statement we are allowing the defendant credit for veracity in her assertion that she had been on prior occasions struck and bruised by Bell. Her failure to claim or exhibit any physical injuries at the time of the shooting or on the day following, when she made her statement to the police officers, is significant as evidence indicating that on the night of February 14th she was not violently attacked by Bell. The testimony given by the witnesses who heard the shooting showed that the shots were not fired in a volley, as under the convulsive hand of an hysterical person, wrought up to a pitch of unreasoning excitement or fright, but in a manner indicating some deliberation.

[2] On the cross-examination of the witness Jimmie Seigler, defendant's counsel, referring to a time before the day of the shooting, asked the witness this question: "Were

you living with Arthur Bell at that time?" —to which question the district attorney objected on the ground that it was not proper cross-examination, and was an attempt to degrade the witness. Counsel for appellant insisted that it went to the interest of the witness. The court sustained the objection. We think that the objection was properly sustained. It did not fall within the strict limits of proper cross-examination, and, moreover, if admissible as showing interest, it could not well have illustrated any different interest than that which the jury might infer from the relations shown to exist between the two women and Bell from other evidence.

[3] On September 18, 1922, more than seven months after the shooting of Bell occurred, a deputy district attorney and certain police officers visited the room which had been occupied by defendant and deceased, and from which deceased was taken. They made further examination of the premises to discover marks of bullets. On this visit the deputy district attorney and officers found, at the place where the body of Bell was proved to have laid, a bullet hole in the floor, which extended entirely through the boarding, which was about an inch in thickness. A piece of the flooring containing the hole was sawed out, and a detached bullet was found lying on the plastering beneath. This bullet and piece of flooring were introduced in evidence, and the prosecution used the evidence as a basis for the argument that at least one shot was fired by the defendant after Bell had fallen prone upon the floor. Defendant's counsel strenuously objected to the introduction of the evidence, on the ground that the time of the discovery of the hole and bullet was too remote from the date of the shooting, and that it was not sufficiently established that, by some other instrumentality and persons unconnected with the defendant, the hole had been made and the bullet lodged where it was found. In order to establish a foundation for the introduction of this evidence, the district attorney proved by a police officer that, whenever shooting of any kind was reported to have occurred in the city, a record was made of the occurrence by the police department, and that search had been made through that record covering dates at least a year prior to February 14th, and from that on down to the date when the bullet hole and bullet were discovered in September, and that there was no record of any shooting having occurred at that place during that time. There was testimony, also, of the lessee of the building, who had kept and rented the rooms for a considerable portion of the time subsequent to the date of the shooting. This testimony showed that, so far as that witness knew, there had been no discharge of firearms in or about the premises, although she admitted that a particular room had been occupied by one or two tenants who had the exclusive possession of the apartment. The date of the discovery of this bullet hole and bullet was indeed remote from the time of the shooting of Bell, and it is a matter justifying the comment that it is rather remarkable that the officers engaged in that investigation should not have discovered the important evidence at the time that the original investigation was made of the circumstances of the shooting. However, it did appear that at the time the shooting occurred the floor was covered with a carpet, and the hole which the bullet had made in the fabric might have been difficult to discern. The fact, too, as appeared, that no other bullet holes were found in the walls or woodwork of the room, together with the fact that it was proved beyond question that five shots were fired, furnished circumstances which would aid in identifying the bullet found underneath the floor as being one of those of which theretofore no trace had been discovered. There was testimony that the bullet corresponded in size and character to the other bullets found in and about Bell's body. It was, of course, a matter for the jury to consider and determine as to what the position of Bell's body was at the time that shot was fired. It was not error to admit the evidence in rebuttal. Pen. Code, § 1105.

[4, 5] It is complained that certain instructions given by the trial judge did not sufficiently state the law as the defendant was entitled to have it expressed, and that certain instructions offered by the defendant were improperly rejected by the court. The fault with the contentions made as to the alleged errors so complained of is that they do not take into view the entire charge as given by the court, but point to segregated portions thereof which, standing alone and without the qualification furnished by other portions of the instructions, seem to make an insufficient statement of the law. It must be assumed always that the jury comprehended and considered the entire charge of the court. We find upon examination that on the question of the right of self-defense the court's charge was clear and full in its statement of the rights which the defendant possessed, both to defend herself from an attack which threatened her life, or threatened great bodily injury to her, and to use the judgment of a reasonable person situated in like circumstances, and that, when so acting, if she believed herself to be in grave danger, as defined in the instructions, then she might there stand and kill her assailant and be justified, even though it afterwards appeared that, as a matter of fact the danger which for the moment was apprehended by her was not real; all in accordance with principles so well settled as to be fundamental in the law. Counsel's assertion that the court by its instructions imposed upon the

defendant the duty to act as a reasonable person would have acted, without the qualification that the jury should consider the situation from the standpoint of the defendant situated as she was shown to have been at the time, is not borne out by the text of the instructions given. The instruction that, if the defendant fired a shot into the body of Bell after he was lying upon the floor, and after all necessity for the use of a deadly weapon in self-defense had ceased, she would not be justified, correctly expressed the law when considered with the other qualifying terms contained in the body of the same instruction.

[6] The instruction that evidence as to the character of the deceased being that of a violent, quarrelsome, and dangerous man was to be considered "only" as a circumstance illustrating "the facts of the homicide, and indicating the aggressor and the nature of the aggression, it being more probable that a man of violent and dangerous character would make an unprovoked and deadly assault than that a quiet and peaceable man would do so," was perhaps not particularly lucid in its terms, but neither was the one which counsel for defendant offered purporting to cover the same ground, with some addition thereto. By the additional matter it was evidently intended that the jury should be advised that a person would be justified in acting with less deliberation and using more vigorous means in defending against an assault committed by a person of known violent character than where such character was not known to be possessed by such person. The additional matter, if clearly expressed, would have correctly stated the law. But, again, when examining the alleged error for the failure to give the instruction last referred to, we are met with the answer that, in other instructions, given at the request of the defendant, the jury was told that the evidence as to the character of the deceased should be considered as a circumstance in determining whether or not by his acts and conduct he gave the defendant reasonable ground to apprehend such danger as to justify her in shooting him, and that if, "in view of previous acts or conduct or state of mind of the assailant, of which the person assaulted is aware, indicate an imminent danger, the assailed is justified in acting with reference thereto."

[7] Again it is complained that the district attorney was guilty of prejudicial misconduct in arguing to the jury that bullets were known to take unusual courses when deflected in their flight. This argument included a statement of alleged facts claimed to have been shown in another case in the same court, the district attorney stating, however, that he was making the statement for the purpose of illustration. Following his objection to this argument, defendant's counsel offered an instruction particularly advising the jury that they must not consider as evidence "any statement of counsel during the trial of this case or the argument thereof as to the personal knowledge, belief, or opinion of the attorney who makes such statement," which the court refused to give. The court did, however, give the plain and pointed instruction that the jurors in making up their minds as to the guilt or innocence of the defendant should be guided solely by the evidence introduced at the trial, and by the instructions as to the law as given by the court. We are not prepared to agree that the district attorney transgressed the limits of a reasonable argument in illustrating his contentions in the way he did. It is no doubt better practice for counsel to refrain from presenting alleged facts of other cases for the purpose of convincing the jury of the logic of the argument. The instruction of the court, advising the jury as to what it might properly consider as a basis for its finding, we must assume was observed, and that remarks of the district attorney were considered for their argumentative weight only, and as by way of illustration.

The record presented here in no wise presents a case wherein the right of a defendant to a fair and impartial trial has been infringed upon. The evidence discloses a situation where a jealous woman became infuriated at what she believed to be the unfaithfulness of her companion, and, with malice and intent to do the very thing she accomplished, made an attack and shot to death the man who she believed had come to prefer another woman to her, and this without believing in the smallest degree that it was necessary to resort to such extreme means to defend herself against a threatened attack.

The judgment and order are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

61 Cal. App. 302

WORK v. WHITTINGTON et al. (Civ. 3789.)

(District Court of Appeal, Second District, Division 2, California. March 8, 1923.)

1. New trial ⟾163(2)—Grant for insufficiency of evidence to "warrant" verdict held equivalent to insufficiency to "sustain" it.

Where motion for new trial was made on all statutory grounds, and the court's minutes stated it was granted for insufficiency of the evidence to "warrant" the verdict, it was equivalent to specifying the insufficiency of the evidence to "sustain" it, within Code Civ. Proc. § 657.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sustain; Warrant.]

2. Appeal and error ⟾979(2)—If evidence conflicting, action of trial court in granting new trial not reviewable.

Where there is an appreciable conflict in the evidence, the action of the trial court in granting a new trial is not open to review, the ruling being a matter largely within its discretion, and it is only when that discretion has been abused that the order will be reviewed.

3. Appeal and error ⟾1015(3)—Question of probative force of evidence is for trial court.

The question as to the probative force or evidentiary value of testimony is one the determination of which is with the trial court in a proceeding on motion for new trial, where one of the grounds therefor is the insufficiency of evidence to justify the verdict.

4. Appeal and error ⟾933(4)—Assumed that court, in granting new trial, was satisfied verdict was against evidence.

A motion for new trial for insufficiency of evidence to support the verdict being addressed to the sound discretion of the court, it must be assumed on appeal that, in granting it, the court was satisfied that the verdict was against the weight of evidence.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by George E. Work against W. Whittington and another. From an order granting a new trial, defendants appeal. Affirmed.

W. P. Thompson, of Fresno, for appellants.
Power & McFadzean, of Visalia, for respondent.

FINLAYSON, P. J. This is an appeal from an order granting plaintiff a new trial in an action tried by a jury. Plaintiff, the holder of two promissory notes executed by defendants as the makers and indorsed by the payee, brought the action to recover on the notes. He claimed that they had been indorsed and delivered to him before maturity, in due course, and without notice to him of any infirmity in them, and that he paid full value therefor. Wherefore he claimed that he was entitled to recover, regardless of any fraud which the payee may have practiced upon these defendants.

[1] Plaintiff's motion for a new trial was made upon all of the statutory grounds. The court's minutes state that it was granted on the ground of the "insufficiency of the evidence to warrant the verdict." This, we think, is equivalent to specifying, as the ground of the order, the insufficiency of the evidence to "sustain" the verdict, within the purview of the concluding provision of section 657 of the Code of Civil Procedure.

[2, 3] If there is any appreciable conflict in the evidence, the action of the trial court in granting a new trial is not open to review here. The granting or refusing of a new trial is a matter largely within the discretion of the trial court, and it is only when that discretion has been abused that the appellate court will reverse the order. Merralls v. Southern Pacific Co., 182 Cal. 19, 22, 186 Pac. 778. Even in cases where there may not appear to be a conflict in the evidence, and where all the proofs seem to be favorable to one or the other of the parties litigant, the question as to the probative force or the evidentiary value of the testimony is one the determination of which is with the trial court in a proceeding on a motion for new trial, where, as here, one of the grounds is the insufficiency of the evidence to justify the verdict. Otten v. Spreckels, 24 Cal. App. 251, 257, 141 Pac. 224.

[4] We can perceive no ground for the contention that the trial court abused its discretion in granting a new trial. The motion was addressed to the sound discretion of that court, and we must assume that in granting it the court was satisfied that the verdict was against the weight of the evidence. Shilling v. Dodge, 22 Cal. App. 517, 135 Pac. 299.

The order is affirmed.

We concur: WORKS, J.; CRAIG, J.

⟾For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

61 Cal. App. 252

PEOPLE v. PRIBNOW. (Cr. 1071.)

(District Court of Appeal, First District, Division 1, California. March 5, 1923.)

1. Rape 🔑54(3)—Conviction held not erroneous as based on prosecutrix' uncorroborated and inherently improbable testimony.

In a prosecution for statutory rape, where defendant made no attempt to disprove prosecutrix' charges, but admitted that her story was essentially true, and there was other testimony that he and she occupied the same room together, his conviction *held* not erroneous as based on uncorroborated and inherently improbable testimony by prosecutrix.

2. Rape 🔑52(3)—Absence of evidence of resistance or complaint by prosecutrix held not ground for reversal.

In a prosecution for statutory rape, where the evidence showed that defendant's relations with prosecutrix, which he admitted, began when she was a child of tender years and continued until he was arrested, and that he had complete control over her as his adopted child, a conviction *held* not erroneous because of the absence of evidence of resistance or complaint by prosecutrix.

3. Criminal law 🔑785(16)—Instruction precluding rejection of entire testimony of witness swearing falsely to one matter if he swore to truth in other particulars held not erroneous.

An instruction permitting rejection of all the testimony of a witness willfully swearing falsely to a material point, unless he swore to the truth in other particulars, *held* not erroneous as weakening and destroying a former portion of the same instruction to which no such proviso was appended.

4. Criminal law 🔑1172(2)—Instruction precluding rejection of entire testimony of witness swearing falsely to material point held not ground for reversal.

In the absence of anything in the record indicating that the testimony of any witness was subject to distrust, an instruction that the jury might reject all the testimony of a witness swearing falsely to a material point, unless convinced that he swore to the truth in other particulars, *held* not ground for reversal.

5. Criminal law 🔑1172(6)—Instruction defining rape by force or violence not prejudicial to defendant, where prosecutrix testified as to absence of force.

In a prosecution for statutory rape, where prosecutrix testified that there was no force and that she voluntarily submitted, defendant was not prejudiced by an instruction defining rape by force or violence.

6. Criminal law 🔑763, 764(1)—Instruction that whether "child" raped consents or resists is immaterial held not erroneous as instruction that prosecutrix was under age limit.

An instruction on statutory rape, "that whether such child consents or resists is wholly immaterial," *held* not erroneous as practically instructing the jury that prosecutrix was under the age limit, being general and not referring to prosecutrix or any other witness.

7. Criminal law 🔑759(1)—Instruction as to evidence of like crimes held not erroneous as leading jury to infer commission thereof after filing of information.

In a prosecution for statutory rape, where there was no evidence of other acts of intercourse between the parties after the time charged, an instruction that the jury might consider evidence of other acts before and after such time, to prove defendant's adulterous disposition, *held* not erroneous as leading the jury to infer other acts occurring after the information was filed.

8. Criminal law 🔑1169(11)—Evidence of like offenses at other places held not prejudicial as too remote.

In a prosecution for statutory rape, where the evidence showed and defendant admitted adulterous relations with prosecutrix for a long time, evidence of intercourse between them at other places than that charged *held* not prejudicial as too remote.

9. Criminal law 🔑1169(5)—Admission of prosecutrix' written statement as to other acts of intercourse with defendant and birth of child held not prejudicial.

In a prosecution for statutory rape, where the jury were instructed that evidence of other acts of intercourse between the parties before and after that charged was admitted solely to prove defendant's adulterous disposition and as tending to render it more probable that the act charged was committed, admission of prosecutrix' written statement as to other acts of intercourse with defendant and the birth of a child *held* not prejudicial.

10. Criminal law 🔑815(5)—Instruction that defendant's adoption of prosecutrix was immaterial held not erroneous.

In a statutory rape prosecution, an instruction that the fact that defendant had adopted prosecutrix had no bearing on the case *held* not erroneous as precluding consideration of a relationship negativing the probability of prosecutrix' story.

11. Rape 🔑41—Confirmation certificate stating date of prosecutrix' birth held admissible.

In a prosecution for statutory rape on defendant's adopted daughter, a confirmation certificate, certifying to the date of prosecutrix' birth on information given by defendant, who was present when she was confirmed, *held* admissible as tending to show that he knew her age when the offense was committed.

12. Criminal law 🔑1169(1)—Admission of photograph indicating prosecutrix' age when taken held not prejudicial.

In a statutory rape prosecution, admission of a photograph, which prosecutrix testified was taken in a certain year and shown to her by defendant on a certain occasion, when they discussed her age as indicated by a writing on the back, to which he called her attention, *held* not prejudicial, being merely a circumstance

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

which might aid the jury in determining her age.

13. Criminal law 🔑421(3)—Prosecutrix' testimony as to age admissible.

Prosecutrix' testimony as to her age is admissible, though her knowledge thereof is derived from her parents' statements or family repute.

14. Rape 🔑41—Jury may consider prosecutrix' appearance as indicating age.

The jury may consider prosecutrix' appearance as indicating her age.

15. Criminal law 🔑1186(4)—No reversal except for miscarriage of justice.

A conviction may be reversed only where there was a miscarriage of justice.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

William Pribnow was convicted of rape, and he appeals. Affirmed.

Ernest B. D. Spagnoli, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

TYLER, P. J. The appellant was convicted of the crime of statutory rape. This is an appeal from the judgment and from an order denying his motion for a new trial.

The facts as revealed by the record show that the prosecutrix, Irene Pribnow, a female person, was adopted by the defendant and his wife in the state of Missouri when she was about 5 years of age. About 4 years thereafter defendant persuaded her to have sexual relations with him, and this course of conduct continued between the parties at different times and places up to the 29th day of March, 1922, the time of the commission of the act here complained of, and when the prosecutrix had reached the age of 16 years. At the time she caused the arrest of the defendant a written statement was made by her of her relations with him. This statement contained the facts as above narrated, and also the further fact that the conduct of the parties resulted in the birth of a child, which was adopted by a family in Oregon.

Defendant did not take the stand in his own behalf, nor did he call any witnesses to disprove the testimony of the prosecutrix, which was to the same effect as her previous written statement. On the contrary, there is evidence in the record to show that when this statement was read to the defendant shortly after his arrest he admitted that its contents were in all essentials correct, except that he was of the opinion that the prosecutrix was not quite as young as 9 years when their illicit relations commenced. Defendant here seeks a reversal of the judgment, and assigns numerous grounds therefor.

[1] It is first claimed that the story of the Pribnow girl is uncorroborated and inherently improbable. A complete answer to this contention is that the defendant made no attempt in any manner to disprove the charges, but, on the contrary, admitted that the story was in all essential particulars true. There is also testimony in the record to the effect that the defendant and the prosecutrix occupied the same room together. The conviction was not had, therefore, upon the sole uncorroborated testimony of the prosecutrix.

[2] Complaint is also made of the absence of evidence of resistance on the part of the prosecutrix or complaint by her. There is no merit in this contention. A reading of the record shows that the relations of the parties began when the prosecutrix was a child of tender years, and continued up to the very time of the defendant's arrest, and that he had complete control and dominion over the child. The absence of reasonable complaint on the part of one in the situation of the prosecutrix might ordinarily be highly significant; but this question was one for the jury to consider under all the facts of the case, including the evidence and defendant's admission of his acts.

[3, 4] Exception is also taken to certain portions of the charge to the jury. In the first instruction complained of, the court advised that body that, where a witness is false in one part of his testimony he is to be distrusted in others, and that it might reject the whole testimony of a witness who had willfully sworn falsely to a material point, and that, if it found that such testimony was given with the willful design to deceive, it should be viewed with distrust and suspicion, and that the jury might "reject all unless they shall be convinced, notwithstanding the base character of the witness, that he or she has, in other particulars, sworn to the truth." It is claimed that the giving of the latter part of the instruction indicated by the quotation marks constituted error, for the reason that it weakened and destroyed the former portion of the instruction.

We see no error in the instruction, and we are of the opinion that it fairly states the law. The jury was in effect told that it had the power to entirely disregard the testimony of any witness found to be false in any material respect, but that it was not bound to do so. Aside from this there is nothing in the record to indicate that the testimony of any witness was subject to distrust.

[5] The next alleged error in the instructions is based upon the fact that the court in its charge defined the crime of rape when accompanied with force or violence; and it is claimed that the giving of this instruction under the circumstances of the case was error, as the jury might have inferred that force or violence was used. We fail to see

how defendant was in any way prejudiced by this instruction. There was no evidence of any force having been used; on the contrary, the witness testified that there was none, and that she voluntarily submitted to the act complained of. There is no merit therefore in this contention.

[6] In instructing the jury upon the crime of statutory rape, the court concluded as follows: "Therefore, whether such child consents or resists is wholly immaterial." It is contended that this instruction is erroneous, for the reason, first, that the prosecutrix was not proven to be under the age of 18 beyond a reasonable doubt, and that, in referring to her as a "child," the court practically instructed the jury that she was under the age limit; second, as there was no evidence of resistance, the prosecution not being based upon rape by force and violence, the instructions might be construed as assuming resistance.

We have already considered the latter objection. As to the first, it is sufficient to say that the court was merely referring to the rule of law generally concerning females under the age limit. The instruction was general and did not refer to the prosecutrix or any other witness in the case. This objection is therefore also without merit.

[7] The court further instructed the jury that it might consider evidence of other acts of sexual intercourse between the parties both before and after the time charged to prove the adulterous disposition of the defendant. It is conceded that evidence of such acts as were committed at the place where the crime was charged prior to the filing of the indictment was properly received; but it is contended that, as there was no evidence of acts committed subsequent to that time, the jury might infer that there were other acts that occurred after the filing of the information. What we have already said with reference to some of the other instructions applies with equal force to this one. The instruction is general and could in no manner have deceived the jury, as there was no evidence of the commission of subsequent crimes.

[8] In this connection it is further contended that evidence of sexual intercourse between the parties at other places should have been excluded as being too remote. We fail to see how defendant was prejudiced thereby. The evidence showed the course of conduct and adulterous relations between the parties for a long period of time, a matter which the defendant admitted.

[9] Complaint is also made of the admission in evidence of a statement in writing made by the prosecutrix and above referred to, for the reason that it contained evidence of other and independent crimes and acts of sexual intercourse, and also prejudicial evidence to defendant's case consisting of references to the birth of the child, and other evidence not in any way connected with the crime here charged. The court fully instructed the jury that other acts of sexual intercourse between the defendant and the prosecutrix, both before and after the time charged in the information, were admitted for the sole purpose of proving the adulterous disposition of the defendant and as having a tendency to render it more probable that the act charged was committed, and for no other purpose. The birth of a child, growing out of the relations of the parties, could only have happened as the result of such former acts. Under these circumstances we cannot say that the admission of the statement affected the substantial rights of the defendant.

[10] At the conclusion of the charge to the jury, one of its members asked the court if it might take into consideration the fact that defendant had adopted the prosecutrix. The jury was informed that this fact did not add to or detract from the offense charged and had no bearing upon the case. Appellant assigns the remarks of the court as error, claiming that the jury had a right to consider the circumstances, as the relationship between the parties would negative the probability of the story told by the prosecutrix. It is manifest that the juror had in mind his right to determine whether or not the defendant had committed the crime of incest. The jury was only instructed that the relationship between the parties was not an issue in the case. The probability or improbability of the defendant having committed the crime charged was in no manner affected by the colloquy between the court and the juror. There is, therefore, no merit in this contention.

[11-14] And finally it is claimed that it was not shown beyond a reasonable doubt that the prosecutrix was under the age of 18 years at the time of the commission of the offense charged. The confirmation certificate showing the date of the birth of the prosecutrix was admitted in evidence; and appellant assigns such admission as error. This certificate was issued by a pastor of the Lutheran church at Portland, Or. It is not written in the English language, but it is perfectly apparent therefrom that it certifies to the fact that Irene Pribnow was born September 16, 1905, and confirmed April 13, 1919. The prosecutrix testified that, at the time she was confirmed, defendant was present, and gave the pastor the information concerning the date of her birth. This evidence therefore simply tended to show that defendant knew her age at the time of the commission of the offense charged. In this connection the appellant also objects to the admission in evidence of a certain photograph claimed by the prosecutrix to have been taken in the year 1910. She testified in reference thereto that the defendant had shown the photograph to her on a certain occasion, at which time they

had discussed her age. She further testified that he had called her attention to certain writing on the back thereof indicating her age, and told her that such writing had been made by her mother. We fail to see how this evidence prejudiced defendant's rights. It was but a circumstance from which the jury might derive some assistance in determining the age of the prosecutrix. Again, upon this subject, we are of the opinion that her age was fully established by her direct testimony. The testimony of a prosecutrix as to this fact is admissible, although her knowledge of it is derived from the statements of her parents or by family repute. People v. Ratz, 115 Cal. 132, 46 Pac. 915. Moreover, the jury was entitled to consider the appearance of the prosecuting witness as indicating her age. People v. Koosistra (Cal. App.) 208 Pac. 316.

[15] We do not deem further discussion of the case necessary, but will only add that, from a full examination of the record, including the evidence, we are satisfied that, although the court's rulings and instructions may not be entirely free of technical error, the trial did not result in a miscarriage of justice, in which event only may this court reverse the judgment.

The judgment is affirmed.

We concur: ST. SURE, J.; RICHARDS, J.

---

61 Cal. App. 1

MILLER et al. v. PACIFIC ELECTRIC RY. CO. (Civ. 4088.)

(District Court of Appeal, Second District, Division 1, California. Feb. 14, 1923.)

1. Appeal and error 🔑110—Order denying new trial not appealable.

In view of Code Civ. Proc. § 963, an order denying a motion for a new trial is no longer appealable.

2. Appeal and error 🔑870(6)—Point raised on motion for new trial may be considered on appeal, although order denying new trial not appealable.

While an order denying a new trial is not appealable, a point raised on the motion for new trial is not lost to appellant and may be considered on appeal from the judgment.

3. New trial 🔑108(4)—Error in measurements held insufficient to show that result would have been changed on another trial.

In an action for death of plaintiff's decedent through being struck by defendant's electric train, where it was made to appear on motion for new trial that the exact distance between the nearest rail and the curb was slightly less than six feet shorter than the distance which had been agreed upon as correct at the time of trial, such fact was not sufficient to show that, if the error had not occurred, a verdict might have been rendered for plaintiff.

4. Appeal and error 🔑1056(1)—Exclusion of evidence as to signals not prejudicial error.

In action for death of plaintiff's decedent killed by defendant's electric train while riding in an automobile as a guest, exclusion of evidence as to which was louder a bell or a whistle, and whether it was just as easy to sound the whistle as to sound the bell, *held* not prejudicial error.

5. Trial 🔑296(4, 5)—Instructions held not erroneous as to proximate cause where such subject completely covered in other instructions given.

In an action for death of plaintiff's decedent through being struck by defendant's electric train while riding as a guest in an automobile, instructions as to contributory negligence were not erroneous as omitting the requirement that the negligence must have proximately contributed to the accident, where other instructions completely covered the subject of proximate cause.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Nina Bell Miller and another against the Pacific Electric Railway Company to recover damages for death. Judgment for defendant, and plaintiffs appeal. Affirmed.

Edwin S. Earhart and Robt. J. Adcock, both of Los Angeles, for appellants.

Frank Karr, R. C. Gortner, and W. R. Millar, all of Los Angeles, for respondent.

HOUSER, J. In this action plaintiffs charge that on July 29, 1921, Wiliam Lee Miler was killed by a Pacific Electric train at the intersection of Eighth street and American avenue in the city of Long Beach while he was riding in an automobile as a guest of his father-in-law. At the commencement of the trial a map of the locality where the accident occurred was offered and received in evidence as Defendant's Exhibit 1, and all parties to the action stipulated that the map was a correct representation of the intersection of Eighth street and American avenue and immediate vicinity, and that the measurements thereon were correct. The map shows that American avenue from east to west curb lines is approximately 96 feet, and that the double-track railroad of the defendant occupies approximately 20 feet in the center of the avenue, leaving two roadways, one on either side of the tracks, approximately 38 feet wide from curb to rail. The evidence showed that a five-car train of the defendant was proceeding southerly along American avenue, and that the automobile in which deceased was riding was proceeding westerly on Eighth street, which is 50 feet wide from curb to curb. The last stop made by the train prior to the accident was at Tenth street, and under the skip-stop arrangement in force at that time the next regular stop of the train was at Seventh street.

The jury returned a verdict in favor of defendant, and from a judgment in its favor the plaintiffs appeal. On the motion for a new trial it was shown by affidavits and admitted by counsel for defendant in open court that the true distance from the curb line to the first track was only 32.39 feet, a discrepancy of not quite 6 feet.

During the closing argument of the case the learned trial judge interrupted counsel, and, after some discussion, the court gave to the jury an instruction which closes as follows:

> "So that so far as Mr. Bell [the driver] himself is concerned, without reference to the deceased, he was guilty of such negligence that if he was suing he could not recover."

Whereupon Mr. Earhart, one of the attorneys for plaintiffs, said:

> "That is exactly in the line of my remarks, that absolutely irrespective of the degree of negligence, gross or slight, of Mr. Bell, it does not affect the deceased. He was an invited party."

Later the court instructed the jury as follows:

> "But, under the circumstances of this case, I instruct you that the driver of the machine was guilty of negligence which proximately contributed to the injury."

[1, 2] Following a verdict in favor of defendant, plaintiffs made a motion for new trial, which motion was by the court denied. Within her notice of appeal appellant has included the denial of her motion for a new trial, but, following the provisions of section 963 of the Code of Civil Procedure and a long line of decisions thereunder, the appeal from the order denying the motion for new trial must be dismissed, as such an order is no longer appealable. The point, however, raised on the motion for new trial is not lost to appellant, as it may be considered on the appeal from the judgment. The point relied upon arose out of the discovery, after the trial, of the fact that, instead of the distance from the east curb of American avenue to the most easterly rail of the car tracks being 38 feet, as shown on the map which was stipulated on the trial to be correct, the actual distance was 32.39 feet, or a difference of a little more than 5½ feet. It is contended that this difference became vital and important in view of an instruction given by the court, which closes as follows:

> "And if you further find that such negligence of deceased (going on the track without using ordinary care) contributed in any manner or in the slightest degree to the happening of the accident, plaintiffs cannot recover."

Appellant argues that every inch of space traversed and every second of time used in doing so would be added to the time and opportunity which the deceased would have had of observing the approaching train. Assuming that the automobile was being driven at from 8 to 10 miles an hour, as testified by the driver thereof, at the rate of even 8 miles per hour it would require less than one-half second for it to traverse the distance of 5½ feet; and it is contended that in that space of time the deceased might have said or done something which would have caused the jury to have rendered its verdict in favor of plaintiffs. But it must be remembered that before plaintiffs would be entitled to a verdict in their favor the jury must not only have found no contributory negligence on the part of deceased, but that the jury must also have found the defendant guilty of negligence. The jury very well may have concluded on the evidence that the defendant was free from negligence; hence it would be immaterial whether deceased was or was not guilty of negligence. In a matter of this nature it is necessary that the aggrieved party show, among other things, that the situation in which he finds himself arose through no fault or negligence of his own which with ordinary prudence he could have guarded against; furthermore, that had the error not occurred, the verdict would, more probably, have been in his favor. The record is absolutely silent as to either of these conditions, save that in appellant's brief counsel expresses the belief, in effect, that had the deceased actually had the additional less than one-half second of time, which a calculation shows he might have had in the event the distance between the curb line and the first car track had been 38 feet instead of 32 feet, the verdict, in all likelihood, would have been in favor of plaintiffs. Nowhere does it appear that counsel for plaintiffs ever made any effort to ascertain the exact distance either before the date of the trial or during the time the case was in progress.

[3] For all that appears, the testimony showing the actual distance was just as available before the date of the trial as it has ever been since that time. The showing, lacking at least in the foregoing particulars, was insufficient.

Plaintiffs assign error because of the fact that on the trial of the case plaintiffs attempted to show that the electric train was equipped with a gong and an air whistle, and that the sounding of the air whistle was a more effective method of attracting the attention of persons in peril who were about to cross the tracks, and that the court prevented them from so doing. The following excerpt from the reporter's transcript will show what took place at that time:

> "Q. From your experience, Mr. Hotzell, as a motorman, which is the louder, a bell or a whistle?
>
> "The Court: Doesn't the law allow either?
>
> "Mr. Earhart: Yes, sir.
>
> "The Court: Then I don't think it makes any difference.

"Mr. Earhart: The point I am making is lateron to develop that he had means at his command to have protected this dead man and didn't use it. * * *

"Mr. Earhart: Q. Mr. Hotzell, it is just as easy to sound the whistle as it would be to sound the bell?

"Mr. Millar: That is objected to as immaterial.

"The Court: Objection sustained."

[4] It appears in evidence that the car was equipped with both a gong and a whistle, but that, if not by ordinance of the city of Long Beach, at least by rule of the defendant company, motormen were forbidden to use the whistle at the place where the accident occurred. Beginning at a point two blocks from the scene of the accident and continuing thereto, defendant's motorman rang the gong practically all the time that the street car was running that distance. That fact concerns plaintiffs to the extent of it being established: First, whether deceased was in the exercise of ordinary care in not hearing the ringing of the gong; and, secondly, whether the defendant was using ordinary care in ringing the gong instead of blowing the whistle. Ordinary human observation would indicate that, if the deceased could not, at the distance the evidence showed he was from the electric train, hear the gong, he could not hear, or would not have heard, a whistle. Neither the question of whether a whistle would make more noise than a bell, nor the question of whether it was "just as easy to sound the whistle as it would be to sound the bell," was the ultimate fact for the jury to determine. The jury was only called upon to decide whether in the circumstances the defendant used ordinary care. The evidence showed that the defendant might have used either the bell or the whistle, or possibly both the gong and the whistle, and the entire matter was one for the jury to determine under instructions given to the jury which amply covered the defendant's duty in the premises. The failure of the court to admit the evidence was not such an error as prejudicially affected the plaintiffs' substantial rights or caused a miscarriage of justice.

Appellant also complains of two instructions given by the court to the jury. In the first one, after defining the duty of deceased to use ordinary care on going on defendant's tracks, and after stating that with the use of ordinary care the deceased should have known of the approach of the train, the instruction concludes:

> "And if you further find that such negligence [of deceased] contributed in any manner or in the slightest degree to the happening of the accident, plaintiffs cannot recover."

The second instruction was as follows:

> "The speed limit under the ordinance of Long Beach was 20 miles per hour, and a violation of the speed ordinance would be negligence of itself, and if that speed law was violated, and that was a contributing cause of the accident, and if the deceased was not guilty of any negligence, then the plaintiff would be entitled to recover."

It is pointed out that in each of these instructions there is an omission of the qualification that, in order that any negligence on the part of deceased should preclude recovery by plaintiffs, such negligence must have proximately contributed to the happening of the accident; in other words, the instruction covers any sort of negligence on the part of deceased, whether or not it contributed directly to the event. It is, of course, a well-known rule that the several instructions, while possibly given separately, cannot be so considered, but that they must be considered as a whole; and if in this case the point made by plaintiffs was covered by other instructions given by the court, then, because the alleged erroneous instructions did not contain the proper qualification with reference to "proximate cause," plaintiffs were not injured by such failure. Looking, then, to the entire body of instructions herein, it will be found that in no less than ten different places is the jury, in substance, informed that, unless negligence on the part of the deceased was the proximate cause of the injury, it was of no consequence. Quoting from the instructions, we find such expressions as the following:

> "The defendant has alleged contributory negligence on the part of the plaintiff. The burden is upon the defendant to prove such contributory negligence by a preponderance of the testimony, and also whether that negligence proximately contributed to the injury."
>
> "On the other hand, the burden is on the defendant to prove contributory negligence of the plaintiff and that that negligence, if any, proximately contributed to the injury. Now, if they have not met that burden, or if the evidence is equally balanced on that point, then you could not find that the deceased was guilty of contributory negligence."

[5] It is therefore conclusively evident that any omission from the specified instructions of the qualification relating to "proximate cause" was not only fully covered, but was emphasized in other instructions given by the court.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

61 Cal. App. 28

BLOOM v. ALLEN et al. (Civ. 4460.)

(District Court of Appeal, First District, Division 1, California. Feb. 19, 1923.)

1. Highways 🔑184(3)—Whether striking of plaintiff eight feet from road by an auto stage traveling at high speed negligence held for jury.

Evidence that defendant's stage, traveling at a high rate of speed, crossed a bridge which was both wet and slippery, and on reaching the end of the bridge skidded violently, and struck plaintiff, who was about eight feet from the road, *held* to make defendant's negligence a question for the jury.

2. Trial 🔑165—Motion admits truth of evidence and inferences therefrom.

A motion for a nonsuit admits the truth of plaintiff's evidence, and every inference which can be legitimately drawn therefrom, and on such a motion the evidence will be interpreted most strongly against defendant.

3. Highways 🔑173(2)—Liable for negligent injuries inflicted on pedestrians.

Carriers are liable for injuries inflicted on pedestrians as a result of the negligent operation of their vehicles.

4. Trial 🔑139(4)—Nonsuit not granted where evidence sufficient to go to jury on any alleged cause of action.

Where there is sufficient evidence to go to the jury on any cause of action set forth in the complaint, a nonsuit will not be granted.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Edwin Bloom, by Charels Matson, his guardian an litem, against William Allen and another, copartners. From a judgment of nonsuit and an order denying a motion for a new trial, plaintiff appeals. Reversed.

Keith C. Eversole, of Ukiah, for appellant.
M. H. Iversen, of Ukiah, for respondents.

TYLER, P. J. Appeal from a judgment on nonsuit and from an order denying a motion for a new trial in an action for negligence caused by the alleged unskillful operation of an automobile driven by an employee of defendants, who are copartners doing business under the firm name of Allen & Doxsee, and also under the firm name and style of the Coast Line Freight & Stage Company. The occupation of the firm is that of carrying and transporting passengers for hire between the cities of Ft. Bragg and Point Arena in the county of Mendocino, and between intermediate points to Cazadero in the county of Sonoma.

[1] The evidence shows that on November 23, 1918, one of the stages, as was its custom, tied up at a place called Greenwood for the night. The stage so tied up was sometimes, and as a part of respondent's business, utilized for short runs or special trips to neighboring points. Upon the evening of the day mentioned, and upon which the accident complained of occurred, the stage regularly arrived at Greenwood. Arrangements had been made several nights previously for the transportation of several young men, one of whom was the plaintiff, to Point Arena. A charge of $16 for the trip had been agreed upon between the driver and the group, which was neither demanded nor paid. Pursuant to this arrangement the stage, operated by the regular driver of the company, proceeded on its journey, and when some distance out of Greenwood and at the end of a long bridge a slide was encountered in the road, which completely blocked the traffic, and made passage impossible until such time as it was removed. Being confronted with this situation the driver turned the stage around, concluding to return to Greenwood. It was then suggested to him by some of the party that they would procure shovels and remove the slide. The driver agreed to resume the journey if this result was attained. The obstruction having been removed by the passengers, two of them walked back to Greenwood, and informed the driver of the stage that the road was clear and open. The driver stated that it was too late to make the journey, but he agreed to return to the point where the road had been obstructed, and bring the other passengers back to Greenwood, and accordingly set out in the stage upon this mission, accompanied by the two young men who had walked in. On approaching the point where the slide had occurred it was necessary to cross a bridge of considerable length. The road was muddy, and the bridge was wet and slippery. There is also evidence to show that the stage came down a hill approaching the bridge at a rapid rate of speed, and that it crossed the same in a like manner. As the stage drew near the young men awaiting its arrival had walked out to meet it, and were seated or standing by the bridge railing as it approached them, plaintiff being one of their number. The rate of speed at which the stage was traveling was sufficient to convince the persons waiting that their position on the bridge was dangerous, and they turned back and ran toward the end of the bridge. Plaintiff reached that point and proceeded down an old road some eight feet from the edge of the traveled one. Concluding that he had reached a place of safety, but still running, he turned his head to ascertain the position of the stage. At about this moment the car reached the end of the bridge, at which point the road crossed sharply to the right. It skidded violently, the rear end thereof striking plaintiff on the head, seriously injuring him.

At the conclusion of this evidence defendants moved for a nonsuit upon the grounds, first, that the evidence showed no negligence upon the part of the defendants which contributed in any manner to the accident; second, that the relation of passenger and carrier did not exist in the case; and upon the further ground that contributory negligence on the part of the plaintiff caused the injury complained of. Judgment of nonsuit was granted upon the ground that the relation of passenger and carrier did not exist, and that there was no negligence shown. Plaintiff appeals from such judgment.

[2] We are of the opinion that the trial court committed error in granting the motion. The court's power and limitations with reference to the granting of a nonsuit are clear and well-defined. The motion admits the truth of plaintiff's evidence and every inference which can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against the defendant. Stieglitz v. Settle, 175 Cal. 131, 165 Pac. 436; Goldstone v. Merchants' Cold Storage Co., 123 Cal. 625, 56 Pac. 776; Estate of Arnold, 147 Cal. 583, 82 Pac. 252. Here there is evidence to show that at the time of the accident the car which caused the accident was driven at a high rate of speed down a declivity approaching the bridge, which was both wet and slippery. In addition to direct testimony that it was traveling too fast for safety, and as a circumstance indicating its speed, the car when it attempted to negotiate the turn to the right skidded violently, and a sufficient distance at least to strike the plaintiff, who was some eight feet away from the road. These facts were clearly sufficient to have been submitted to the jury for its determination whether they constituted negligence, and plaintiff as a matter of law was entitled to have the jury pass upon the question.

It is urged by the respondents that the mere fact that the car skidded is not of itself evidence of negligence. Assuming this to be true, as above pointed out, there is other evidence tending to show that the skidding was caused through the negligent operation of the vehicle.

[3] Under what circumstances the relation of passenger and carrier may still exist in the performance of the contract of carriage temporarily suspended due to a washout is a question which has received the attention of the courts. See 4 Corp. Jur. 629; 4 R. C. L. 1043; Killmeyer v. Wheeling Traction Co., 72 W. Va. 148, 77 S. E. 908, 48 L. R. A. (N. S.) 683. Here, however, whether plaintiff be viewed as a passenger or a pedestrian the result must be the same, for, assuming the evidence above stated to be true, defendants failed not only to use that high degree of care required of them as carriers, but they likewise failed to exercise even that degree of care incumbent upon them toward the public generally. Carriers are liable for injuries inflicted upon pedestrians as the result of the negligent operation of their vehicles. We are not called upon, therefore, to discuss or decide the question whether or not plaintiff was a passenger at the moment of his injury, as this question is only important as fixing the degree of care required of defendants.

[4] As above indicated, a nonsuit is improperly granted if there is sufficient evidence to go to the jury upon any cause of action set forth in the complaint. The complaint in this case shows a cause of action in favor of plaintiff at least as a pedestrian, and the evidence fully supports the same. This being so, it follows that the judgment should be, and it is hereby, reversed.

We concur; RICHARDS, J.; ST. SURE, J.

---

61 Cal. App. 140

CHRISTOU v. BARRIOS. (Civ. 4372.)

(District Court of Appeal, First District, Division 2, California. Feb. 26, 1923.)

Sales ⚷3—Contract for transfer of right to purchase sugar held sale of sugar, and not assignment.

Where plaintiff's assignors agreed to purchase sugar from a Chinese firm, and thereafter agreed with defendant to transfer to defendant their confirmed right to purchase sugar, defendant agreeing in consideration of the transfer of the purchase to pay $6,000 on arrival of the goods from the Orient, it being stipulated that, if the seller failed to deliver the merchandise, plaintiff's assignors would not be responsible for any loss suffered by defendant, *held*, that the contract was one of sale, and not of assignment, and a complaint to recover the $6,000 was insufficient under Civ. Code, § 3311, where it failed to allege damages.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action on contract by John Christou against O. Barrios, doing business under the firm name and style of Barrios & Co. Judgment for defendant, and plaintiff appeals. Affirmed.

Raymond Perry, of San Francisco, for appellant.

Goldman & Altman, of San Francisco, for respondent.

NOURSE, J. Defendant's demurrer to plaintiff's third amended complaint was sustained. Plaintiff declined to amend, and judgment was thereupon entered in favor of defendant.

The amended complaint alleges that on the 17th day of May, 1920, plaintiff's assignors, Harry Kockos and Andrew Kockos, copart-

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ners doing business as Kockos Bros., entered into a contract to purchase 300 tons of Java 24 table sugar for $20 per 100 pounds net c. i. f. San Francisco, Cal., in bond from A. B. Moulder & Co., Limited, of Hongkong, China. The seller's confirmation of the sale, which is set forth in the complaint in hæc verba, requires:

> "Irrevocable letter of credit at 60 day sight, without interest, to be cabled immediately to Hongkong, China. This credit to be established today, May 17, 1920."

The complaint then alleges:

That on the same day plaintiff's assignors, having said confirmed right to purchase said sugar, entered into the following agreement with defendant "to transfer to said defendant their confirmed right to purchase said sugar":

> "San Francisco, U. S. A., May 17, 1920.
>
> "Messrs. Barrios & Co., San Francisco, Cal.—Gentlemen: We beg to confirm sale to you of 300 tons—2,000# each Java 24 sugar at $20.00 per hundred pounds, net c. i. f. San Francisco in bond—Hongkong Chamber of Commerce certificate or any other certificate final as to quality and weight—May/June shipment from Orient to San Francisco—double mats 100# net.
>
> "It is understood that this sale has been confirmed by A. B. Moulder & Co., Limited, Hongkong, to us through Bernhardt Fest & Co.
>
> "Terms:
>
> "It is understood and agreed that Barrios & Co. will immediately to-day open letter of credit at 60 days sight covering above merchandise in favor of Moulder & Co. and we will notify Moulder & Co. through Bernhardt Fest & Co. that we have transferred above merchandise to Barrios & Co. and credit will be established by Barrios & Co.
>
> "Furthermore, in consideration of the transfer of this purchase to you, you will pay us $6,000 United States money on arrival of goods from the Orient with understanding that if we want you to give us bank guaranty you will furnish same without delay.
>
> "Furthermore, it is understood that if seller will fail to deliver above merchandise Kockos Bros. will not be responsible for any loss you may suffer in this transaction under any consideration.
>
> "It is furthermore understood that brokerage, if any, will be paid by Barrios & Co.
>
> "If the above is in order, kindly sign the inclosed copy.
>
> "Yours respectfully, Kockos Bros.
> "Andrew Kockos.
>
> "Approved and accepted. Barrios & Co.
> "O. Barrios.
>
> "Witness: Gilbert A. Ellis."

That Kockos Bros. notified A. B. Moulder & Co. of the transfer to defendant Barrios & Co., and that the latter would immediately establish the letter of credit. That plaintiff's assignors had performed each and every condition on their part to be performed. That defendant "did fail and refuse to open said letter of credit * * * at 60 days sight in favor of A. B. Moulder & Co.," and failed and refused to carry out the terms of his contract. "That by reason thereof there became due and immediately payable to said Harry Kockos and Andrew Kockos, copartners doing business as Kockos Bros., the sum of $6,000." Then follows an allegation of demand for the payment of the sum of $6,000 and defendant's refusal to pay the same, with a prayer for the recovery of this amount. The demurrer is both general and special.

Appellant concedes that the complaint fails to state a cause of action if the contract above set forth between his assignors and respondent was one for the sale of sugar, and not, as claimed by him, merely a transfer by Kockos Bros. of their rights under their agreement with Moulder & Co. That it does not state a cause of action for the recovery of damages for breach of a contract of sale is quite apparent. The damages for breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, are fixed by section 3311 of the Civil Code to be:

> "1. If the property has been resold, * * * the excess, if any, of the amount due from the buyer, under the contract, over the net proceeds of the resale; or, 2. If the property has not been resold * * * the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller, together with the excess, if any, of the expenses properly incurred in carrying the property to market, over those which would have been incurred for the carriage thereof, if the buyer had accepted it."

There is no allegation by which damages under this section of the Code could be shown, and, in fact, no allegation whatever that plaintiff was damaged.

On the question of the construction of the contract, appellant argues that the opening recital, "We beg to confirm sale to you of 300 tons—2,000# each Java 24 sugar at $20.00 per hundred pounds," is controlled by the recital, "in consideration of the transfer of this purchase to you, you will pay us $6,000"; also that, if the agreement was intended to be a sale, there would be one recital of a consideration instead of $20 per 100 pounds to A. B. Moulder & Co. and $6,000 to Kockos Bros.; the letter of credit to be opened by respondent would have been payable to Kockos Bros.; no mention would have been made of A. B. Moulder & Co., and they would not have been referred to as the seller; there would have been a direct obligation upon the part of Kockos Bros. to tender delivery of the sugar instead of the covenant releasing them from responsibility in the event of the seller's failure to deliver.

The opening recital must be read in connection with the other provisions of the contract. Standing alone, it quite clearly provides for a sale of sugar at $20 per 100 pounds. But it is apparent from the entire contract that the parties did not understand or intend that Kockos Bros. were contracting to sell the sugar to respondent at that price. The full payment required under respondent's contract was equivalent to 300 tons of sugar at the rate of $21 per 100 pounds; $20 was the price Kockos Bros. were to pay for it. It is obvious that the agreement between Kockos Bros. and respondent was made with reference to the former's agreement with Moulder & Co. covering the identical merchandise; also that it is the Moulder & Co. sale which is embodied in the first paragraph of defendant's agreement. It sets forth a description of these goods, with the price, time of shipment, manner of packing, etc., as contained in their confirmation of sale. The following paragraph states that "this sale" has been confirmed to Kockos Bros. by Moulder & Co. The words "We confirm sale to you" have a well-defined and unambiguous meaning, the same as understood both in their ordinary and popular sense and according to their strict legal sense—a sale is contemplated. They are not the words ordinarily or technically used to express an assignment of a right under an executory contract. So that, unless these words are disregarded as being entirely meaningless here, the only intent which can logically be deduced from them is to confirm a sale to defendant of the goods embraced in the Moulder & Co. contract—a resale. Under the heading "Terms" provision is made for payment of the full amount called for by the contract. First, it provides for the immediate establishment of a letter of credit "covering above merchandise" in favor of Moulder & Co.; second, for the payment of $6,000 to Kockos Bros. on arrival of the goods from the Orient. The amount of the letter of credit required of respondent, as determined from the paragraph describing the merchandise, is based upon the sale price to Kockos Bros. and is similar in all respects to the letter of credit required of Kockos Bros. by their agreement with Moulder & Co. No significance inconsistent with a sale attaches to this fact or to the fact that defendant's letter of credit was made payable to Moulder & Co. instead of Kockos Bros. The seller may have the purchase price, or a portion thereof, made payable to a third person. Pointing towards a sale is the statement: "We will notify Moulder & Co. * * * that we have transferred above merchandise to Barrios & Co." A transfer of merchandise is quite distinct from an assignment or transfer of a right under an executory contract to purchase. The next provision appellant contends is controlling and determines the nature of the contract to be, not a sale, but a transfer of a right. It is: "Furthermore, in consideration of the transfer of this purchase to you, you will pay us $6,000 * * * on arrival of goods from the Orient." Respondent insists this is simply a $6,000 balance of the purchase price. Alone, this provision more nearly indicates an assignment than a sale. It is not in the usual form for either, and is perhaps not sufficient to outweigh the effect of other provisions indicating that a sale was intended. In addition to those mentioned is the provision relieving Kockos Bros. from responsibility for any loss suffered by respondent for failure to deliver. This was entirely superfluous if the instrument was regarded merely as an assignment. As assignor he would not have been liable for the seller's breach in any event. But in the absence of such a provision Kockos Bros. would have been liable for failure to deliver under a contract of sale. The Moulder & Co. agreement excused them from responsibility for delays in delivery beyond their control, and Kockos Bros. were undoubtedly providing against this contingency.

Looking at the instrument as a whole, we think it must be construed as a contract of sale, and that the demurrer was properly sustained.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

61 Cal. App. 156

PEOPLE v. PRYOR. (Cr. 675.)

(District Court of Appeal, Third District, California. Feb. 27, 1923.)

1. Intoxicating liquors ⟹236(19) — Evidence held to sustain conviction for manufacturing liquor.

Evidence *held* to sustain conviction for manufacturing intoxicating liquor in violation of an ordinance of the city of Tuolumne.

2. Intoxicating liquors ⟹236(11) — Evidence held to sustain conviction for selling liquor.

Evidence *held* to sustain conviction for selling intoxicating liquor in violation of an ordinance of the town of Tuolumne.

3. Intoxicating liquors ⟹236(6½)—Evidence held to sustain conviction for having possession of liquor.

Evidence *held* to sustain conviction for having possession of intoxicating liquor in violation of an ordinance of the town of Tuolumne.

Appeal from Superior Court, Tuolumne County; J. A. Smith, Judge.

James Pryor was convicted of manufacturing, selling and having in his possession intoxicating liquor, and he appeals. Affirmed.

J. P. Carey, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was charged in three separate counts of an information with manufacturing, selling, and having in his possession "certain intoxicating liquor, to wit, brandy, then and there containing one-half of 1 per cent. or more of alcohol by volume," in violation of a certain ordinance of the county of Tuolumne. He was convicted on all the counts, and appeals from the judgment.

[1-3] The only point made is that the evidence is insufficient to support the verdict, but there is no merit whatever in the contention.

As to the first count appellant states his position as follows:

> "The first charge, the manufacture of liquor, was placed before the jury on a presumption. There was no evidence that alcoholic liquor had been manufactured. The only evidence adduced to sustain said charge was the finding of a steamer and some spoiled or decayed grain in a bathroom of appellant's house, and a tube that was found by a third party in a spring adjacent to the house."

Herein appellant is in error. William Sweeney, the sheriff of the county, testified that on May 21, 1922, he went to the place occupied by defendant, and in response to the question, "While you were there on this particular occasion did you find any alcoholic liquors or a still or any other evidence of the manufacture of alcoholic liquor?" He replied, "Yes, Mr. Pryor delivered a bottle of liquor to me from his bedroom, and there was a part of a bottle in another part of the house, and a small still in the bathtub, and some material there fermenting in a tub—made from a sawed-off barrel." He further testified that the material in the tub was barley; that it was "fermenting like you find it in all places where liquor is made"; that "from my past experience finding in a number of places liquor fermenting, * * *. I had seen it in a number of places, seen it working, going through the same process" he "took it to be for the manufacture of alcoholic liquor." He further testified that the defendant did not deny the ownership of the "still."

Austin Morales also testified that for a time he stopped at the "Pryor place"; that while there he saw a "still" upon the property; "there was mash in the barrel in the bathroom; there was corn and yeast;" that he saw "a copper boiler and a coil and cooler;" that he took the "still and elbow" at the direction of Mr. Pryor, the defendant, to a certain garage and left it there for two days to get it fixed. "Mr. Pryor sent me back to the gentlemen that owned the garage, and they didn't have it fixed, and he wrapped it up and in a short time he took it to Stockton." The record discloses other circumstances in line with the foregoing, but we have quoted sufficiently to justify the conclusion that defendant was engaged in the manufacture of intoxicating liquor.

There is abundant evidence also to support the other two counts. We shall not segregate it, as the same testimony relates to both.

One Dolly Harris testified that she was acquainted with the defendant; that she was at his place on May 21, 1922; that she "asked Mr. Pryor for a drink; at first he said he wouldn't give me none, and then he told my sister, Edna Keaton (who was working for Mr. Pryor) to bring me a drink"; that she had several drinks, and paid therefor the sum of $3; that the liquor was strong and made her drunk.

Morales, who accompanied her to the place, testified that he saw Dolly Harris go into Mr. Pryor's house; that she was sober when she went in and was under the influence of liquor when she came out; that she had $4.50 when she went in and $1.50 when she came out; that he saw Mr. Pryor "standing in the yard, and I called her to come out, and she didn't come out, and so I went in and asked him to call her, and he called, and she came out; that is, she came stumbling out."

It may be added that two bottles of liquor were delivered by the defendant to the sheriff on said date; that their contents were analyzed by a chemist and found to contain over 50 per cent. of alcohol.

The case is so simple and clear as to demand no further consideration.

We may conclude with the statement that the presiding judge seems to have manifested the utmost concern to protect all the rights of the defendant, and we find no error in the record.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

---

61 Cal. App. 223

PEOPLE v. MORIARITY. (Cr. 1076.)

(District Court of Appeal, First District, Division 1, California. Feb. 28, 1923.)

1. Criminal law 🔑1149—Permitting withdrawal of plea of guilty discretionary with trial court.

An application to withdraw a plea of guilty and substitute a plea of not guilty is a matter within the trial court's discretion, and its ruling thereon will not be disturbed in the absence of a clear abuse.

2. Criminal law 🔑274—Refusal of withdrawal of plea of guilty held not an abuse of discretion.

Where a defendant had entered two pleas, the second one of them being of guilt, and his application to withdraw it and enter a third did not come until after his hearing on a motion for probation, which it was apparent the court was about to deny, and the evidence pointed conclusively to guilt, there was no abuse of discretion in refusing to permit the plea of guilty to be withdrawn.

3. Criminal law ⚷981(2), 1147—Mere suggestion of insanity does not compel submission of question to jury, and court's action will not be disturbed in absence of abuse of discretion.

The mere suggestion of an accused's insanity, unsupported by affidavit or other evidence raising a doubt as to his sanity, does not compel the court to order a submission of the question to the jury under the provisions of the Penal Code relating to such inquiry after conviction, and the action of the court will not be reversed unless abuse of discretion is shown.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

James Moriarity was convicted of lewd and lascivious acts, and he appeals. Affirmed.

Ernest B. D. Spagnoli, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

ST. SURE, J. The district attorney filed an information against the defendant charging him with violation of section 288 of the Penal Code. The victim of defendant's lasciviousness was a child nine years of age.

The record contains recitals in substance as follows:

On June 27, 1922, the cause came on to be heard for arraignment; defendant being represented by the public defender. Defendant was arraigned, and the cause continued until June 30th to plead. On June 30th defendant pleaded not guilty, and the cause was continued to July 7th for trial. On July 7th the cause was ready for trial, the defendant with his counsel was present, and on defendant's own motion he was permitted to withdraw his former plea of not guilty, and thereupon pleaded guilty to the charge. He waived time for judgment and was arraigned for judgment. Defendant asked for probation, and the court continued the cause to July 12th, and thereafter to July 14th. On July 14th the cause came on to be heard upon defendant's motion for probation. Witnesses were sworn and examined as to the facts in the case.

At this stage of the proceedings defendant's present counsel, Ernest B. D. Spagnoli, made his initial appearance as counsel for defendant, and in his behalf moved the court that defendant be permitted to withdraw his former plea of guilty. The court denied the motion and also denied probation. Defendant's counsel then suggested to the court that the defendant was insane, and asked that he be tried as to his sanity. The court denied this motion and pronounced its judgment, sentencing defendant to state's prison.

Defendant appeals from the judgment of conviction, from the order denying the motion to withdraw plea of guilty and enter a plea of not guilty to the information, and from the order denying motion for trial as to insanity.

[1] Defendant's first assignment is that "the court erred and abused its discretion in denying defendant's motion to withdraw his plea of guilty and be allowed to enter a plea of not guilty." With this contention we cannot agree. An application to withdraw a plea of guilty and substitute a plea of not guilty is a matter entirely within the discretion of the trial court, and its ruling thereon will not be disturbed in the absence of a clear abuse of discretion. People v. Cosgrove (Cal. App.) 192 Pac. 165.

[2] From the facts in the case before us it appears that there was no abuse of discretion. The record shows that defendant had already entered two pleas, and that his application to withdraw the second and enter a third did not come until after the hearing upon his motion for probation, and when, from the evidence adduced, it was apparent that the court was about to deny the same. There was no showing offered or made as to defendant's innocence; on the contrary, the testimony of witnesses for the people, given in the presence of defendant and his counsel, point conclusively to guilt. People v. Breshi, 44 Cal. App. 307, 186 Pac. 361.

[3] The suggestion to the trial court that defendant was insane, upon which was based a motion for a trial upon this question, which motion was denied by the court, was insufficient to invoke the aid of those provisions of the Penal Code relating to an inquiry into the insanity of the defendant after conviction. The mere suggestion of a person's insanity, unsupported by affidavit or other evidence raising a doubt in the mind of the court as to defendant's sanity, does not compel the court to order the question submitted to a jury. The action of the trial court in the matter will not be reversed unless an abuse of discretion is apparent. People v. Geiger, 116 Cal. 440, 48 Pac. 389; People v. Loomis, 170 Cal. 347, 149 Pac. 581. Here no showing whatever was made to the court. There was no evidence, oral or documentary, introduced on the subject. Evidently there was no doubt in the mind of the court as to the sanity of the defendant; otherwise sentence would not have been imposed. People v. Fountain, 170 Cal. 460, 150 Pac. 341. There was no abuse of discretion.

Defendant, in a supplement to his opening brief, urges two additional points for reversal as follows:

"(1) The defendant did not plead guilty and the judgment is invalid.

"(2) Appellant was not arraigned for judgment pursuant to section 1200 of the Penal Code."

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

The record, which is conclusive upon us, shows that defendant was properly arraigned, and that he pleaded guilty.

The judgment and orders appealed from are affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

---

61 Cal. App. 178

In re GURNSEY'S ESTATE.

GURNSEY v. WILTSEY et al.

(Civ. 2566.)

(District Court of Appeal, Third District, California. Feb. 27, 1923.)

1. Wills 🔑384—Judgment dismissing contest unappealed from not assailed on appeal from order refusing to strike cost bill.

Where no appeal was taken from a judgment dismissing a will contest at contestant's costs, on appeal from an order refusing to strike out a cost bill, appellant cannot attack on the judgment dismissing the contest.

2. Wills 🔑402—Superior court authorized to dismiss will contest at contestant's cost.

In view of Code Civ. Proc. §§ 1312, 1313, relating to will contests, which provides for filing written grounds of opposition to probate and for demurrer and answer to the petition, and that on trial contestant is plaintiff and petitioner is defendant, and for impaneling the jury and conducting trial as trials are conducted under the Code, in a will contest the trial court becomes vested with general authority of courts of record in matters of procedure, and hence, on contestant's motion for dismissal, the court was authorized to enter judgment of dismissal at contestant's cost.

3. Appeal and error 🔑154(4)—One not aggrieved by consent judgment or decree requested.

A party is not aggrieved by a consent judgment or one which he has requested the court to decree.

Appeal from Superior Court, Tehama County; J. F. Ellison, Judge.

In the matter of the Estate of Harriet A. Gurnsey, deceased. Proceeding by Mary A. Wiltsey and others to probate deceased's will, wherein John A. Gurnsey entered a contest. Contest dismissed. From an order denying his motion to retax costs and to strike cost bill, contestant appeals. Affirmed.

James T. Matlock, of Red Bluff, for appellant.

W. P. Johnson and McCoy & Gans, all of Red Bluff, for respondents.

BURNETT, J. By filing in the office of the county clerk of Tehama county written grounds of opposition to the probate thereof, John H. Gurnsey on February 27, 1922, initiated a contest of the will of Harriet A. Gurnsey, deceased. On March 8th following respondents filed an answer to said written opposition. On April 3d the contest was set for trial on May 31, 1922, contestant then demanding a jury. The cause came on regularly for trial on said May 31st, and respondents announced themselves ready to proceed. Contestant, however, asked permission to file an amended contest; but this was denied by the court. Whereupon contestant moved for a dismissal of the action, and judgment of dismissal and for costs was rendered as follows:

"John H. Gurnsey having on the 27th day of February, 1922, filed in writing his contest of the will of Harriet A. Gurnsey, deceased, and Phoebe E. Mills, Juliette Sykes, and Mary J. Wiltsey, named in said will as legatees and devisees, having filed their answer to said contest, and the said contest having been set for trial for May 31, 1922, at 10 o'clock a. m. of said day, and said matter coming on for trial at said time, McCoy & Gans and W. P. Johnson, attorneys for Phoebe E. Mills, Juliette Sykes, and Mary J. Wiltsey, announced that they were ready for the trial, and James T. Matlock, attorney for the contestant, asked the court for leave to file an amended contest to said will, which request the court denied, whereupon contestant by his said attorney asked the court to dismiss the contest at contestant's costs. Wherefore, it is ordered, adjudged, and decreed that the said contest by John H. Gurnsey of the probate of the will of Harriet A. Gurnsey, deceased, be, and the same is, dismissed, and it is ordered, adjudged, and decree that Phoebe E. Mills, Juliette Sykes, and Mary J. Wiltsey recover from said John H. Gurnsey their costs in the matter of the contest of the said will."

On June 2d following, said respondents filed "memorandum of costs on contest" of said will, the amount being $43.20. On June 6th contestant filed "notice of motion to retax costs," and also for an order "to strike out and eliminate the entire cost bill * * * upon the further ground and for the further reason that said cost bill was not prepared or served or delivered or filed within the time required or allowed by law, or in accordance with law, or within any further time allowed by the court or adjudged thereof, or that said cost bill was prepared or served or delivered or filed before the entry of any judgment in said cause." It was recited in said notice that "said motion will be based upon the law in such cases made and provided, and upon the minutes and records of the court, and upon the papers in said cause, and upon testimony to be produced on said hearing." Said motion was denied on June 26th, and on July 19th contestant gave written notice of an appeal "from an order denying contestant's motion to retax and to strike out the cost bill in said matter, which said order was made and entered in the above-entitled matter on the 26th day of June, 1922, and from each and every part of said order."

No evidence is brought up to show that any item in the cost bill is improper. There is nothing to indicate that the bill was not served and filed in the time required by law. Indeed, the record, if sufficiently authenticated to be considered for the purpose, shows that the proceedings culminating in the order denying said motion were entirely regular.

[1, 2] The attack, though, of appellant is really directed against the judgment of dismissal, which we have hereinbefore set out. His contention is that a contest to revoke the probate of a will is a special proceeding (Estate of Joseph, 118 Cal. 660, 50 Pac. 768); that the dismissal of such contest cannot be had under section 581, Code of Civil Procedure, since that section relates exclusively to "actions," the remedies under our Code being divided into two classes, "1, Actions; 2, Special Proceedings" (section 21, Code Civ. Proc.); that there can be no judgment for costs except as a part of and an incident to the judgment upon the issue in the action, and, "if the court loses power to render a judgment between the parties upon the issues before it, it is equally powerless to render a judgment for the costs incurred therein" (Begbie v. Begbie, 128 Cal. 154, 60 Pac. 667, 49 L. R. A. 141). He summarizes his position as follows:

> "We claim that the judgment so entered was had and done without any authority of law, for the reason that when there was a withdrawal of the contest, or a dismissal thereof, or a failure to proceed further on the part of contestant, the matter was ended, and the court lost power to render any judgment between the parties, and since costs are but an incident to a judgment it is therefore powerless to render a judgment for the costs incurred therein."

There are several answers to this contention. The most obvious is that he has not appealed from said judgment, and he is in no position to complain of it. This judgment cannot be successfully assailed upon an appeal from an order refusing to strike out a cost bill. That would be to permit a collateral attack upon a judgment which is not void upon its face.

But, if we concede that said section 581 does not apply to the case, it does not follow that the trial court was without authority to render the judgment in question. Section 1312, relating to contests of wills, provides for filing written grounds of opposition to the probate thereof, and for a demurrer and answer to said opposition, and prescribes that "on the trial, the contestant is plaintiff and the petitioner is defendant."

Section 1313 provides:

> "When a jury is demanded, the superior court must impanel a jury to try the case, in the manner provided for impaneling trial juries in courts of record, and the trial must be conducted in accordance with the provisions of part two, title eight, chapter four, of this Code. A trial by the court must be conducted as provided in part 2, tit. 8, c. 5, of this Code."

By virtue of these provisions we think it cannot be questioned that the trial court became vested with the general authority that belongs to courts of record in matters of procedure. That it had inherent power to dismiss the action we entertain no doubt.

In Dupuy v. Shear, 29 Cal. 238, it was declared that—

> "The court, having got possession of the case by the commencement of a suit, must have some power to dispose of it, when the plaintiff declines or neglects to proceed."

In Hassey v. South S. F. Homestead, etc., Ass'n, 102 Cal. 611, 36 Pac. 945, it was said:

> "The power of the court to dismiss an action under section 581 of the Code of Civil Procedure, or independently of that section, has been too often exercised and upheld by this court to leave the question an open one."

In People v. Jefferds, 126 Cal. 296, 58 Pac. 704, we find this:

> "Conceding that appellant's reading of section 581 is correct, it does not follow that the power to dismiss an action for lack of prosecution does not reside in the court except upon a showing in conformity with the provisions of that section. It was pointed out in People v. Latham, 53 Cal. 386, that the power to dismiss an action was first exercised by equity courts. For a long period, however, courts of law have exercised the authority as part of their inherent powers; and the same rules now apply to a dismissal at law or equity under code procedure. 6 Am. & Eng. Ency. of Pl. and Pr. 910, and cases cited."

It is also pointed out in Richards v. Bradley, 129 Cal. 670, 62 Pac. 316, that the provisions of section 581 are not "exclusive or mandatory."

In Romero v. Snyder, 167 Cal. 216, 138 Pac. 1002, it is declared:

> "It is settled by numerous decisions in this state that the superior court, without the aid of statutory authority, has power to dismiss an action because of the failure of the plaintiff to prosecute it with reasonable diligence. The doctrine is based upon the theory that courts of general jurisdiction possess this power."

Assuredly, if the court possesses the power when the plaintiff fails to prosecute with reasonable diligence, there is greater reason for its existence and exercise when the plaintiff expressly abandons his cause and requests the court to dismiss the action.

[3] As to the judgment for costs, manifestly, the contestant is in no position to complain, since it was rendered at his in-

stance. A party is not aggrieved by a consent judgment, or one which he has requested the court to decree.

We can conceive of nothing more to justify the court in entering judgment therein for proponents' costs, and the order is affirmed.

We concur: FINCH, P. J.; HART, J.

61 Cal. App. 246

WYCKOFF v. FORCE, Superintendent of Schools, et al. (Civ. 4388.)

(District Court of Appeal, First District, Division 2, California. March 5, 1923.)

1. Schools and school districts 🔑90—Money to meet debt need not be on hand at time debt incurred under Constitution.

Const. art. 11, § 18, prohibiting a district from incurring an indebtedness exceeding in any year the income and revenue for such year, does not require that the money be on hand at the time the indebtedness is incurred, or that the income should be provided at that time; it being sufficient if the income has been or will be provided within the year.

2. Schools and school districts 🔑90—Evidence held to show district had not exceeded authority in incurring indebtedness.

Evidence that a district at the time of trial had over $20,000 remaining in the school fund, and that the estimated balance at the close of the fiscal year after paying all claims, including $5,000 in warrants, would be $13,000, *held* sufficient to sustain a finding that the district did not, in contracting an indebtedness of $20,000, exceed its authority under Const. art. 11, § 18, forbidding the incurring of indebtedness exceeding in any year the income and revenue provided for such year.

3. Schools and school districts 🔑90—Contract for architectural services held not within constitutional limitation as to indebtedness.

A contract for architectural services providing that payment is to be made from time to time as the work progresses *held* not within the inhibition of Const. art. 11, § 18, limiting the amount of indebtedness which the district might incur in a single year, in the absence of any showing that any installment coming due in any year during the life of the contract was in excess of the income and revenue of that year.

4. Mandamus 🔑168(2)—County treasurer alleging warrant payable only from particular fund has burden of proof.

In an action by an architect to compel the county superintendent of schools to approve and the county treasurer to pay an order drawn by the trustees for services rendered, where the county treasurer has separately defended on the ground that the trustees had agreed to make payment only out of a certain bond raised, which fund was already exhausted, he has the burden of proving such allegation.

5. Schools and school districts 🔑82(1)—Trustees may employ architect to be paid out of general fund.

In the absence of a statutory requirement, the trustees of a school district may employ an architect and make his compensation payable out of the general fund.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Suit by Ralph Wyckoff against J. G. Force, as Superintendent of Schools of Monterey County, and others, and James Taylor, as Treasurer of Monterey County. Judgment for plaintiff, and last-named defendant appeals. Affirmed.

Chas. B. Rosendale, of Salinas, for appellant.

C. F. Lacey, of Salinas, for respondent.

NOURSE, J. Plaintiff sued in mandamus to compel the defendant Force, as county superintendent of schools, to approve, and the defendant Taylor, as county treasurer, to pay, an order for $7,000 drawn by the trustees of the Salinas union high school district in part payment for the services of plaintiff as architect in the construction of a new high school building. The complaint alleged that on May 11, 1920, the board of trustees entered into an agreement by the terms of which the plaintiff furnished to the school district plans and specifications for a school building and agreed to supervise and superintend the construction thereof until completion, and in consideration thereof the school district promised to pay plaintiff the sum of $20,000, "payable in indefinite installments from time to time as said work progressed, until said work was fully completed." It was also alleged that plaintiff entered upon the performance of the work pursuant to the agreement, and that the building has not been completed or accepted by the school district. Allegations followed covering the issuance and presentation of the order, the demand for approval and payment, and the refusal on the part of the defendants.

The essential allegations of the complaint were admitted in the joint answer filed by the two defendants, and a special defense was set up in which it was alleged that prior to September 10, 1919, the school district duly issued bonds in the sum of $250,000 for the construction of said high school building; that said bonds were duly sold and the proceeds thereof were deposited in the county treasury to the credit of the "Salinas union high school district building fund, bond No. 1"; that thereafter additional bonds for the same purpose in the sum of $150,000 were authorized, issued and sold, and the proceeds were deposited in the county treasury and credited to the "Salinas union high school district building fund, bond No. 2"; that, while there remained in the building fund proceeds of the sale of the first issue of over $249,000, the trustees entered into a written contract with plaintiff whereby plaintiff was employed to furnish architectural plans and specifications for said school building and to supervise and superintend the construction thereof, and in consideration thereof the school district promised to pay plaintiff 6 per cent. of the contract price of said building, payment therefor to be made at specified times in proportion to the amount of services rendered, and all payments to be made from the moneys derived from the sale of said bonds; that thereafter, on the 11th day of May, 1920, and after the second issue of bonds had been authorized, a verbal agreement was made modifying said contract by the plaintiff agreeing to accept $20,000 in full payment for his architectural services; that on the 1st day of July, 1921, when plaintiff's order was drawn, there was but $54.15 in the building fund of the high school district; that this sum was expended; and that there were no moneys in said fund derived from the sale of said bonds.

The trial court found that the essential allegations of the complaint were true, and that the allegations of the special defense were true except those relating to the terms of the contract of May 11, 1920. Upon this issue the court found that the plaintiff agreed to accept $20,000 for his services as an architect and for other work not specified in the written contract, but that it was not true that the parties understood or agreed that said sum should be paid from the bond moneys referred to in the answer.

Upon these findings the trial court gave judgment against the two defendants as prayed. The defendant Force complied with the order of the court, but the defendant Taylor appealed. The appeal is presented upon a bill of exceptions, which contains four specifications of error, as follows:

> "(1) The evidence is insufficient to justify the finding that, at the time said order was presented for payment, the amount of said order did not exceed the income and revenue provided for the year in which the indebtedness represented by said order was incurred; (2) that the evidence is insufficient to justify the finding that at the time of the submission of this case there was and there is yet in the fund upon which said order was drawn ample money applicable to the payment thereof with which to pay the same; (3) that the evidence is insufficient to justify the finding that the averments of paragraph 8 of the separate answer and defense are not true in that it was not agreed or understood by the parties that the said $20,000 was to be paid from the bond moneys referred to in the separate answer and defense in said paragraph 8; (4) that the evidence is insufficient to justify the finding that on the 11th day of May, 1920, there were then outstanding contracts for construction and contracts for construction which were to be executed at the next meeting of the board of trustees of said district, which would require a payment of all the sum of $214,968.34, then remaining on said 11th day of May, 1920, in the Salinas union high school district building fund."

[1, 2] 1. Section 18 of article 11 of the Constitution merely prohibits the incurring of an indebtedness exceeding in any year the income and revenue provided for such year. It does not require that the money be on hand at the time the indebtedness is incurred or, in fact, that the income should have been provided at that time. It is sufficient if the indebtedness is within the income which has been provided or which will, in the ordinary course, be provided within the year. The evidence was that there was over $20,000 remaining in the high school fund at the time of the trial (March 20, 1922), and that the estimated balance at the close of the fiscal year, after paying all claims, including $5,000 in warrants already drawn, would be about $13,000. There was sufficient evidence, therefore, to sustain the finding that the order did not exceed the income provided for the fiscal year following July 1, 1921, the day upon which it was drawn.

[3] But the date of the order is of little importance. The trial court found, and the evidence supports the finding, that respondent's contract called for his services until the building was completed, payments to be made from time to time as the work progressed. It does not appear that any installment coming due in any year during the life of the contract was in excess of the income and revenue of that year. The contract is not, therefore, within the inhibitions of section 18 of article 11 of the Constitution. Doland v. Clark, 143 Cal. 176, 182, 76 Pac. 958; McBean v. Fresno, 112 Cal. 159, 167, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191; Higgins v. San Diego, 131 Cal. 294, 299, 63 Pac. 470; Smilie v. Fresno County, 112 Cal. 311, 313, 44 Pac. 556.

2. The order was drawn upon the "high school fund," which, we assume, means the general fund of the high school district. If not drawn upon the proper fund, no issue was made of that fact, and the case was tried upon the theory that the warrant was in proper form. The answer did not raise the issue that the full sum of $20,000 was agreed to be paid out of the bond moneys, and it was at no time suggested that the order was not a proper claim against the general fund, or that there were not sufficient moneys in that fund to meet payment. The evidence plainly showed that over $21,000 remained in the fund at the time of the trial, and this was sufficient to support the finding.

[4] 3. Though there is no express allegation on the subject, appellant insists that he raised, as a separate defense, the issue that the trustees agreed to pay the $20,000 out of the bond moneys raised for building purposes. As to this the burden of proof was on the appellant. He offered no evidence to support the allegation, and the only evidence received showed that no arrangement was made regarding the fund from which the payment

was to be made. Thus the trial court was justified in finding against the appellant.

4. The fourth specification relates to a matter which was not a material issue in the case. It is purely argumentative and was offered to show that, if there was money in the building fund on the date of the oral contract which was not needed to cover outstanding contracts, the parties might have intended to make respondent's compensation payable out of that fund. The evidence was that on May 11, 1920, the trustees had actually contracted for an expenditure of over $296,000, but that other contracts amounting to over $117,000 were in contemplation and were actually executed at the next meeting of the board. This supports the finding of the trial court.

[5] On this appeal the appellant argues that the main question involved is whether moneys raised by a special tax levy for maintenance of the high school can be used in the payment of respondent's claim. But, if this is so, the issue has not been properly raised. It is not covered by any pleading, while the evidence is merely that such a tax was levied, but not that the proceeds were deposited in the fund against which respondent's claim was presented or that sufficient moneys from other sources were not placed in that fund. Our attention has not been directed to any statute which prohibits a high school district from raising by taxation moneys for building purposes when the proceeds of bonds issued for such purposes have been expended, and we have not found any statute which provides that the payment of an architect's fees for building supervision must be made a charge against the building account. In the absence of a statutory requirement, there is nothing to prevent the trustees from employing an architect and making his compensation payable from the general fund. We find no error in the record.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

60 Cal. App. 749

WESTERN WELL WORKS, Inc., v. CALIFORNIA FARMS CO. et al. (Civ. 4464.)

(District Court of Appeal, First District, Division 1, California. February 13, 1923. Hearing Denied by Supreme Court. April 12, 1923.)

1. Mechanics' liens ⚷40—Test bore held a "well" within mechanics' lien statute; "ream out."

Under Code Civ. Proc. § 1183, providing for mechanics' liens for labor in constructing wells, drilling a test bore, the sinking of which contributed one-fourth the cost of a completed well, and which the contractor was later to "ream out," which means to enlarge or dress out, was work of such character as to be included within the term "well," as used in the statute, and to constitute the basis of a mechanics' lien.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Well.]

2. Mechanics' liens ⚷78—Land of corporation, whose officers were informed of constructing well, held subject to mechanics' lien.

Where the officers of a corporation were informed that a well was being constructed on the corporation's land for an association in possession thereof, the corporation was bound to all that a prudent and proper inquiry would have revealed, and on its failure to give notice to avoid responsibility as provided by Code Civ. Proc. § 1192, its land became subject to a mechanics' lien for constructing the well.

3. Mechanics' liens ⚷5, 182—Lien authorized for constructing irrigating well applies to land improved and benefited.

Under Code Civ. Proc. § 1185, providing that the extent of a mechanic's lien shall be not only land occupied by the structures but a convenient space about it, or so much as may be required for the convenient use and occupation thereof, the limitation of a lien for work in constructing an irrigating well, having, when completed, a capacity of 2,000 gallons per minute, to a circle of ground 100 feet in diameter around the well, was too narrow, since, in limiting the lien, consideration should be given to the amount of land to be improved or benefited, and the statute liberally construed as required by section 1183 as amended by St. 1911, p. 1313.

Appeal from Superior Court, Fresno County; M. F. McCormick, Judge.

Action by the Western Well Works, Incorporated, against the California Farms Company and others, to foreclose a mechanic's lien on lands of the California Land Company. Plaintiff was granted personal judgment against certain defendants, but adjudged to have no lien on the lands described, and he appeals. Reversed and remanded.

Ralph C. McComish, of San Jose, and G. L. Aynesworth, of Fresno, for appellant.

Everts, Ewing & Wild and J. R. Fitch, all of Fresno, for respondent California Land Co.

RICHARDS, J. [1] This action was instituted by the plaintiff for the foreclosure of a mechanic's lien upon two certain sections of land in Fresno county, owned by the California Land Company, one of the defendants herein. At the time the work was done, from which, as claimed by plaintiff, the lien arose, the lands sought to be affected thereby were in the possession of the California Farms Company, another defendant herein, which was an unincorporated association of persons of whom the defendant Sherwood Green was a member and officer, having authority to act for such association; and which association was, at the time of doing of said work, in the possession of a larger tract of land of which said sections were a part under an option to purchase the same from the California Land Company. The work to be done by the plaintiff was set forth in a contract in writing bearing date of February 10, 1920, between it and the California Farms Company and consisted in the sinking of a test bore in search of water-bearing strata upon said sections of land to the depth of 1,000 feet. The contract proceeded to state that:

> "If, within a depth of 1,000 feet from the surface of the ground, sufficient apparent water-bearing strata are encountered which by mutual agreement would justify finishing the well, then we are to ream out the test bore and sink a well at this point, and case the same with 24" diameter double 12 gauge hard red sheet steel casing for approximately the first 120 feet, then a taper connection from 24" to 12" and 12" diameter double 12 gauge casing for the balance of the distance. * * * After the casing has been installed, we fill in the annular space between the wall of the hole dug to receive the casing and the casing itself with selected washed gravel—making and completing what is known as the Western Well Works, Inc., patented gravel envelope well, constructed under patent No. 1289320."

The contract further embraced the specifications for the well in case the test bore justified its completion, and provided for the installation of a pump thereon having a capacity of from 1,000 to 2,500 gallons of water per minute. The work proceeded under this contract to the depth indicated therein, the plaintiff furnishing all of the derricks, materials, supplies, and labor for the doing of said work in accordance with the provisions of said contract. The California Farms Company did not, however, comply with the terms of its said agreement as to payments nor as to completion of the well, in consequence of which the plaintiff ceased operations and in due time filed and recorded its lien for the labor and materials furnished and used in the prosecution of the work of making said test bore; and thereafter commenced this action for the foreclosure of its said lien, joining the California Land Company, the California Farms Company, and Sherwood Green, and certain other persons alleged to compose said latter association as defendants in said action. In its complaint, the plaintiff, after alleging the facts as to performance by it of said work under said contract with the California Farms Company and of the nonpayment by the latter therefor, proceeded to allege that the California Land Company had notice and knowledge of the doing of said work and the furnishing of said labor, materials, and supplies, on and at all times after February 10, 1920, but that said California Land Company never gave notice by either posting or recordation that it would not be responsible for said work, labor, materials, or supplies. The defendants appeared separately and demurred to the sufficiency of the plaintiff's complaint; the California Farms Company and the defendant Green demurring both generally and specifically, and the California Land Company presenting a general demurrer. These demurrers were overruled. The defendant California Farms Company defaulted by failing to answer after notice. The defendant Sherwood Green answered, denying the making and entering into the contract by the California Farms Company or himself for the doing of said work. The California Land Company answered denying practically all of the averments of the complaint save and except the averment that said defendant claimed the right, title, and interest in said premises sought to be affected by said lien adverse to the claim of the plaintiff, and in that respect alleged itself to be the owner of said premises free and clear of the lien asserted by said plaintiff. It also specifically denied having any notice or knowledge of the doing of said work or of the furnishing of the said labor, materials, or supplies at any time prior to the institution of said action. The cause came on for trial upon the issues thus joined, and upon its submission the court made its findings of fact herein and found that the plaintiff had performed the work of drilling the test bore upon the premises in question under the contract with the California Farms Company and as required by the terms of said contract and had furnished the labor, materials, and supplies necessary for said work as provided therein, and that no part of the sum to be paid therefor by the said California Farms Company had been paid, save and except the sum of $500 on account thereof, and that in due course the plaintiff had filed its claim of lien upon said two sections of land for the balance remaining unpaid upon said contract. The court further found that no part of said premises sought to be impressed with said lien was necessary for the convenient use and occupation of the improvements placed thereon by said plaintiff, save and except a circle of ground 100 feet in diameter around the spot where the derrick had been erected, above the point where said test bore had been drilled. The court further found that the said test bore to be constructed and actually constructed under the terms of said contract between the plaintiff and the California Farms Company was not a well and did not come within the definition of any of the matters for which a lien is granted under the statutes of the state of California. The court also found that the defendant California Land Company had no notice or knowledge of the doing of said work and furnishing of said labor, materials, or supplies at any time prior to the service upon it of the summons and complaint in this action, and that the said defendant California Land Company never gave any notice, either by posting or recordation, that it would not be responsible for said work, labor, materials, or supplies. As conclusions of law from the foregoing findings of fact, the court found that the plaintiff was entitled to a personal judgment against the defendants California Farms Company and Sherwood Green, for the sum of $3,494.86, but that, as to the defendant California Land Company, it was entitled to judgment that the plaintiff had no lien upon the premises described in its complaint. Judgment was entered accordingly. The plaintiff's motion for a new trial was denied, whereupon it took and prosecutes this appeal.

The primary question presented for our consideration upon this appeal is as to whether or not the test bore for a water well, drilled by the plaintiff under the terms of its contract with the California Farms Company, constituted such a structure under the provisions of section 1183 of the Code of Civil Procedure as would entitle the plaintiff to a lien for the work, labor, material, and supplies furnished by it in the drilling of said test bore. We are satisfied that the trial court was in error in its finding and conclusion that the doing of said work, furnishing of said labor, materials, and supplies did not come within the terms and provisions of said section of the Code of Civil Procedure so as to entitle the plaintiff to claim a lien therefor upon some portion of the real estate upon or in relation to which said work was prosecuted and said labor, materials, and supplies were furnished. Section 1183 of the Code of Civil Procedure in force at the time of the doing of said work provided that:

> "Mechanics, materialmen, contractors, subcontractors, artisans, architects, machinists, builders, miners, teamsters and draymen, and all persons and laborers of every class performing labor upon, or bestowing skill or other necessary services, or furnishing materials to be used or consumed in or furnishing appliances, teams and power contributing to the construction, alteration, addition to or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume aqueduct, well, tunnel, fence, machinery, railroad wagon road or other structure shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished and for the value of the use of such appliances, teams or power, whether at the instance of the owner, or of any other person acting by his authority or under him, as contractor or otherwise."

By the terms and specifications of the contract between the plaintiff and the California Farms Company, it was provided that the test bore to be sunk by said plaintiff was to be drilled in search of water-bearing strata and formation and that "if, within the depth of 1,000 feet, sufficient apparent water-bearing strata was encountered which by mutual agreement would justify finishing the well, then we are to ream out the test bore and sink a well at this point." The phrase "ream out" the test bore is to be interpreted to mean "to enlarge or dress out, as a hole." Webster's Dictionary, "ream." It was thus the clear intent of the foregoing provision of the said contract that the well to be thereafter sunk, if the developments of the test bore should justify it, was to occupy the precise spot and to follow the precise line of the test bore, or in other words to constitute an enlargement of the hole made thereby. The undisputed testimony of Mr. Vaughan, president of the Western Well Works, showed that the developments of the test bore were such as to justify the conclusion that a well, if completed according to the specifications of said contract, and operated at said point, would have produced in excess of 2,000 gallons of water a minute, and that by the sinking of said test bore about 25 per cent. of the cost of the completed well would have been contributed. Reading the foregoing provisions of section 1183 of the Code of Civil Procedure in the light of this contract and of the evidence above referred to, the conclusion would seem to be irresistible that the test bore was work of such a character as would reasonably be embraced within the meaning of the word "well" as used in said section. It was, to say the least of it, work which contributed to the construction of such well. That a well is a structure in the sense of said provision of the Code would seem to be clear from the authorities. In the case of Helm v. Chapman, 66 Cal. 291, 5 Pac. 352, it was held that a pit sunk within a mining claim was a "structure." This decision was approved in the case of Silvester v. Coe Q. M. Co., 80 Cal. 510, 22 Pac. 217, and was again cited with approval in the case of Williams v. Mountaineer G. M. Co., 102 Cal. 134, 34 Pac. 702, 36 Pac. 388, in which latter case the Supreme Court, in interpreting the meaning of the word "structure" as used in section 1183 of the Code of Civil Procedure said:

> "The use of the phrase 'other structure' in the above extract shows that the word 'structure' comprehends all the properties specifically enumerated, and is broad enough to include any similar thing constructed, should the enumeration prove incomplete."

The term "well" as modernly used has also been given a broader signification than that embraced in the definitions of earlier dictionaries; as, for example, in its use in relation to boring for oil. In the cases of Haskell v. Gallagher, 20 Ind. App. 224, 50 N. E. 485, 67 Am. St. Rep. 250, and Kanawha v. Wenner, 71 W. Va. 477, 76 S. E. 893, 43 L. R. A. (N. S.) 559, it was held that an oil well was a structure within the meaning of that term as used in mechanic's lien laws. We conclude that the trial court was in error in its finding and conclusion that the work done and labor, materials, and supplies furnished by the plaintiff were not lienable under the provisions of section 1183 of the Code of Civil Procedure.

[2] The next finding of the trial court which the appellant assails is its finding that the California Land Company had no such notice or knowledge of the doing of said work and the furnishing of said labor, materials, and supplies as would have required it, as the owner of the premises affected by said lien, to give the notice provided for in section 1192 of the Code of Civil Procedure, in order to avoid responsibility for said work and liability for said lien. The evidence upon this subject is undisputed and is supplied by the defendant Sherwood Green, who was at the time the secretary of the California Farms Company. He testified that on or about the 1st of May, 1920, at which time considerable progress had been made with said work, he had a conversation with an officer of the California Land Company at Boise City, Idaho, the principal place of business of said corporation. A number of other persons were present, all of whom were connected with the California Land Company. He had gone there for the purpose of making a payment upon the contract of his association with the California Land Company and obtaining an extension upon said contract, and he then there made said payment and procured such extension. In the course of doing so, he discussed with the persons then present the fact that:

> "If they didn't give us an extension, we naturally would take those two sections in which the wells were being drilled, which were sections 22 and 27 under our option, so I know at that time it was made clear to them that we were doing work and drilling wells and we talked about taking those two sections if we didn't get an extension. Section 27 is the section on which the work was being done by the Western Well Works. I discussed with the California Land Company the proposition that we were doing well work on that section."

From this uncontradicted evidence but one conclusion can reasonably be drawn. It is that the California Land Company, through its officers, with whom the defendant Green, as the authorized representative of the California Farms Company, went to Boise City, Idaho, to deal in the matter of obtaining an extension of the contract of his association with said corporation, which extension he then and there obtained, was informed in immediate connection with the obtaining of said extension that work in the nature of drilling a well or wells was then proceeding upon its said land. That such information would be sufficient to put prudent men upon inquiry as to the nature and extent of the work being done upon the property of their corporation we entertain no doubt, in the light of the authorities; and that the defendant California Land Company was bound by the information thus imparted to all that a proper and prudent inquiry would have revealed, the cases fully support. Evans v. Judson, 120 Cal. 282, 52 Pac. 585; J. R. Gentle & Co. v. Britton, 158 Cal. 328, 111 Pac. 9; Perazzi v. Doe Estate Co., 40 Cal. App. 617, 181 Pac. 398. This being so, it was incumbent upon said corporation as the owner of the premises upon which said work was being done by plaintiff to have given notice under the provisions of section 1192 of the Code of Civil Procedure, in order to avoid responsibility for the same. The trial court found that no such notice of nonresponsibility was given by said corporation. It follows that some portion of its said property was subject to the plaintiff's lien.

[3] The foregoing views of this court require a reversal of this judgment, with the probable result of a retrial of this cause. In view of this fact, but one further comment is necessary upon the findings of the trial court. It relates to the court's finding:

> "That none of said premises is necessary for the convenient use and occupation of the improvements placed thereon by the plaintiff save and except a circle of ground 100 feet in diameter, including the land upon which the derrick hereafter mentioned was erected, in such manner that said derrick is in the center of said piece of ground."

It seems to us that this is altogether too narrow an interpretation to place upon the provisions of the statute permitting a lien to be claimed upon the land upon which the building improvement, well, or structure is to be constructed. Section 1185 of the Code of Civil Procedure in providing for the extent of such lien allows, not only the immediate land occupied by the structure itself, but also "a convenient space about the same, or so much as may be required for the convenient use and occupation thereof." The structure upon which the plaintiff performed the work for which he claims his lien was a well, having, when completed, a capacity of at least 2,000 gallons of water a minute. It was to be an irrigating well, and, according to the uncontradicted evidence of Mr. Vaughan, would have sufficed for the irrigation of at least one, if not both, of the sections of land upon which it was to be located. In determining what would be a convenient space for the use and occupation of an irrigating well, consideration must be given to the reasonable and beneficial use of the waters of the well, since the well is useless without the use and application of its waters upon sufficient land to render an adequate return for the cost of its creation and use. The question is not so much as to the amount of land required for the area to be occupied by the well and its appliances, but rather as to the amount of land to be improved or benefited by the creation and use of the well. This is quite clearly set forth in the case of Berentz v. Belmont Oil Mining

Co., 148 Cal. 577, 84 Pac. 47, 113 Am. St. Rep. 308, and also in the case of Hamilton v. Delhi Mining Co., 118 Cal. 148, 50 Pac. 378, wherein the Supreme Court says:

> "The general theory upon which liens to laborers, mechanics, and materialmen are given is, that by the labor, or use of the material, the property has been enhanced in value."

A good illustration of the application of the rule is to be found in Mendoza v. Central Forest Co., 37 Cal. App. 289, 174 Pac. 359, in which a lien was sought to be imposed for work in preparing a tract of land for an irrigation system consisting of ditches, drains, embankments, and the like. The entire tract of land was sought to be affected by the lien. The court says:

> "The farm development here contemplated was a finished piece of work composed of integral parts, some of which the statute expressly designates as structures, and when completed consisted of ditches, drains, embankments, roads, so correlated as to form one harmonious entity designed to accomplish a particular object and constituting a permanent and valuable improvement to the land and necessary to its highest and most profitable uses."

The Supreme Court of the United States has given a like application of the principle in the case of Springer Land Ass'n v. Ford, 168 U. S. 513, 18 Sup. Ct. 170, 42 L. Ed. 562, involving much the same state of facts, and wherein the court said:

> "The truth is that what area of land is subject to lien in a given case largely depends on the character of the improvement. The extent of ground proper and necessary to the enjoyment of the building, a wall, or a fence, would not be the same as that required for or appertaining to an irrigation system, but the principle of determination is the same. This ditch was to expend its waters on this tract and could not be used or operated without it. Each was dependent on the other, and both were bound together in the accomplishment of a common purpose. The lien must apply to the entire tract or be confined to the right of way through which it took its course, and to narrow it down to the latter would be to disregard the very terms of the statute."

In determining the amount of land to be subjected to the lien of the plaintiff in the instant case, the trial court should take into account the fact that the mechanic's lien law is to be liberally construed, with a view to effecting its purpose. The Legislature expressly so declared in the statute amending section 1183 of the Code of Civil Procedure into its present form (Stats. 1911, pp. 1313–1320), and the courts of both this and other jurisdictions have consistently followed the rule of construction thus laid down. Mendoza v. Central Forest Co., supra; Lindsay v. Gunning, 59 Conn. 296, 22 Atl. 310, 11 L. R. A. 553; Montandon v. Deas, 14 Ala. 33, 48 Am. Dec. 84; Filston Farm Co. v. Henderson, 106 Md. 335, 67 Atl. 228; Hess Flume Co. v. La Junta, etc., Land Co., 63 Colo. 236, 166 Pac. 246. The foregoing views are for the direction of the trial court upon a retrial of this cause.

Judgment reversed.

We concur: TYLER, P. J.; ST. SURE, J.

---

60 Cal. App. 717

CATANIA et al. v. GUCCCIONE. (Civ. 4451.)

(District Court of Appeal, First District, Division 2, California. Feb. 8, 1923.)

Appeal and error ⚷356—Appeal dismissed for failure to file bill of exceptions or transcript within required time, in absence of excuse.

Where appellant has not caused to be prepared, settled, or filed a bill of exceptions, and there has been no dismissal by the trial court of any proceedings for a settlement of a bill of exceptions, and the appellant has not filed a transcript on appeal nor obtained an extension of time in which to file the transcript within six months after the filing of the notice of appeal and has shown no excuse for the laches, the respondents' motion for dismissal of the appeal will be granted.

Action by Santo Catania and another against Saverio Gucccione. Judgment for plaintiffs, and defendant appeals. On motion to dismiss appeal. Motion granted, and appeal dismissed.

S. Santillo, for appellant.

Geo. G. Graham, of Fresno, for respondents.

STURTEVANT, J. This is a motion to dismiss an appeal. The plaintiffs commenced an action to recover a judgment for goods sold. The trial court awarded them a judgment in the sum of $1,034.81. Thereafter the defendant made a motion for a new trial, and the motion was denied, and thereupon the defendant filed in the trial court, on June 22, 1922, a notice of appeal, but the appellant has not caused to be prepared, settled, or filed a bill of exceptions, and there has been no dismissal by the trial court of any proceedings for a settlement of a bill of exceptions. The appellant has not filed in this court a transcript on appeal, nor has he obtained any stipulations or orders extending the time to file the same.

On the 3d day of January, 1923, the respondents served a notice that on the 29th day of January, 1923, at the hour of 2 p. m., they would move that the appeal be dismissed "on the grounds that the same has not been prosecuted to effect, and no transcript or bill of exceptions has been settled, sign-

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ed, and filed as provided by law and the rules of the court." Thereafter, on the 25th day of January, 1923, the respondents and appellant entered into a stipulation that the motion to dismiss might, at the time noticed for the making of the motion, be submitted for decision on the papers then on file, and waived oral argument or notice. Thereafter in due course the motion to dismiss was duly submitted.

The moving papers seem to be regular in every respect. The laches of appellant are patent. No excuse therefor is shown. The motion is therefore granted, and the appeal is dismissed.

We concur: LANGDON, P. J.; NOURSE, J.

---

61 Cal. App. 163

In re GALLO'S ESTATE.

GALBRAITH et al. v. PANINI et al.

(Civ. 2561.)

(District Court of Appeal, Third District, California. Feb. 27, 1923. Hearing Denied by Supreme Court April 26, 1923.)

1. Wills 🔑166(2)—Evidence sufficient to sustain finding of confidential relation.

In a proceeding for revocation of probate of a will, evidence *held* sufficient to warrant finding that relations between decedent and beneficiary were confidential.

2. Wills 🔑324(1)—Determination of sufficiency of evidence for jury on contest based on rules in civil cases.

In determining whether or not in a proceeding to contest a will the evidence produced by the contestants is sufficient to require the submission of the case to the jury, the same rules apply as in civil cases.

3. Wills 🔑326—Every favorable inference considered as facts on motion for nonsuit.

On motions for nonsuit in will contest, every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor of the contestants.

4. Wills 🔑326—Court must take view most favorable to contestants on motion for nonsuit.

On motion for nonsuit in will contest, where the evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the contestants.

5. Wills 🔑326—Evidence contradictory to contestants not considered on motion for nonsuit.

On motion for nonsuit in will contest all the evidence in favor of the contestants must be taken as true, and, if contradictory evidence has been given, it must be disregarded.

6. Wills 🔑324(1)—When question for jury in will contest.

If there is any substantial evidence tending to prove in favor of the contestants of a will all the facts necessary to make out their case, they are entitled to have the case go to the jury for a verdict on the merits.

7. Wills 🔑166(1)—That circumstances are within exclusive knowledge of proponents considered in contest for undue influence.

In a will contest on the ground of undue influence, the evidence must be weighed in the light of the fact that the circumstances surrounding the immediate execution of the will were within the exclusive knowledge of those interested in upholding it, while the opportunity of acquiring such knowledge was withheld from contestants, in view of Code Civ. Proc. § 2061.

8. Wills 🔑82—Not set aside because unjust or unnatural.

A will cannot be set aside on the mere ground that it is unjust or unnatural.

9. Wills 🔑55(10), 166(5)—That will unjust considered on contest for mental incapacity or undue influence.

The fact that a will is unjust or unnatural has weight in determining whether a testator was mentally competent when executing his will or was acting under undue influence.

10. Wills 🔑163(2)—Burden of proof in contest on beneficiary participating in execution.

The mere existence of a confidential relation between a testator and one who unduly profits by the will is not sufficient to overturn it; but, when such beneficiary has actually participated in procuring the execution of the will, the burden is on him to show that the will was not induced by coercion or fraud.

11. Wills 🔑53(1)—Admissibility of evidence to show undue influence.

The fact that a will attempted to dispose of a piano to an adopted child to whom it already belonged was entitled to consideration, however slight, as tending to show that the will was a product of a mind other than that of the testator.

12. Wills 🔑166(12)—Conduct of beneficiaries attending execution by testator dangerously ill subject to close scrutiny.

The circumstances attending the execution of a will by a testator who is dangerously ill, and expecting to die, at a time when he is surrounded exclusively by those who benefit by it, are subject to close scrutiny, and successful efforts of beneficiaries to keep contestants out of testator's presence at times vital to beneficiaries' purpose, as alleged in the petition, are entitled to weight.

13. Wills 🔑166(12)—Circumstantial evidence sufficient in will contest.

In building up a case on circumstantial evidence in a will contest, it is not necessary that any single fact proved, standing alone, shall establish the issue of undue influence, but it is sufficient if all the facts and circumstances given in evidence, considered together, lead to a rational inference that the ultimate fact is as alleged.

14. Wills 🔑324(3)—Undue influence held for jury.

In a will contest, *held*, that there was sufficient evidence to go to the jury on the issue of undue influence.

15. Wills 🔑164(1)—Nationality and relative ages of testator and beneficiaries held material in will contest.

In contest of will on ground of undue influence, the nationality of beneficiaries and testator and their relative ages were material.

16. Wills 🔑164(4)—Assistance in accumulation of property by contestant admissible.

Contestants of will had the right to show that the property of decedent had been accumulated in part by the efforts of a contestant because tending to prove that the will was the more unnatural.

17. Wills 🔑164(3)—That contestant children had little property admissible to show unnaturalness of will.

That contestant children owned little or no property was admissible in will contest, because it would be more unnatural for a parent to disinherit children having limited means of support.

18. Wills 🔑164(5)—Evidence of attempts to prejudice testator's mind admissible.

In will contest on ground of undue influence, contestant children had the right to show that any of the beneficiaries had attempted to prejudice the testator's mind against either contestant.

19. Wills 🔑164(5)—That beneficiaries did not notify contestants of illness of decedent admissible.

In a will contest on ground of undue influence, contestant children had the right to show that beneficiaries having decedent in charge at time of dangerous illnesses did not notify contestants thereof.

20. Wills 🔑164(5)—Attempt to procure execution of will admissible on issue of undue influence.

Contestants of will had the right to show the activity of one of the beneficiaries in trying to procure the execution of a will by decedent.

21. Wills 🔑165(4)—Declarations of testator admissible to show feelings and desires.

Declarations of testator are admissible in contest of will on ground of undue influence to show decedent's feelings and desires with respect to contestants, and as bearing upon his state of mind.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

In the matter of the estate of Annie Gallo, deceased. Proceeding by Esta F. Galbraith and another against Dario Panini and others, for revocation of probate of will. From a judgment of nonsuit, contestants appeal. Reversed.

A. H. Ashley, of Stockton, for appellants.

Arthur L. Levinsky and R. J. Jeffry, both of Stockton, for respondents.

FINCH, P. J. The will of the decedent was duly admitted to probate, and thereafter appellants filed their petition for revocation of the probate thereof. At the close of contestants' case the court granted a nonsuit, and entered judgment of dismissal. The contestants have appealed from the judgment.

The contestants alleged mental incompetency, undue influence, fraud, menace, conspiracy, and want of due execution. Appellants' brief is not arranged in accordance with Supreme Court rule VIII (176 Pac. ix), requiring the presentation of "each point separately, under an appropriate subheading, showing the nature of the question to be presented," but it sufficiently appears that appellants contend the evidence warrants the submission to the jury of the issues of mental incompetency and undue influence, at least. It is charged that such undue influence was exercised by Dario Panini, Rose Bacigalupi and Lena Ciari, beneficiaries under the will.

[1] It appears from the evidence that in the year 1897 the decedent resided with her husband, Giacomo Gallo, in the city of Stockton. They had but one child, John Gallo, one of the contestants, who was then of the age of about 10 years. July 24, 1897, they took into their home Esta F. Badua, now Esta F. Galbraith, the other contestant, who was then a babe in arms. Esta was treated in all respects as their own child, the fact that she was not such being concealed from her, and in 1907 she was legally adopted by them. At all times up to her death Mrs. Gallo manifested the greatest affection for Esta, and a motherly pride in her accomplishments. January 19, 1911, Giacomo Gallo died. Prior to his death he conveyed all of his property to his wife. He and a Mr. Bardoni were partners in the saloon business, and after his death contestant John Gallo took his father's place in the management of the saloon, and Mrs. Gallo later acquired Bardoni's interest therein. John continued in the management of the saloon until October, 1917, when his mother commenced an action against him for possession of the saloon, alleging that he claimed to be the owner thereof; that he refused to account to her for the proceeds of the business, and threatened her life if she attempted to eject him. She recovered judgment against him, and John thereafter had nothing to do with her business or the management of her affairs, but engaged in business for himself in Stockton. He was married, and lived with his wife in his own home.

Dario Panini occupied a room in the Gallo home from June, 1909, to the time of Mrs. Gallo's death. He began taking his meals there some time prior to her husband's death, and continued to do so at all times thereafter. His laundry was sent out with that of Mrs. Gallo, and he seems to have been treated as would be a member of the family. He was a barkeeper at the saloon at all times after 1911, having been employed by John. When John was ousted Panini succeeded him as manager, and continued as such at all times thereafter. Under her direction he paid all bills, including grocery, household, and all other bills. She paid him wages. She was paying him "wages at the time of her death, and right along." After the advent of prohibition he conducted a soft drink place for her, and received half of the profits. During the last 18 months of her life she was ill more or less. Her brother, Peter Foppiano, who with his young daughter lived at Mrs. Gallo's home, seems generally to have taken care of her during such illnesses, though Panini sometimes took care of her, and sat up with her at night "more than once." Panini testified that "during most all of that 18 months there was not a single night that Mrs. Gallo was home that there was a woman in the house with her all night." While she was in the hospital, Panini visited her twice a day. He acted as her agent in the sale of her lease of the saloon building. He had the keys of her safe when she died. The jury would have been warranted in finding that the relations between Mrs. Gallo and Panini were confidential.

Rose Bacigalupi and Lena Ciari are surviving sisters of the decedent, both residing in Stockton. They manifested a sisterly interest in the care of Mrs. Gallo during her illness, visiting her frequently, and administering to her wants. Louis Bacigalupi, the executor, is the husband of the former sister, and Peter Ciari, a subscribing witness to the will, is the husband of the latter. The mother, a third sister, and four brothers survived the decedent. Her mother was a widow, residing in Stockton, and in needy circumstances. The third sister was a widow, dependent upon her children for support.

Esta was married May 5, 1917, and she thereafter resided with her husband in Stockton until some time in 1918, when they went to San Francisco, where they thereafter resided. They seem not to have been in affluent circumstances, both being in employment, and living in a small flat. During her childhood Esta was sent to grammar school, and later to high school. John and his father purchased and gave Esta a piano. Mrs. Gallo knew at all times that the piano belonged to Esta, and after the latter's marriage recognized Esta's right to take the piano whenever she chose, though it was left with Mrs. Gallo because Esta did not have room for it in her flat. Esta was given musical instruction, and Mrs. Gallo took pride in her daughter's ability to play the piano. Both before and after Esta's marriage Mrs. Gallo was accustomed to calling her "my baby," and at all times both displayed a great affection for each other, frequently visiting each other after Esta's marriage. While residing in San Francisco, Esta wrote Mrs. Gallo regularly three times a week, and frequently called her up by long distance telephone. At one time Mrs. Gallo arranged to pay for such calls, because she thought the expense was too great for Esta to pay. For many years Mrs. Gallo was in the habit of talking with her acquaintances about the good qualities of her children, especially Esta, and telling such persons that John and Esta would receive all of her property at her death. A large number of these acquaintances testified at the trial. Their testimony shows a steadfast purpose on the part of Mrs. Gallo to give her property to her children. During 1920 Mrs. Gallo was in a hospital from February 26th to March 19th, from April 19th to April 24th, and from July 10th to July 31st. She died August 27, 1920. Shortly before she was first taken to the hospital she said she had her property "all fixed up for my baby and my boy Johnnie." April 18th, the day before the will in suit was executed, she told one of the witnesses, in the presence of Panini, that she had made a will "leaving equal shares of her estate; that she thought it was the only right way to do." Frequently thereafter and up to within a few days of her death, she stated that she had willed her property to her children. The foregoing testimony was given by so many apparently disinterested witnesses that the truth thereof cannot well be doubted, even if the rule governing the disposition of motions for nonsuits did not require that full credence be given thereto. Mrs. Gallo's affection for Esta continued to the very last. The night before her death she said that "she was going to take a trip to Los Angeles and on her way back she was going to go and see her baby Esta in San Francisco."

The testimony shows that, after the termination of Mrs. Gallo's litigation with her son, their relations were friendly. He visited her on an average of once a week. She offered to assist him in his business. She gave him "jellies, mushrooms, or anything she had cooked" to take home. In 1918, in conversation with a man who had been a witness for John at the trial of the case brought against him by Mrs. Gallo, she said that "she didn't have anything against Johnnie, but against the daughter-in-law, Nellie, and (in suing him) she was doing it to protect Johnnie." John's wife died December 31, 1919. In July, 1918, she said to her son:

"If you want to go in any kind of business, why come down, if I can help you, because it was your money. You are entitled to it. You made it." On this appeal it must be assumed that there was no estrangement existing at the time the will was executed.

The persons to whom the decedent's property was given by the will and the inventory values thereof are as follows: John Gallo, 160 acres of land, $12,000; Esta Galbraith, $10 and piano, $100; Lena Ciari, victrola, $75; Rose Bacigalupi, trunk, linens, and diamonds, $864; Dario Panini, residue of estate, $30,871.88. That the will is unnatural and unjust in giving the bulk of the estate to Panini, is apparent. Esta was the owner of the piano, and hence received but $10 under the will. It is most unnatural for a woman, without cause, to disinherit a daughter for whom she had entertained the greatest affection to the very last in favor of one to whom she owed no duty or obligation. The fact that Esta is an adopted daughter, rather than of the decedent's own blood, is not material, because it must be assumed that the decedent acted in good faith when, in the adoption proceeding, she agreed to treat Esta in all respects as her own lawful child should be treated. Civ. Code, § 226. After adoption the two sustained towards each other the legal relation of parent and child, and had all the rights and were subject to all the duties of that relation. Civ. Code, § 228.

At the time of the preparation and execution of the will the decedent was surrounded by those who benefit by its provisions, and the son and daughter had no knowledge of the serious illness from which their mother was suffering. Mrs. Gallo was taken to the hospital February 26, 1920, and it appears that an operation was performed the next day, by which a large number of gallstones were removed. Panini testified: "Dr. Craviotto examined her, and then he came out and he says, exactly like that, 'Best somebody tell her to fix up her will,' or something about, before she go operation, on table. That was the first operation, in February. * * * I sent for Mr. Jeffry at that time. I went and told him Mrs. Gallo wanted to see him. * * * Mrs. Bacigalupi did not tell me to go and tell Mr. Jeffry that. Dr. Craviotto told me at that time it was a very tough matter. * * * He come out and says, * * * 'The operation is awful dangerous.'" It does not appear that Panini had any conversation with Mrs. Gallo about making a will, or that she directed him to call Jeffry. Jeffry went to the hospital on that day, but it does not appear what, if anything, was then done relative to Mrs. Gallo's affairs. With full knowledge of the dangerous operation Mrs. Gallo was to undergo, none of the beneficiaries under the will notified John of the fact, but he was informed of his mother's condition, after 7 o'clock in the evening of the day she was taken to the hospital, by a Mrs. Gianelli, and he immediately drove out to see his mother.

Mrs. Gallo returned to her home March 19th, and was up and about for a month. In the forenoon of April 19th she became violently ill again. One witness, F. J. (Joe) Green, testified that Mrs. Gallo was in such agony that "she hollered to me, 'Oh, my God, Joe, what will I do, what will I do!' and she was just about * * * to tear the night gown off of her; * * * tore it right off at the shoulder." Peter Foppiano telephoned to Jeffry that Mrs. Gallo wanted to see him. Jeffry went to her home, and evidently had a consultation with her. He then left the house, and presumably prepared the draft of the will in question, the same being typewritten. Mrs. Bacigalupi testified that, in the forenoon of that day, Mrs. Gallo "was sick, too sick to talk of anything. In the afternoon we took her out to St. Joseph's Home; so I think nobody can make a conversation when they are so sick to be taken out to St. Joseph's Home; I don't think so, myself. She certainly felt very much better after she got to St. Joseph's Home." This answer was given in reply to a question as to what she and her sister talked about at Mrs. Gallo's home on the 19th. John testified that, after learning of his mother's illness on the 20th of April, he went to the hospital, arriving there after 7 o'clock in the evening, and that his mother then had a high fever, and "was lying there, groaning." The will was executed at the hospital. Mrs. Bacigalupi testified that she saw her sister sign a paper there, but she did not know whether it was a will, and that Peter Ciari and Mr. Jeffry, the subscribing witnesses, signed it. Again John was not notified of his mother's illness, but learned the next day, from some one not a member of the family, that his mother was in the hospital. Mrs. Gallo returned home on the 24th of April, and seems to have suffered no further violent illness until July 10th, when she was again taken to the hospital, where she remained until July 31. During that time a second operation was performed.

About 8 o'clock in the morning on August 26th she became very ill, and apparently gave up hope of recovery. She said to Mrs. Bacigalupi: "Don't leave me alone. * * * I am going to die." She died the next morning at 20 minutes to 7 o'clock. In the presence of Mrs. Gallo's approaching death no word was sent by any of the beneficiaries to either of the children, though John was in Stockton. Mrs. Gianelli testified that between 5 and 6 o'clock in the evening of the 26th Mrs. Bacigalupi "came to my house and said that her sister was dying, * * * and that she knew she was going to die. And I then asked her if she had notified the children; if John, or John Gallo knew. She said 'No;' that he didn't know it; that she didn't want him, because he would send for the sister in the city, if he knew the mother was dying, and that they didn't want her." Mrs. Bacigalupi denied having made the statement, but on motion for a nonsuit Mrs. Gianelli's testimony was entitled to full credit. Mrs. Bacigalupi testified that she did not notify Esta of her mother's condition, and explained: "I didn't know her address, and I didn't send no message to her." She did not testify that she made any effort to learn Esta's address. It is apparent that she would have had no difficulty in ascertaining such address if she had endeavored to do so.

Mrs. Gianelli testified that Mrs. Gallo "seemed to be frightened about going to have an operation. * * * She thought she was going to die. * * * She was sick, and very miserable, nervous; had headaches, and seemed as though she was sick all over. * * * She was * * * very, very sallow at that time. * * * She was sick in general, all over, especially her head. With reference to her head, she just said she had awful headaches. * * * She would lay down her glasses, or something—her purse or something. * * * Then she would have to look for it. She would then say: 'I think I am going crazy.' * * * The latter part of 1919 she used to say that she would get those periodical spells; she was at one time better; then, again, she would get worse with those pains that she had, and the gallstones; and the doctor told her she would suffer headaches, and that seemed to be periodical. * * * She almost incessantly spoke of being ill." Eugene B. Podesta testified that after Mrs. Gallo returned from the hospital the second time she "said she almost died." Clarence A. Garrett testified that in 1918 Mrs. Gallo said "If she didn't get a change and the people would leave her alone, she was losing her mind. She couldn't remember nothing. She had to get away from them. I told her * * * to forget it; that she was a young woman yet; to get away from it. She said she couldn't; that it kept preying on her mind all the time. * * * She said the only trouble she ever had between her and her son was other people interfering. * * * I saw her crying or nervous more than once. * * * She said she was losing her mind on account of people preying on her."

F. J. Green testified that "shortly before the first operation" Mrs. Gallo said that "the way she felt, she was going to be pretty sick; liable to die. * * * She was worried about her money matters. Ever since her place was out of business, seemed to worry her." Mrs. Molini testified that two or three weeks before her death Mrs. Gallo said that "somebody was talking about her children, and she told me that she didn't like anybody to talk about her children. If there was any talking to do, she would do that herself." John Gallo testified that when he visited her the evening of April 20th "she talked fair. I says: 'Awful funny you come out to the hospital and don't let one know;' and she says: 'I told them to tell you.' I says: 'Who?' And she says: 'Lolly and Panini.' * * * Lolly is her brother, my uncle, Peter Foppiano. * * * Peter Foppiano or Mr. Panini had not given me any information that she was ill or at the hospital, no time. When I told her they had not let me know, she says: 'Kind of funny; I told them.' I says: 'Maybe they didn't want me to know; maybe they got things fixed up to suit themselves.' * * * She said: 'If I get better this time, nobody will get my money. I am going to have my dear friends—' I says: 'There is no one looking for your money, that I know of, unless it is your dear friends.' And she says: 'Well, I think so too.' * * * She said she had pains; the pains were choking her—suffocating her. She was kind of throwing herself back. * * * The next day she said they didn't feed her much. * * * She complained about not getting enough to eat. And I saw a tray setting there. She didn't eat but part of what was on the tray." He said that when Panini was present in his mother's home she "just looked to be so scared and nervous—shaking like."

Mrs. Eberhardt testified that she observed Mrs. Gallo's manner during the years 1919 and 1920, and that "at times I really thought that she sometimes did not really know what she was talking about. * * * At times I thought she used to act very excitable;" that before the first operation "she made the remark that she was bothered." Of the many witnesses examined by contestants, none expressed an opinion as to the mental sanity of decedent. Mrs. Bacigalupi testified that her sister was of sound mind. She admitted that once or twice before Esta's marriage she referred to Esta, in Mrs. Gallo's presence, as the "queen," and said "she had a good home and didn't appreciate it." John Gallo testified: "I first learned that my mother had made a will the morning she died, about 10 minutes after having taken her out of the house. Mrs. Bacigalupi, Pete Foppiano, and Panini were present, and there was some other gentlemen. * * * They were talking together. Mrs. Bacigalupi said the will was made; if the 'queen' knew what she was going to get, she couldn't buy very much with it." Mrs. Bacigalupi testified that she did not make such statement, and that "my first information that my sister had left a will came when I seen it in the paper." She and Panini both testified that they never talked with Mrs. Gallo about making a will or suggested to her the manner in which she should dispose of her property.

From the evidence as a whole it may fairly be inferred that Mrs. Gallo was unable to read or write, except that she was able to write her name. The will declares that the testatrix thereby revokes and annuls "all former wills and codicils by me made." Other than this provision of the will the evidence is silent as to whether she had made a prior will. Her declarations, made prior to April 19th, to the effect that she had made a will, of course, are not competent evidence of the fact so stated. Mr. Ashley, attorney for contestants, was attorney for Mrs. Gallo in her suit against her son. Both before and after April 19th, she stated that her will was in his possession. Her apparent confidence thus manifested in the attorney who had successfully conducted her litigation in the past suggests the query whether the selection of another attorney to draw her will was her own act. These facts are entitled to consideration in connection with other circumstances, in determining the issue of undue influence.

[2-7] The rules governing the dispositions of motions for nonsuits are well settled.

> "In determining whether or not in a proceeding to contest a will, the evidence produced by the contestants is sufficient to require the submission of the case to the jury the same rules apply as in civil cases. Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor of the contestants. Where evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the contestants. All the evidence in favor of the contestants must be taken as true, and if contradictory evidence has been given it must be disregarded. If there is any substantial evidence tending to prove in favor of the contestants all the facts necessary to make out their case, they are entitled to have the case go to the jury for a verdict on the merits." Estate of Arnold, 147 Cal. 583, 586, 82 Pac. 252, 253; Estate of Ricks, 160 Cal. 450, 117 Pac. 532; In re Ross, 173 Cal. 178, 159 Pac. 603; Estate of Campbell, 46 Cal. App. 612, 189 Pac. 812.

Applying the foregoing rules, it sufficiently appears from the evidence: (1) That at the time Mrs. Gallo presumably gave directions for the preparation of the will, and at the time she signed it, she was troubled in mind, weakened in body, and suffering greatly from a serious illness; (2) that the will is very unnatural and unjust; (3) that Panini selected the attorney who drew the will, knowing that such attorney was not the one who had theretofore attended to Mrs. Gallo's legal affairs; (4) that Mrs. Bacigalupi, charged with undue influence, entertained a settled dislike for Esta; (5) that the testatrix was surrounded exclusively by those who benefit by the terms of the will; (6) that the beneficiaries thereunder designedly refrained from notifying the son and daughter of their mother's dangerous illness, at times when the presence of the children would naturally have tended to frustrate any purpose the beneficiaries may have had to influence the testatrix in the disposition of her property. The evidence must be weighed in the light of the fact that the circumstances surrounding the immediate execution of the will were within the exclusive knowledge of those interested in upholding it while the opportunity of acquiring such knowledge was withheld from contestants. The latter were under the necessity of calling the defendants as witnesses to prove the circumstances attending the execution of the instrument. The unfortunate situation of contestants cannot dispense with proof of their case, but "evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict." Code Civ. Proc. § 2061.

[8, 9] The law is settled beyond controversy in this state that a will cannot be set aside on the mere ground that it is unjust or unnatural. Estate of Wall, 187 Cal. 50, 200 Pac. 929; Estate of Baird, 176 Cal. 381, 168 Pac. 561; Estate of Martin, 170 Cal. 657, 151 Pac. 138; Estate of Lavinburg, 161 Cal. 536, 119 Pac. 915. Such facts, however, have weight in determining whether a testator was mentally competent at the time of executing a will (Estate of Martin, 170 Cal. 657, 151 Pac. 138; In re Wilson, 117 Cal. 262, 49 Pac. 172, 711; Field v. Shorb, 99 Cal. 661, 34 Pac. 504, or was acting under undue influence (Estate of Snowball, 157 Cal. 301, 107 Pac. 598). The weight to be given such evidence depends upon how far the provisions of the will depart from what would be natural. As bearing upon the importance which courts have given to unnatural provisions in wills, it may be noted that in some states, where a testator has left his property to strangers in blood, to the exclusion of his wife or children with whom he had lived on apparently friendly terms, evidence of such facts has been held sufficient to shift the burden of proof and to require the proponents of the will to show "that it was the free and deliberate offspring of a rational, self-poised, and clearly disposing mind." 1 Redfield on Wills, p. 537; Schouler on Wills, Executors and Administrators (5th Ed.) § 77; Mullen v. McKeon, 25 R. I. 305, 55 Atl. 747; Lancaster v. Alden, 26 R. I. 170, 58 Atl. 638; Gay v. Gillilan, 92 Mo. 251, 5 S. W. 7, 1 Am. St. Rep. 712; Weston v. Hanson, 212 Mo. 248, 111 S. W. 44; Harrel v. Harrel, 1 Duv. (62 Ky.) 203; Johnson v. Shaver, 41 S. D. 585, 172 N. W. 676.

[10-14] The mere existence of a confidential relation between a testator and one who unduly profits by the will is not sufficient to

overturn it, but, when such beneficiary "has actually participated in procuring the execution of the will, the burden is on him to show that the will was not induced by coercion or fraud." Estate of Baird, 176 Cal. 381, 384, 168 Pac. 561; Estate of Ricks, 160 Cal. 450, 117 Pac. 532; Estate of Lavinburg, 161 Cal. 536, 119 Pac. 915; Estate of Packer, 164 Cal. 525, 129 Pac. 778. The fact that the will attempts to dispose of the piano which belonged to Mrs. Galbraith, whose ownership Mrs. Gallo knew and recognized, is entitled to some consideration, however slight, as tending to show that the will was the product of a mind other than her own. "Such fact would make the will more unnatural, and although it would not prove undue influence, it would be a proper circumstance to be considered in connection with other facts tending to prove such influence." In re Ruffino, 116 Cal. 304, 317, 48 Pac. 127, 130. The circumstances attending the execution of a will by a testator who is dangerously ill and expecting to die, at a time when he is surrounded exclusively by those who benefit by it, are subject to close scrutiny. Goble v. Grant, 3 N. J. Eq. 629; In re Knight's Will, 87 Misc. Rep. 577, 150 N. Y. Supp. 137. In addition to the foregoing, the successful efforts of the beneficiaries to keep the son and daughter out of their mother's presence at times vital to the defendant's purpose, as alleged in the petition, are entitled to weight. In building up a case on circumstantial evidence, it is not necessary that any single fact proved, standing alone, shall establish the issue, but it is sufficient if all the facts and circumstances given in evidence, considered together, lead to a rational inference that the ultimate fact is as alleged. Of course, it is not intended to intimate that the weight of the evidence is on the side of one party or the other, but it is held that there was sufficient evidence to go to the jury on the issue of undue influence.

[15-20] Many rulings of the court in the admission and rejection of evidence are assigned as errors. In several instances the testimony ruled out was later admitted. Of the more than 300 exceptions noted a comparatively small number have merit. In view of the fact that contestants were compelled to make out their case on circumstantial evidence, together with the testimony of defendants, they were entitled to as great latitude as the rules of evidence will permit. Panini testified that he was born in Italy December 26, 1875. The court struck out this testimony as immaterial. Since Panini was charged with undue influence, in determining the probability of such having been exercised and the probable effect thereof upon Mrs. Gallo, the nationality of both and their relative ages were material. Without considering all of appellants' contentions specifically, it may be said generally that contestants had the right to show that the property of decedent had been accumulated in part by the efforts of the son, because such evidence would tend to prove that the will was the more unnatural (In re Wilson, 117 Cal. 262, 280, 49 Pac. 172, 711); that the children owned little or no property, because it would be more unnatural for a parent to disinherit a son or daughter, having limited means of support than one who was in affluent circumstances; that any of the beneficiaries had attempted to prejudice the testator's mind against either contestant; that such beneficiaries, having Mrs. Gallo in their charge at times of her dangerous illnesses, did not notify the son and daughter thereof. While Louis Bacigalupi was on the witness stand he was asked whether, on the 19th day of April, 1920, his wife, Rose Bacigalupi, said to him: "You hurry up and go and make Annie's will. She wants to make a will." The court sustained defendants' objection to the question on the ground that no foundation had been laid, in that Mrs. Bacigalupi had not been asked while on the stand whether she had made such statement. The court seems inadvertently to have overlooked the fact that the question was not asked for purposes of impeachment, but to show the activity of Mrs. Bacigalupi in trying to procure the execution of a will by decedent. Such activity would be a circumstance to be considered on the issue of undue influence.

[21] While the declarations of the testator were admissible to show her feelings and desires with respect to her children, and as bearing upon her state of mind, the conclusion that there was sufficient evidence to go to the jury on the issue of undue influence is not based upon the assumption that such declarations as to any past event are competent proof of such event.

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

60 Cal. App. 725

CARLETON v. BONHAM et al. (Civ. 4081.)

(District Court of Appeal, Second District, Division 1, California. Feb. 8, 1923.)

1. Appeal and error 🔑1058(1)—Sustaining objection not prejudicial where matter objected to immediately afterward admitted.

Where an objection to testimony is sustained, but no motion to strike out is made, and the matter objected to is immediately afterwards brought out without objection, no prejudice results from the fact that the objection was sustained in the first instance.

2. Appeal and error 🔑237(2), 692(1)—Exclusion of evidence not prejudicial error in absence of motion to strike, record not showing what answer would have been.

In a suit to set aside certain deeds, exclusion of evidence was not reversible error where no motion to strike out the incomplete answer was made, and the record did not show what the answer would have been if the witness had been permitted to finish it.

3. Witnesses 🔑240(2) — Leading questions within discretion of court.

It is within the discretion of the trial court to permit leading questions.

4. Evidence 🔑471(14) — Question as to whether grantor appeared to be a mentally keen woman, calling for appearance, held proper.

In a suit to set aside certain deeds on the ground of undue influence, a question whether in all her business transactions at the bank grantor appeared to be keen mentally, and a business woman, was proper as calling for appearances, and not for a state of facts.

5. Appeal and error 🔑1053(1)—Striking evidence held to cure error, if any, in its admission.

Striking a statement objected to from the record *held* to cure the error in its admission, if any.

6. Witnesses 🔑206—Communications by client to attorney in presence of third person not "privileged communications."

Communications made by a client to his attorney in the presence of third persons are not privileged within Code Civ. Proc. § 1881, subd. 2.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Privileged Communication.]

7. Deeds 🔑203—Evidence as to grantee's relationship and position in household of grantor held admissible on question of undue influence.

In a suit to set aside deeds made by a mother to her daughter on the ground of undue influence, it was not error to admit evidence by the daughter as to what work she did during the early years of her life at home with her mother; the relationship and position of the daughter in the household of her mother being material, relevant, and competent.

8. Witnesses 🔑167—Evidence as to value of property concerned held not inadmissible under statute.

In a suit to set aside a deed from a mother to her daughter on the ground of undue influence, evidence as to a conversation between grantor and grantee concerning some furniture, and of a statement by the grantee regarding the value of the amount of her share of the income property, was not inadmissible as in violation of Code Civ. Proc. § 1880, disqualifying certain persons from testifying as to matters occurring before death of a decedent; such section being inapplicable.

9. Deeds 🔑203—Evidence as to joint bank account between grantor and grantee held admissible as showing relationship.

In a suit to set aside a deed from a mother to her daughter on the ground of undue influence, evidence by the daughter that her husband gave her some checks which were later deposited in the joint bank account of the mother and daughter was not inadmissible, it having a direct tendency to show the business dealings and relationship existing between the mother and daughter as to the joint banking account.

10. Witnesses 🔑388(2)—Impeaching question without foundation laid improper.

Where no proper foundation for an impeaching question has been laid, an objection thereto is properly sustained.

11. Deeds 🔑72(1)—"Undue influence" sufficient to avoid deed defined.

Undue influence in the execution of a deed must arise from a confidence reposed by the grantor in the grantee, with the added feeling on the part of the grantor that the grantee has some power or authority over him, and it must appear that such power or authority was used by the grantee on the will of the grantor for the purpose of obtaining an unfair advantage of his weakness of mind or body, or of his necessities or his distress, and that such feeling of power and authority on the part of the grantor was actually present and operating upon his mind with such pressure as to overpower the mind and overcome the volition of the grantor at the very time the deed was executed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Undue Influence.]

12. Gifts 🔑47(3)—Burden on grantee in gift deed to show that it was voluntarily made.

In a suit to set aside a deed by a mother to her daughter, where it appeared that the mother lived in the household of the daughter, that she was aged and feeble in body, and that opportunity for undue influence existed, the burden was upon the grantee to show that the gift was made freely and voluntarily, and with perfect understanding of its effect.

13. Deeds 🔑211(4)—Finding that undue influence had not been exercised sustained.

In a suit to set aside certain deeds made by a mother to her children, wherein it appeared that the mother was aged and feeble in body, and that an opportunity for undue influence existed, evidence *held* to sustain a finding that undue influence had not in fact been exercised.

14. Appeal and error ⚷1011(1)—Fact findings of court on conflicting evidence not disturbed.

Where fact findings by the trial court are based on conflicting evidence, they will not be disturbed on appeal.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Melville B. Carleton against Anna Bonham and others, to set aside certain deeds. Judgment for defendants, and plaintiff appeals. Affirmed.

James L. Allen, of Santa Ana, and J. W. Hocker, of Los Angeles, for appellant.

A. C. Verge and O. V. Willson, both of Los Angeles, and C. L. Brown and Joseph F. Seymour, both of El Centro, for respondents.

HOUSER, J. In this action Melville B. Carleton sued his sister, Anna Bonham, and her husband, Lyman L. Bonham, and his sister's five children and his own daughter, Ruth Melrose Carleton, for the purpose of having set aside and canceled certain deeds made in favor of the several defendants by the mother of the plaintiff and his said sister. The plaintiff charges the defendants with having obtained the deeds by means of fraud and undue influence exerted and practiced by them upon the mother at a time when she was sick and incapable of transacting any business. The court found against plaintiff on all the material issues of the complaint, and directed judgment in favor of the defendants, from which judgment plaintiff appeals.

It appears that the mother, Lydia E. Hildreth, was a widow of the age of 72 years at the time the deeds which are sought to be canceled were executed; that she was an invalid, and had suffered greatly for many months prior to her death; that she was possessed of considerable property, located in the city of Brawley, Cal., worth approximately $25,000, and that she had lived for several years with her daughter, Mrs. Bonham, and her husband and children. Mrs. Hildreth died on the 15th day of December, 1920. On October 18, 1919, in consideration of "labor performed" by Lyman L. Bonham, Mrs. Hildreth deeded to him one of the pieces of property which is the subject of one of the attacks by plaintiff herein. On October 30th of the same year Mrs. Hildreth made her will, by which she devised all the other pieces of property, and her devisees under that will were the same as the grantees in the several deeds which are the subject-matter of this suit—the only difference between her will and her deeds being that in the will she devised one particular lot, together with its improvements, etc., to the plaintiff and Mrs. Bonham in equal shares, while in the deed she granted that particular lot to the defendant Anna Bonham alone. That piece of property is estimated to be worth $8,500. There is another difference between the will and the deeds, which is that, where by the will a particular lot was devised to one of the children of Mrs. Bonham and another lot to another of her children, by the deeds these children exchanged places as to those particular lots. All these deeds were executed on the 29th day of December, 1919. All the property owned by Mrs. Hildreth was located in Brawley, with the exception of an equity in certain property in Orange county, which equity she deeded to plaintiff. That equity was worth about $640. She also deeded to plaintiff one of the lots in Brawley, the value of which was estimated to be about $1,000. There were 11 different pieces of real property, and Mrs. Hildreth made a separate deed for each piece. The income property was granted by these several deeds to Mrs. Bonham and to one or more of her children. Some of the unproductive property was granted to some of the other children of Mrs. Bonham, and some of it was granted to Mr. Carleton and to his daughter, Ruth Melrose Carleton. The deeds, with the exception of the one conveying the Orange county property to plaintiff, were all recorded on the 31st day of December, 1919; but the plaintiff first learned of the execution and recording of the several deeds to which he takes exception on January 17, 1920, at a time when his mother was very ill.

In December, 1919, which was perhaps a month or six weeks after the will was drawn, Mrs. Hildreth, who for about two months before that time had been living in a cottage with a colored woman named Mrs. Smith, who was a janitress, and who looked after Mrs. Hildreth at night and prepared some of her meals for her, went to live with her daughter, Mrs. Bonham, in one of Mrs. Hildreth's houses in Brawley. Mrs. Hildreth was on friendly terms with the plaintiff, who lived in Los Angeles, and during the last few months of Mrs. Hildreth's life she visited her son in Los Angeles, and he visited his mother at Brawley on one or two occasions. Mrs. Hildreth and Mrs. Bonham had joint checking accounts in two different banks at Brawley, and Mrs. Bonham had an individual checking account.

[1] 1. Appellant has specified many particulars by which he contends that the court committed prejudicial error as to his rights. His first specification of error is that the court erred in excluding the testimony of the witness Mamie Smith, as follows:

"Q. How was—tell the court her condition at that time. A. When I went in she was so bad off she asked me, 'Where is Mel?'

"Mr. Brown: Now we object to what was said.
"The Court: Sustained."

Immediately following the order of the court sustaining the objection, the following occurred:

"Q. Was Mrs. Bonham present? A. She let me in; she told me to go in.
"Q. Was she there when her mother asked you where Mel was? A. Yes, sir; and I turned to Mrs. Bonham, and said, 'Why don't you write to him and tell him?'
"Q. What did her mother say about that? A. She asked me to go tell Mel that she wanted him."

It will be noted that, although the objection was sustained, no motion was made to strike out. Furthermore, that the same matter to which objection was made came in immediately afterward without objection; consequently appellant could not have been prejudicially affected by the fact that the objection was sustained in the first instance.

[2] 2. The second specification of error is that the court erred in excluding the testimon of Mrs. Ida Burger, as follows:

"A. When the little girl came to me, she (Mrs. Hildreth) was wringing her hands and screaming and crying and going on because she was all alone, and didn't have any place to die in where she could have peace and comfort. She said, 'Ada, I have done for every one—
"Mr. Brown: Object to that.
"The Court: Any statements she made can't be competent."

From an examination of the transcript it appears that the question which brought out the matter to which counsel refers was put to the witness by one of the attorneys for defendants, and that the objection to the answer was not made by either of the attorneys for plaintiff, but was made by another of the attorneys for defendants. Moreover, there was no motion by any of the attorneys to strike out, and the record is silent regarding any effort to show what the witness would have testified to had she been permitted to finish her answer. Certainly no prejudicial error may be predicated on such a record.

3. The third specification of error relates to the overruling of an objection to a question asked by one of the attorneys for defendants of a witness who was a bank clerk in one of the banks where Mrs. Hildreth had her joint checking account with Mrs. Bonham, and with which clerk Mrs. Hildreth generally transacted her banking business—the record showing as follows:

"Q. I'll ask you whether in all her business transactions at the bank she appeared to be keen mentally and a business woman.
"Mr. Allen: Objected to as incompetent, irrelevant, and immaterial; no foundation laid, and directly leading; calling for a conclusion.
"The Court: Overruled.
"A. She did."

Counsel argues that—

"Neither the question nor the answer thereto referred to any period of time, and therefore incompetent, and as to whether or not she was a business woman, is both irrelevant and immaterial. The question clearly calls for a conclusion and is leading."

[3, 4] The transcript of the testimony fairly shows that the time referred to was, at most, not more than a year before the death of Lydia E. Hildreth. While the question was somewhat leading, it was clearly within the discretion of the court whether or not to permit it to be answered. Besides, the question merely called for appearances—not for a state of facts. That such a question is proper, see Holland v. Zollner, 102 Cal. 636, 36 Pac. 930, 37 Pac. 231; Robinson v. Exempt Fire Co., 103 Cal. 5, 36 Pac. 955, 24 L. R. A. 715, 42 Am. St. Rep. 93; In re Wax, 106 Cal. 350, 39 Pac. 624; People v. Manoogian, 141 Cal. 596, 75 Pac. 177; People v. Wong Loung, 159 Cal. 533, 114 Pac. 829.

4. Specification of error No. 4 has to do with the refusal of the court to grant plaintiff's motion to strike out all the testimony given by witness Wilson, because of the fact that the relation of attorney and client existed between him and Mrs. Hildreth. The particular statement made by the witness, to which objection is made, is as follows:

"Mrs. Hildreth called me to her residence, Mrs. Bonham's place, and she was confined to her bed, and asked me to prepare these deeds."

The reporter's transcript on appeal shows, immediately after the foregoing statement, the following:

"Mr. Hocker (attorney for defendants): I move to strike out what Mrs. Hildreth said, if he referred to Mrs. Hildreth telling him to prepare the deeds, for the reason it is incompetent. Move to strike out any conversation or statement made by Mrs. Hildreth with reference to this transaction.
"The Court: I'll grant the motion."

[5] It would therefore appear that, as to that particular statement of the witness, and it being the only objectionable one pointed out by appellant, the error, if any, was cured by the court in granting appellant's motion to strike same from the record. But, assuming the rule to be contrary to what actually is the case, that it is the duty of this court to search the record to determine whether testimony other than that specifically referred to by appellant may possibly come within the specification of error, it still appears that counsel's position is untenable, as illustrated in the case entitled Estate of Nelson, 132 Cal. 187, 64 Pac. 296, where the court, in discussing a question similar to the one here involved, said:

"The proponents afterwards called as a witness Mr. Goad, who had drawn the codicil of October 20th, and, against the objection of the contestants that he was incompetent under section 1881, the court permitted him to testify concerning his interview and conversation with Nelson preparatory to drawing the codicil, and the instructions which he received from Nelson therefor. * * * The communication, as well as the relation between the attorney and his client, ceases to be confidential when it is clearly manifest that it is the intention of the client that the communication should be disclosed, if any occasion therefor should be presented. The consent of the client to such disclosure, which is provided for in section 1881, may be implied, as well as express, and by requesting his attorney to draw his will the client impliedly asks him to do and say whatever may at any time and place be requisite for the purpose of establishing the integrity of the will. Goad had prepared the codicil under the directions of the testator, and, by employing him as his attorney for this purpose, the testator had waived the protection of the statute, and released the attorney from the obligation of secrecy as fully as if the attorney had become a subscribing witness to the will. The client thereby makes the attorney the medium through whom the right which he seeks to create may be established." And see, also, In re Wax, 106 Cal. 348, 39 Pac. 624; Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867; Estate of Dominici, 151 Cal. 181, 90 Pac. 448.

In addition thereto, the testimony given by Mr. Wilson shows that at times Mrs. Bonham was present during the conversations, the testimony referred to being as follows:

"Q. Whom did you talk with when you went to the residence? A. Mrs. Hildreth.

"Q. Was any one present? A. Mrs. Bonham was there.

"Q. She was there each time you were talking with her? A. I think she was.

"Q. And there at the time the deeds were signed? A. I don't know she was there at the time they were signed because she wasn't in the room very much as she was in the house."

[6] If the testimony may be construed to the effect that there was a third person present, there was nothing really confidential about the several conversations between Mr. Wilson and Mrs. Hildreth—the rule in such cases, which is so well understood as to require no citation, being that communications made by a client to an attorney in the presence of third persons are not privileged within the meaning of subdivision 2 of section 1881 of the Code of Civil Procedure.

[7] 5. Specification of error No. 5 deals with an alleged error of the court in permitting Mrs. Bonham, one of the defendants, to testify, over the objection of plaintiff's attorney, as to what work she did during the early years of her life while she was living at home with her mother, the answer being that she lived on a ranch, and did nearly all the housework. In view of the fact that undue influence is one of the issues in this case, the relationship and the position of the daughter in the household of her mother was material, relevant, and competent, and it follows that there was no error committed by the court in admitting the testimony to which objection was made.

[8] 6. In specification of error No. 6 appellant asserts that a conversation between Mrs. Bonham and Mrs. Hildreth concerning some furniture, and in specification No. 7 a statement by Mrs. Bonham regarding the value of the amount of her share of the income property concerned herein—all of which was introduced into evidence by defendants and objected to by plaintiff—amounted to prejudicial error because it was in violation of section 1880, Code of Civil Procedure; but an examination of that section will show that it has no application to a case of this kind.

[9] 7. By specification of error No. 8 it is claimed the court erred in admitting testimony given by Mrs. Bonham to the effect that her husband gave her some checks which the witness later testified were deposited in the joint bank account of Mrs. Hildreth and Mrs. Bonham. The objection that this testimony was incompetent, irrelevant, and immaterial was not well taken, as it had a direct tendency to show the business dealings and relationship existing between the mother and the daughter, especially as to the joint banking account.

[10] 8. Specification of error No. 9 relates to an alleged error by the court in sustaining an objection to a question calling for a conversation, but at the time the objection was made the proper foundation for the question, which was impeaching in its nature, had not been laid; hence the objection was properly sustained. However, as the proper foundation was immediately laid, the witness was permitted to answer the question without objection.

No evidence was introduced which tended to support the general allegation of fraud, and all the remaining specifications of error refer to findings on the issue of undue influence. It is contended that there is no sufficient evidence to support such findings, and that such findings are contrary to the evidence. Contained within the issue of undue influence is the question of the mental capacity of Mrs. Hildreth at the time of the execution of the deeds in question. While there is some testimony in the record to the effect that Mrs. Hildreth was failing in health, and was very weak both before and at the time of the execution of the deeds, and that she was not mentally competent, the evidence taken as a whole preponderates the other way—in fact, it is so satisfactory and convincing on that point that it would be extremely difficult to understand how the judge of the trial court could have reached any different conclusion than he did. It would appear that the finding in that regard is unassailable, and, if counsel's brief is to be taken as an indication of their views thereon, great reliance is not placed on that contention.

Dealing, then, with the remaining general specification of undue influence, the evidence received by the court, as given by three witnesses, was to the effect that about the 1st of September, 1919, which would be about four months before all the deeds but one were executed, Mrs. Hildreth was nervous, crying, and hysterical; that Mrs. Bonham was also crying, and the mother and daughter were quarreling over some bedroom furniture and a lot or some lots—Mrs. Bonham contending that, while Mrs. Hildreth had given the furniture, consisting of a dresser and a commode and a bedstead, to Mrs. Bonham some two years before that time, and Mrs. Bonham had had the use and possession of it during all the intervening period, Mrs. Hildreth at the time they were quarreling had already, in the absence of Mrs. Bonham, taken back the furniture, and then wished to make other disposition of it by dividing it between two of Mrs. Bonham's young daughters; and in regard to the lot Mrs. Bonham was insisting that Mrs. Hildreth deed that lot to Mr. Bonham, as she had theretofore agreed to do, in payment of labor which Mr. Bonham had performed for Mrs. Hildreth. There was also some testimony by one or two of the witnesses, in substance, that Mrs. Bonham had said that, if Mrs. Hildreth would not deed the lot as Mrs. Bonham wished, she would not take care of her mother any longer; also, by one witness, that the mother had said to the daughter, "Anna, I don't want to do that; I don't want to wrong Mel; I want to do the right thing by you both; I want to divide that between the two of you;" and that Mrs. Hildreth had also said, "Anna, do you think I am going to deed you all my stuff before I die? I am not going to deed any of the children anything until I get ready." The same witness further testified that Mrs. Bonham told her mother that she had agreed to deed the lot to Mel, and that she had also promised to deed it to Lyman (Mr. Bonham) for the work he had done. Another witness said he had heard Mrs. Bonham threaten to sue Mrs. Hildreth if Mrs. Hildreth did not deed a lot worth about $800 to Bonham.

It appears in evidence that the furniture was later returned to Mrs. Bonham, and that the lot was deeded to Mr. Bonham on October 18, 1919, for "labor performed," which would be approximately six weeks after the date of the quarrel between Mrs. Bonham and Mrs. Hildreth, as testified to by the several witnesses.

The only other direct evidence which tended to establish plaintiff's case on the issue of undue influence was certain testimony to the effect that during the last 3 or 4 months of Mrs. Hildreth's life the rents were collected by Mrs. Bonham, and that for a considerably longer period Mrs. Hildreth and Mrs. Bonham had joint checking accounts in two different banks at Brawley. Opportunity to exert undue influence was shown by the fact that at the time the deeds were drawn, and for perhaps 30 days prior thereto, Mrs. Hildreth, who was quite ill, was living in the same house with Mrs. Bonham, who was caring for Mrs. Hildreth during all that time.

With reference to the quarrel between the two women, Mrs. Bonham denied having made the exact statements which some of the witnesses testified she made, but said that she charged her mother with being an "Indian"—that is, that, after having made a gift, she would take it back—and that her mother cried because Mrs. Bonham had called her an Indian. Mrs. Bonham's testimony shows a long line of devotion to her mother and service in her behalf. She testified that up to the time she was 24 years of age she lived with her parents on a farm; that her mother was ill in bed during a considerable portion of the latter part of that time, and that the household duties fell upon Mrs. Bonham. She testified:

> That her mother "would probably get up about 9 o'clock in the morning and get around a little bit, and I farmed out with the men folks. I was kind of delicate, and I drove a team and done a lot of work like that outside, * * * and came in at night and helped to get dinner up and supper up and breakfast ready for the men in the morning, and then I would go out and work with a team and with a cultivator and rake. * * * I did the washing of her (Mrs. Hildreth's) bandages and rolled them for her, and we generally would have about one a day. I took them and washed them and ironed them and would roll those up and have them ready for her, and she would dress her limb when she would wake up about 9 o'clock."

Mrs. Bonham married when she was 24 years of age, and was away from home for 2 or 3 years, when she returned to take care of her father, who had become blind in the meantime, and also to care for her mother who was ill again. That continued for a little over a year. After the year 1913, and up to the time of her death, Mrs. Hildreth lived with Mrs. Bonham the greater part of the time. In 1916, and continuing for 3 years thereafter, Mrs. Bonham and Mrs. Hildreth ran a lodging house in Brawley. That is the property which, by the will, was to be divided between plaintiff and Mrs. Bonham, but which, by one of the deeds made on December 29th, was granted to Mrs. Bonham. The arrangement between Mrs. Hildreth and Mrs. Bonham was, according to Mrs. Bonham's testimony:

> "I was to have half of everything. I rented the rooms and houses and furnished them out of the rooming house and my own house to make the money to pay the debts."

Mrs. Bonham's testimony regarding the terms of her arrangement with her mother in connection with the management of the rooming house is corroborated by the testimony of the bank clerk, who testified that the "exact wording of this account" was as follows:

> "Lydia E. Hildreth, in trust for herself and Anna Bonham, joint owners, subject to the check of either, and balance at the death of either to belong to the survivor."

But Mrs. Bonham never received anything other than a few dollars for a pair of shoes, etc. The receipts averaged $350 per month, which was all turned over to Mrs. Hildreth and was used by her to pay for the lodging house and other properties. Mrs. Bonham did all the work, "sweeping, dusting, being night clerk and day clerk, mopping and polishing floors, putting down carpets and taking them up," general rooming house work, collecting rents for the rooms, and waiting on her mother, who was sick in bed most of the time. Mrs. Bonham also did the washing. Regarding the making of the deeds, Mrs. Bonham testified as follows:

> "Q. I'll ask you if you know how the deeds were to be made that were made, or who was going to get the property, prior to the time the deeds were executed? A. No, sir.
>
> "Q. When Mr. Wilson came there as notary public prior to the execution of the deeds, did you have any knowledge about how she was going to dispose of her property? A. No, sir. She just said she was going to deed them and have it over with; $1,000 would be charged, anyhow, for probating it, and she said she was through with her property.
>
> "Q. She was going to make deeds and settle it without probate? A. Yes, sir.
>
> "Q. To save that expense? A. Yes, sir.
>
> "Q. I'll ask you, then, whether or not, so far as you know, that the deed she made on the 29th of December, 1919, was made in accordance with her will and wish and without any influence or duress or fraud or anything of that kind. A. Yes, sir."

With reference to the joint bank accounts, Mrs. Bonham testified that her husband's wages went into those accounts, and that she rented her own piano for a year, and later sold it for $100, and those receipts were also turned into the joint bank accounts; that receipts from sales of chickens and eggs which belonged to her personally went into her private bank account.

Mrs. O'Blenes, who for two years, between 1917 and 1919, lived "right across the alley" from Mrs. Bonham and Mrs. Hildreth, never saw either of them crying or heard them having any dispute over the furniture. G. R. Beasley, a son of Mrs. Bonham, never saw any difficulty between them, and never heard either his mother or his father try to influence Mrs. Hildreth with reference to the disposition of her property. The testimony of Mr. Wilson, attorney at law and notary public, who prepared the deeds and took the acknowledgment of Mrs. Hildreth's signature thereto, is significant. Prior to the time the deeds were drawn he had acted as Mrs. Hildreth's attorney in various matters covering a period of several years. In connection with the drawing of the deeds Mr. Wilson said:

> "The first time I went to see her it seems to me, as far as I can remember, I was there five or six times. There was some little matters about her rooming house which she and Mrs. Bonham had rented to some party, I forget the name now, and she asked me about that contract, and then she brought up the matter of making these deeds, and I told her to give me the description of the property and the parties to whom she wanted the deeds made, and I would look the matter up and prepare the deeds and when I got them prepared I would bring them around to her to sign."

Mr. Wilson prepared the deeds at Mrs. Hildreth's request, and she read them before they were signed. They were made and executed by her in accordance with her express will at that time. He neither saw nor heard any indications of any persons influencing Mrs. Hildreth in the execution or just prior to the execution of the deeds. The matter of giving the direction to draw the deeds, the actual delivery of them, and their execution covered a period of about two weeks. The description of the property covered in some of the deeds was not very good, and it was necessary to take time to write to Orange county to get the proper description. Mrs. Bonham was nursing Mrs. Hildreth at the time the deeds were signed, and she was in and out of the room. Mrs. Hildreth was in bed the first time that Mr. Wilson saw her in connection with drawing the deeds, which was about two weeks before the deeds were executed, and he saw her in connection with that matter five or six times. When the deeds were finally executed Mrs. Bonham came into the room and propped Mrs. Hildreth up in her bed. She did not sign the deeds immediately, but read them, and then signed them.

Counsel for appellant concede the rule of law in a case of this kind to be that the mere fact that a conveyance is made by a person to his child "does not render the deed presumptively invalid." In 17 Ann. Cas. at page 989, it is said:

> "The courts have universally held that no presumption of undue influence in the case of a conveyance inter vivos by a parent to a child arises from the mere relation of the parties, and that, therefore, the burden is upon the party attacking the conveyance to show undue influence"—citing many cases.

And it has been held that the circumstances of age and enfeebled condition, together with the added fact of an unequal division among the children of the property of the parent, and that the parent resided with the more fortunate child from a pecuniary standpoint—all of which facts fit this case to a nicety—are not sufficient to create a presumption of undue influence. Jones v. Thomas, 218 Mo. 508, 117 S. W. 1177. But the California cases, notably Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910, Becker v. Schwerdtle, 6 Cal. App. 462, 92 Pac. 398, and Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289, are to the effect that, where great age and enfeebled condition in the parent, together with such a division of the parent's property among the children as would in itself suggest great partiality, are shown, the burden is upon the attacked donee to show that the gift was made freely and voluntarily, and with full knowledge of the facts and a perfect understanding of the effect of the transfer.

[11] General influence, however strong, is not undue influence. The opportunity may be present and the grantee may suggest or advise or give good reasons, such as appeal to the affections or sentiments of gratitude for past services, or even argue with the grantor and thus persuade him to deed his property to him; and, in the absence of any showing or any presumption that the importunity was such that it could not be resisted by the grantor, and that the very act of the grantor in executing the deed was the result of force or coercion or something of that nature, which broke down his will or destroyed his free agency at the time the deed was executed, undue influence cannot be said to exist. Undue influence in the execution of a deed must arise from a confidence reposed by the grantor in the grantee, with the added feeling on the part of the grantor that the grantee has some power or authority over him; and it must appear that such power or authority was used by the grantee on the will of the grantor for the purpose of obtaining an unfair advantage of his weakness of mind or body, or of his necessities or his distress, and that such feeling of power and authority on the part of the grantor was actually present and operating upon his mind with such pressure as to overpower the mind and overcome the volition of the grantor at the very time the deed was executed.

There is nothing here that indicates with any clearness that Mrs. Hildreth was in the least affected by anything or by any act or conduct emanating from the daughter. True she returned the furniture to her daughter, but the furniture already belonged to her. True, she made a deed to Mr. Bonham of the lot regarding which the two women had their quarrel, but the evidence showed that she owed it to him for "labor performed," and that she was simply paying her debt in the manner in which she had theretofore agreed to pay it. The furniture was returned shortly after the quarrel, and the deed to Mr. Bonham was made within six weeks thereafter. The will was executed within two months, while all the other deeds were not executed until after the expiration of four months from the date of the quarrel. If the execution of these deeds was brought about through the exercise of undue influence, it would seem reasonable and probable that they should all have been executed at the time the deed was made to Mr. Bonham, or, failing in that, that the will, which was practically identical with the deeds as far as plaintiff is concerned, with the exception of this particular piece of property, should have disposed of the matter completely at that time, subjugating the will of Mrs. Hildreth to that of Mrs. Bonham, and to the entire satisfaction of Mrs. Bonham.

[12, 13] In this case, while the opportunity for the exercise of undue influence undoubtedly existed, and while the law of this state appears to be that, in circumstances such as the evidence shows were here present, the burden is cast upon the grantee to show that the gift was made freely and voluntarily, and with perfect understanding of the effect of the transfer, the findings of the court based upon the testimony of many apparently credible witnesses preclude any conclusion other than that at all times, including the act of the execution of the deeds, the grantor was acting with the utmost freedom, of her own volition, and with the greatest clarity of her mental perceptions, which, according to all the witnesses, was far above the average of ordinary attainment. If the evidence can be said to show any one thing clearly in this case, it is that at no time before the execution of the deeds was Mrs. Hildreth's mind in any wise affected. Her body was weak, and she was suffering from the effects of disease, but her mind retained its full vigor. Her act in giving the bulk of her property to her daughter, rather than to her son, was most natural. The evidence shows years of continuous devotion, solicitude, and kindly care by the daughter for her mother, to say nothing of the labor, sacrifice, and hardship expended and suffered by the daughter on the mother's account. The mother's gift to the daughter was but a recognition, and in no sense a full compensation, for the daughter's service to her. On the other hand, while friendly relations existed between the mother and the son, nothing appears in the record to show that any particular interest or attention was ever shown by the son in his mother's welfare. Perhaps he was unable, either from his nature or from his financial condition, to respond in great volume to his mother's necessities. The deeds to him of a portion of his mother's property amply cover any pecuniary or parental obligation arising out of the conditions as shown by the record herein.

[14] The findings of the court on all issues of fact were against plaintiff's contentions. A careful review of the evidence contained within the reporter's transcript on file in this appeal convinces this court that such findings are supported by a preponderance of the evidence, and are therefore legally un-

assailable. As to some of the issues the evidence is overwhelmingly in favor of the findings, and as to each and all of the others there is at least a substantial conflict in the evidence upon which each of them is based. California cases so numerous as to require no citation, and for reasons so thoroughly understood as to require no elucidation, are practically unanimous in holding that in such circumstances the findings are conclusive.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

61 Cal. App. 125

UNGER v. SAN FRANCISCO-OAKLAND TERMINAL RYS. et al. (Civ. 4404.)

(District Court of Appeal, First District, Division 1, California. Feb. 26, 1923. Hearing Denied by Supreme Court April 26, 1923.)

1. Street railroads ⚷117(24)—Negligence in riding in automobile struck by street car held for jury.

Where plaintiff, after having assisted a friend in starting a recently purchased automobile truck, offered to ride with him on the trip which the friend was about to take to become accustomed to his car, and the car became stalled on defendant's street car track, and was struck by a street car and plaintiff injured, and it appeared that plaintiff's friend was an experienced mechanic and driver of automobiles, although inexperienced in the mechanical operations of the particular car driven at the time of the accident, whether plaintiff was negligent in riding in the car was for the jury.

2. Negligence ⚷136(30)—Automobile driver's negligence imputable to occupant of vehicle held for jury.

Where plaintiff volunteered to ride with a friend in his newly acquired automobile truck, which became stalled on defendant's street car track and was struck by a street car, and it appeared that plaintiff's friend was an experienced mechanic and driver of automobiles, even though inexperienced in the mechanical operations of the particular car driven at the time of the accident, it could not be said as a matter of law that the friend was negligent in driving along the street to get used to his newly acquired car, or to attempt to make the particular crossing, even though it be conceded that plaintiff and his friend were engaged in a common enterprise.

3. Street railroads ⚷117(35)—Negligence under last clear chance doctrine held for jury.

Evidence of negligence on the part of the motorman in the operation of a street car, striking an automobile truck stalled on the track, *held* to make a case for the jury under the last clear chance doctrine.

4. Street railroads ⚷117(33)—Negligence of driver of automobile stalled on track held for jury.

The driver of an automobile or other vehicle, stopped for any temporary cause in front of an approaching street car, cannot be held guilty of negligence as a matter of law if he does not desert his vehicle, at least until it is reasonably certain that an impact is unavoidable, as he has a right to assume that those in charge of the approaching street car, seeing his predicament, will not recklessly run him down, and a right to make reasonable effort to start his vehicle, and so save it from a collision, and whether his acts constitute negligence is a question for the jury, in view of the circumstances.

5. Street railroads ⚷117(33)—Negligence of occupant of automobile stalled on track held for jury.

Where plaintiff, riding with his friend in the latter's recently purchased automobile truck, was injured in a collision between defendant's street car and the truck at a crossing after the truck became stalled in front of an approaching car, plaintiff was not negligent as a matter of law in failing to desert the vehicle; he having a right to rely on the driver's ability to extricate it from its dangerous position and on the duty of the motorman on observing his predicament not to recklessly run him down.

6. New trial ⚷144—Finding that verdict had not been improperly arrived at sustained.

Where, in a personal injury action against a street railroad company, the charge was made that the jury arrived at a verdict for plaintiff by a process of addition and subtraction, but there were counter affidavits by certain jurors denying that any agreement that the jurors should be bound by the computation had been made, it was not an abuse of discretion for the trial court to resolve the conflict adversely to defendant's contention.

7. New trial ⚷114—Newly appointed judge, who did not preside at trial, may determine motion for new trial on preponderance of evidence.

Where, in a personal injury action, a verdict for plaintiff had been returned, and pending motion for new trial the presiding judge resigned and a new judge succeeded to his office, it was the duty of such new judge to determine the motion for new trial according to his conception of the preponderance of the evidence, notwithstanding that he had not seen or heard the witnesses.

Tyler, P. J., dissenting.

Appeal from Superior Court, Alameda County; Everett J. Brown and Dudley Kinsell, Judges.

Action by S. M. Unger against the San Francisco-Oakland Terminal Railways and another. Judgment for plaintiff, and defendant named appeals. Affirmed.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

A. L. Whittle and Chapman & Trefethen, all of Oakland, and Morrison, Dunne & Brobeck, of San Francisco (Orrin K. McMurray, of Berkeley, of counsel), for appellant.

Ostrander & Carey, of Oakland, for respondent.

RICHARDS, J. This appeal is from a judgment in the plaintiff's favor, after a jury trial, for damages resulting from a collision between an automobile in which the plaintiff was riding and a street car of the appellant. The contentions of the appellant are chiefly predicated upon the evidence in the case, which will be reviewed in dealing with the various points made in the course of these contentions. The collision occurred upon East Twelfth street, in the city of Oakland, along which the street car tracks of appellant extend, and at a point thereon a short distance east of the intersection of Twelfth street with Fallon street. The accident occurred between 5:30 and 6 o'clock in the evening of April 7, 1919, at which time there was much travel by street cars, automobiles, and other vehicles at and in the vicinity of the immediate point where the collision took place. The plaintiff, immediately prior to the time of said collision and of his injuries, had been riding in an automobile truck owned and driven by one Parley Cook, and it is the appellant's first contention that the plaintiff's acts and conduct in riding in said automobile truck prior to and at the time of said accident constituted negligence as a matter of law which should have prevented his recovery in this action. This contention is based upon the following state of facts:

On the afternoon of April 7, 1919, the plaintiff, while walking along East Twelfth street, observed Parley Cook, with whom he was acquainted, in front of his residence trying to start his said automobile truck. The machine in question was an old Rambler touring car made over into a truck, which Cook had purchased that day, and with the mechanical operation of which he had theretofore not been familiar. He was having difficulty in getting the machine started, and the plaintiff, observing this, went up to offer what suggestions he could in aid of Cook's effort to start the machine. The plaintiff was somewhat familiar with this type of car, having driven one like it before. He suggested to Cook that he should drain his carburetor, and he did so, and then had no difficulty in starting the machine. Cook was going down the street for the purpose of getting used to the car, and plaintiff asked if he could help him, and said if he could he would be glad to ride downtown with him, and if there was anything he could show him he would be glad to do so. Cook assented to this and they boarded the car; the plaintiff knowing that Cook had just purchased the car and had never driven a car having the same sort of gear shift before. They proceeded down Twelfth street westerly, Cook with two of his younger children sitting upon the driver's seat, and the plaintiff standing in the body of the truck behind, resting his hands upon the back of the seat. The two older children of Cook were also in the rear with plaintiff. The truck, thus occupied and driven, came down on East Twelfth street until it passed the Civic Auditorium, when Cook turned south to cross the railroad track on Twelfth street. There were at that point two main tracks on Twelfth street used by the appellant for its cars, running easterly and westerly thereon, comprising several lines radiating from the center of the city of Oakland to various portions of the city and its suburbs. The plaintiff observed that several other machines were passing and called to Cook to "look out." Cook stopped the truck on the tracks of appellant and had difficulty in starting again in time to avoid a collision with one of appellant's east-bound cars.

The foregoing facts, which are practically undisputed, are relied upon by the appellant to sustain its contention that the plaintiff was guilty of negligence as a matter of law in riding with Cook down Twelfth street to the busy crossing where the car was stalled, and where the collision occurred. There were certain other facts, however, shown in the evidence which have an important bearing on this question. It appeared that Cook, while unfamiliar with the mechanical operation of the truck he had just purchased, was a mechanic by trade, and was familiar with the mechanism and operation of automobiles generally; that he had been working as a mechanic in several garages in Oakland and other places for about two years prior to the date of this collision, during which he had driven automobiles of various types to various places throughout the state. It also appeared that on the evening in question, when the plaintiff first approached Cook in front of the latter's residence and found he was having trouble in starting his car, the trouble was not in the operation of its starting mechanism, but was in the flooding of the carburetor, and that when this was relieved Cook started his car without further trouble. It also appeared that Cook stopped at least twice on the way down Twelfth street, once at a garage to get supplies, and again as he neared the crossing where the collision occurred, and there is nothing to show that he had any difficulty in manipulating the gears or starting the car on either of these occasions. These latter facts bear directly upon the question as to whether the plaintiff was negligent in riding down Twelfth street in said truck and with Cook as the driver, under the circumstances above related.

[1, 2] Upon this question we think men might reasonably differ in opinion, and, this being so, the question of fact as to the plaintiff's negligence in so doing would, under well-settled rules of law, be one which should

have been submitted to the jury. Conceding for the sake of argument that the plaintiff and Cook were, under the circumstances as above detailed, engaged in a common enterprise, it cannot be reasonably held that Cook, an experienced mechanic and driver of automobiles, even though inexperienced in the mechanical operations of this particular car, was, as a matter of law, negligent in driving along Twelfth street in order to get used to his newly acquired car, or that he was so negligent in essaying to negotiate this particular crossing as to bar the plaintiff's right to recover as a coadventurer with him in that expedition. We are of the opinion, therefore, that the trial court properly refused to grant the appellant's motion for a nonsuit upon that ground.

As to the appellant's contention that the plaintiff was guilty of negligence as a matter of law in not deserting the car after it had been stalled upon the appellant's track, and after he had become aware of the approach of appellant's street car, we shall deal with that contention at a later point in this opinion.

[3] The appellant's next contention is that the evidence in the case shows that there was no negligence on the part of the defendant's employees in the operation of its said street car at and prior to the time of said collision. It is the claim of the appellant in this regard that the evidence was clearly and conclusively that, when the plaintiff called to the driver Cook, to "look out," whereupon Cook stopped the car, the said stopping occurred upon the north or west-bound track, and it continued to stand there up to the moment before the collision, and that while it was so standing the defendant's car, in approaching easterly upon its south track, had a clear passage, and that its motorman was therefore justified in continuing to approach said crossing along said unobstructed track, and that it was only when he had thus proceeded to a point almost opposite to where said truck was standing that the driver thereof suddenly started his truck and ran it unexpectedly in front of said moving street car, when it was too late to stop the same in time to avoid a collision. If these were the undisputed facts in the case, it would necessarily follow that the defendant was guilty of no negligence in the premises and hence that the plaintiff would not be entitled to recover for whatever injury he suffered as the result of said collision. But the difficulty with this contention is that these facts are not undisputed. The plaintiff and Cook and the young son of Cook all testified positively that the truck was stalled upon the south track in the direct path of the approaching car, and that by the time Cook had succeeded in getting it started again the car was so near as to make the collision inevitable. The testimony of these witnesses created a substantial conflict in the evidence as to the precise location at which said truck was stalled upon the appellant's tracks, and it was the exclusive function of the jury to resolve that conflict which way they believed the truth to lie. If, upon the evidence last above recited, the jury found the fact to be that the truck was standing apparently stalled upon the south track, upon which the east-bound street car of the appellant was approaching, then it would be a matter of deduction for the further determination of the jury as to whether under the conditions attending that approach the motorman in charge of said street car was negligent in continuing the advance up to the instant of the collision with said truck. The facts upon which such deduction might reasonably be drawn are briefly these:

The appellant's street car swung into Twelfth street from Oak street, one block west of Fallon street, coming east. From the time the said car passed the easterly line of Oak street, the point where the collision occurred was within the range of vision of the motorman on said street car, about 600 feet to the eastward, and continued to be visible by him during his approach from that distance and up to the moment of the collision. There is a slight down grade to the tracks coming eastward on Twelfth street from Oak, varying from 2.71 per cent. at Oak street to 1 per cent. at or near the place of the collision. The street car, as it emerged from Oak street, was going at about the rate of 15 miles an hour, according to the testimony of the motorman, but slowed down to 10 or 12 miles an hour and coasted down toward the crossing. The motorman testified that, as he came into Twelfth street he saw the truck standing still at a point north of both tracks, and in this regard he is supported by the testimony of the plaintiff's witnesses. The motorman further testifies that his view of the truck at that point was intercepted by the passing of another street car going west, and that when it had passed he again saw the truck, standing still, but at a different point, viz. upon or partly upon the north track along which said west-bound car had just passed. As to the passage of said west-bound car the motorman is also supported by the testimony of the plaintiff's witnesses, who stated that the truck had stopped at a point north of the crossing to permit said west-bound car to pass. The conflict between the testimony of said motorman and that of the plaintiff and his witnesses arises over the question as to where the truck again stopped after the passage of said west-bound car. The motorman testifies that, when he next observed said truck after the passage of said west-bound car, he was about 50 feet away from the point where it was then standing, and that he observed the driver of the truck looking in his direction and leaning forward over his steering wheel, and that he proceeded sounding his gong loudly.

From this testimony of the motorman, by

which the appellant is bound, the deduction is irresistible that, wherever the truck of Cook had moved to and was standing after the west-bound street car had passed by, the motorman saw it there, and it continued within his unobstructed view up to the moment of the collision; and if, as the plaintiff and his witnesses testify, it was then stalled upon the south track and in the direct path of the approaching east-bound car, then the motorman saw it there. If he did so, and continued to approach so near to the standing car and at such a speed as would render unavoidable a collision, unless the driver of the truck succeeded in starting it and clearing the track, the jury would be justified in finding the motorman guilty of such negligence in so doing as would constitute the proximate cause of the plaintiff's injury. The evidence is conflicting as to the distance the street car was away when the motorman had a clear view of the truck standing upon the tracks. The plaintiff testified that as soon as the truck stopped upon the south track he ran to its rear end, and looking up the track saw the approaching car about 450 or 500 feet away. If this evidence was accepted by the jury, it would follow that for that distance the motorman saw the truck standing in his direct path upon the track. From the fact that it continued to stand there with its driver at the wheel, observing the street car's approach and apparently trying vainly to start the truck, the jury might reasonably have concluded, not only that the motorman actually knew that the truck and its occupants were in a place of danger, but that he also reasonably must have known that the driver of the truck was for some reason unable to extricate himself from his place of imminent danger, in the immediate path of the approaching car.

If the jury so found the facts to be, it would be its duty to apply the doctrine of last clear chance to such a situation under a proper instruction from the trial court (Hansen v. N. W. P. R. R. Co. [Cal. App.] 209 Pac. 63); and this would be so, notwithstanding the driver's antecedent negligence in driving the car into such a dangerous position, if he was so negligent, in case the jury should find that, being there, he was doing all that a reasonable man could do to escape the impact and avoid the collision. The instruction which the trial court gave upon the doctrine of last clear chance came fairly within the rule as stated by the Supreme Court in the recent case of Young v. Southern Pacific Co., 210 Pac. 259, and the cases therein cited. The chief objection which the appellant makes to the court's instruction upon the doctrine of last clear chance is not so much to the statement of the rule as to its application to the facts of this case as the appellant conceives and argues them to be.

In the discussion of the facts of the case thus far, and of the law applicable thereto, we have been considering the subject from the viewpoint of the driver of the truck rather than that of its other occupants, of whom, up to the moment of the impact, the plaintiff was one. We have done this upon the theory advanced by the appellant, which for the sake of argument thus far we have conceded, that the negligence of the driver of the truck was imputable to the plaintiff to the extent of preventing a recovery by him, if the driver himself could not have recovered for injuries to his truck or to his own person. A new element enters, however, into the discussion at this point, immediately and independently affecting the plaintiff's right of recovery. It arises at the moment when the plaintiff became aware that the truck was stopped or stalled upon the defendant's track in the path of an approaching car. The plaintiff's own evidence upon this subject, by which, of course, he is bound, is that as the truck came upon the crossing he warned the driver to "look out." This was not a direction to stop, but only to drive carefully, in view of the fact that several other machines were passing and that there was danger of a collision with them. The driver, however, stopped his car by putting his foot on the brake and throwing out the clutch, keeping the engine running. The plaintiff ran to the rear of the truck "to jump out," as he says, and he then saw the approaching street car, which he estimates was from 350 to 450 feet away. He did not jump out, but turned back to assist the driver in starting the truck. He found him trying to switch gears, and told him to "put it in low." The gear shift stuck, and thereupon the plaintiff, again looking up, saw the street car bearing down upon them at a distance of but 25 or 30 feet away. He ran to the rear to jump out, but as he did so the driver of the truck succeeded in starting it, and had almost cleared the track when the shock of the impact between the car and the rear end of the truck came, throwing the plaintiff out directly in front of the car, which ran over his right leg, stopping within about 8 feet.

[4, 5] This is the plaintiff's own story of how his injury occurred. It is in conflict with that of some of the defendant's witnesses, but it is supported in its essential aspects by the testimony of other eyewitnesses of the accident. If the jury believed the plaintiff's testimony in this respect, it was for them to determine whether or not the plaintiff was negligent during the moments between the time when the truck was stopped on the track and the instant of the impact. The driver of an automobile or other vehicle stopped for any temporary cause in front of an approaching street car cannot be held guilty of negligence as a matter of law if he does not desert his vehicle, at least until it

is reasonably certain that an impact is unavoidable. He has a right to assume that those in charge of the operation of the approaching street car, seeing his predicament, will not recklessly run him down. He has a right to make a reasonable effort to start his vehicle, if it is susceptible of being started, and so save it and its occupants from injury. Whether his acts in so doing or attempting to do were unreasonable and negligent would be a question of fact, which it would be the province of the jury to determine, in view of all of the circumstances of the particular case. The same reasoning and the same rule would apply to the plaintiff herein, if we assume the fact to be as the appellant insists it is, that he was engaged with the driver of the truck in a common adventure; and if he were not so engaged, but was the occupant of the truck as a passenger, a like rule must be applied to his case, since the occupants of vehicles placed in dangerous positions, as in the way of approaching cars, are not ordinarily required to desert the vehicle, nor are they ordinarily to be held guilty of negligence as a matter of law in not doing so, since they also have a right to rely upon the ability of the driver of the vehicle to extricate it from its dangerous position and upon the duty of the motorman observing his predicament not to recklessly run them down. Whether the plaintiff herein was negligent in remaining in the truck as long as he did, or in attempting to leave the same and in the manner he did, are questions for the determination of the jury, in view of all the circumstances of the particular case. Dowd v. Atlas Taxicab, etc., Co., 187 Cal. 523, 202 Pac. 870.

The appellant makes several objections to the instructions of the court other than that relating to the doctrine of last clear chance. These have been considered by us in the light of the entire body of such instructions, and we do not deem it necessary to deal with them in detail, for the reason that, taken as a whole, the instructions of the trial court were not only very full and fair, but we think clearly embodied the law touching the questions to which they related, while practically every instruction which the defendant requested was given by the court in the precise form of such request.

[6] The appellant charges that the jury was guilty of misconduct in the manner in which its members arrived at their verdict, and offers in support thereof the affidavit of one of the jurors, to the effect that after several ballots had been taken, the jury standing 9 to 3 for the plaintiff, one of the jurors stated that the amount of the verdict could be arrived at by a simple method of addition and subtraction; that thereupon each of the jurors then in favor of the plaintiff named the amount he or she thought should be awarded him in damages. These amounts were written down by the foreman and divided by 9, and the sum of $9,500 was thus arrived at. This juror stated that he agreed to be bound by the result so determined, and gave up his own opinion that $2,500 would be an adequate sum to be awarded plaintiff, because of his belief that he had agreed so to do. In opposition to this affidavit counter affidavits were presented from several of his fellow jurors, denying that any agreement that a juror should be bound by the computation had been made, or that any of said jurors were so bound, but that, on the contrary, the verdict was finally arrived at after further discussion and consideration following the foreman's said calculation. The trial court resolved this conflict in these affidavits against the defendant's contention, and we cannot say that it abused its discretion in so doing. The case of Dixon v. Plums, 98 Cal. 384, 33 Pac. 268, 20 L. R. A. 698, 35 Am. St. Rep. 180, cited by the appellant is not parallel as to its facts with the case at bar, and in its statement of the law rather opposes than upholds the appellant's contention.

[7] Finally, the appellant contends that it is entitled to a reversal of this case for the reason that the trial court did not properly exercise its judicial discretion in respect to the granting or denial of the defendant's motion for a new trial. This contention is based upon the following facts as described in the record before us. The cause was tried in the superior court of Alameda county, before Hon. Everett J. Brown and a jury. Judge Brown resigned his judicial position after the trial of the cause but before the motion for a new trial had been brought on to hearing. The motion for a new trial was heard before his successor in office. In passing upon said motion the judge then sitting in said court indicated that on the face of the record he would feel that the preponderance of the evidence on certain vital points in the case was in favor of the defendant, and that he therefore would be justified in granting the motion for a new trial, but that, not having seen or heard the witnesses, or been able to observe their appearance, attitude, or manner of testifying during the trial, he did not feel that he was in a position to pass upon the matter of the conflict in the evidence, and that he would therefore refer the whole matter to the appellate court by denying the motion for a new trial. It may be conceded that the judge, in his attitude in thus passing upon the motion for a new trial, was mistaken in his conception of the duty and function of the magistrate, who, not having presided or been present at the trial of a cause nevertheless is called upon by the fact of his succession to pass upon and determine the merits of the motion for a new trial.

Trial judges are not infrequently called to decide motions for new trials in cases tried before juries in which the most material evidence is partly, or even wholly, in the form of depositions. In such cases, as in this case, the judge, in considering the motion for a new trial, is deprived of the advantage of seeing and hearing the witnesses testify; but the judge should nevertheless determine the motion upon his best judgment as to where the preponderance of the evidence lies. It would appear in this case that, had the judge, in passing upon the motion for a new trial, done this, the motion for a new trial would have been granted instead of denied; but it does not therefrom follow of necessity that this cause must for that reason be reversed upon this appeal. This court, having had cast upon it the burden of considering this appeal, must do so in the light and under the mandate of section 4½ of article VI of the Constitution, which forbids this court to set aside a judgment for any error in any matter of procedure, unless after an examination of the entire cause, including the evidence, this court shall be of the opinion that there has been a miscarriage of justice. Assuming this burden, this court has carefully examined the entire record in this case, including the evidence. Upon such examination we are satisfied that the record herein discloses no such preponderance of evidence in the defendant's favor upon any vital element in this case as would justify the conclusion that the jury were unwarranted in resolving its conflicts in the plaintiff's favor. Having thus concluded that the jury, which did see and hear the witnesses, were justified by the state of the evidence as a whole in returning their verdict in the plaintiff's favor, it would be a miscarriage of justice for this court to set aside that verdict and the judgment based thereon merely because the judge of the trial court in passing upon the motion for a new trial mistook his duty and function in the regard above indicated. It was an error in procedure which did not result in a miscarriage of justice.

The judgment is affirmed.

ST. SURE, J. I concur in the affirmance of the judgment. Lord Mansfield is said to have given this advice to a friend newly appointed to a colonial judgeship:

> "Never give reasons for your decisions; your judgment will very probably be right, but your reasons will almost certainly be wrong."

The Supreme Court of this state expressed a similar thought when it said:

> "With the process of reasoning by which the court reached its conclusion we have nothing to do. That may have been erroneous, and the ruling correct." Chabot v. Tucker, 39 Cal. 434; In re Kingsley, 93 Cal. 576, 29 Pac. 244; Davey v. Southern Pacific Co., 116 Cal. 325, 48 Pac. 117; People v. Bailey, 30 Cal. App. 581, 590, 158 Pac. 1036.

It is the duty of the trial court to grant a new trial when it is not satisfied with the verdict; and it is not bound by the rule as to conflicting evidence, as is the appellate court. Condee v. Gyger, 126 Cal. 546, 59 Pac. 26; Wendling, etc., Co. v. Glenwood, etc., Co., 153 Cal. 411, 417, 95 Pac. 1029; Weringer v. Rutledge, 180 Cal. 566, 569, 182 Pac. 31. I am of the opinion that, when the trial court considered and passed upon the evidence adduced at the trial and gave its order denying the motion for a new trial, it fully performed the duty enjoined by law. Upon appeal it then became the duty of this court to examine the evidence, and, if there was a conflict therein, affirm the order. That, in effect, has been done. In the lower court, before denying the motion, the judge, who had not presided at the trial, spread upon the record for the benefit of this court his reasons for thinking why, upon the cold record, a new trial ought to be granted, and in the same breath denied the motion. We are not concerned with the mental attitude of the trial judge, except as shown by his acts. In its processes of reasoning the human mind takes many slants, which may be interesting from a psychological standpoint; but we are bound by the rules which the wisdom of the law has established, two of which I have stated above and now invoke. It may be that the defendant has been placed at a disadvantage by having the motion heard by a judge who could only gain his impressions from the record. Still the rules of law placed him in the shoes of the judge who presided at the trial, clothed him with all his powers and duties, and we are not permitted to otherwise regard him or his order made in the case. Churchill v. Flournoy, 127 Cal. 355, 362, 59 Pac. 791; Hausmann v. Sutter St. Ry. Co., 139 Cal. 174, 72 Pac. 905; Pollitz v. Wickersham, 150 Cal. 244, 88 Pac. 911; Wendling, etc., Co. v. Glenwood, etc., Co., 153 Cal. 411, 417, 95 Pac. 1029.

TYLER, P. J. I dissent. It conclusively appears from the record that the trial judge was of the opinion that a new trial should be granted, and that his sole reason for denying the same was his mistaken belief that he was without power so to do, because of the fact that, there being a conflict in the evidence and he not having heard the testimony, he was unable to judge of the credibility of the witnesses as indicated by their demeanor upon the stand, and was therefore not in a position to consider the motion upon its merits. The court stated, in denying the motion, that it desired the appellate court reviewing its action to fully understand this as the reason for its conclusion, and it was on this precise understanding that the motion was denied.

As indicated in the prevailing opinion the court was mistaken in the conception of its duty and functions in passing upon the motion. It is the province and duty of the judge of the trial court in such a proceeding to inquire into the sufficiency of the evidence to support a verdict or finding, and to grant a new trial if in his judgment such evidence is insufficient to support the decision. This power and duty are in no manner affected or impaired by the fact that the trial was not had before him, and that his only knowledge of the facts in the case was obtained from the cold record. Garton v. Stern, 121 Cal. 347, 53 Pac. 904; Jones v. Sanders, 103 Cal. 678, 37 Pac. 649. Such motions are addressed to the sound discretion of the trial court. Drathman v. Cohan, 139 Cal. 310, 73 Pac. 181. The appellate court has not the power to act merely because of its belief that the evidence preponderates one way or the other; this power resides in the trial court, and appellant herein was entitled to have that court properly exercise its discretion. This duty cannot be passed on to us.

In considering the application the court below is not bound by the rule as to conflicting evidence, as is the appellate court. Condee v. Gyger, 126 Cal. 546, 59 Pac. 26. As before stated, that court was of the positive opinion that a new trial should be granted, and only denied the motion under the mistaken belief that its opinion as to the effect of the evidence having been reached by a mere perusal of the record, unaided by an opportunity to observe the demeanor of the witnesses while testifying, it was unable to give effect to such opinion, notwithstanding that thereby the defendant was practically deprived of all benefit arising from its right to make the motion. Such is not the law. There is a very serious conflict in the evidence, and appellant was entitled to have the court properly exercise its discretion in determining the motion, and failure on its part to do so manifestly deprived the appellant of the benefit which would follow from such proper exercise of discretion. Hughley v. City of Wabasha, 69 Minn. 245, 72 N. W. 78.

It is not for us to say that from a consideration of the entire case, including the evidence, that in our opinion the act of the court in refusing to grant the motion was justified, irrespective of error. The constitutional provision has no application to such a situation. Nor does the fact that an appellate court is not usually concerned with the reasons given by the trial court for its action in a given matter preclude it from reviewing such action, where the reason given indicates an entire misconception of the trial court's duty and power. If in the present case the judge, in passing upon the motion, had said, "Gentlemen, this is a very voluminous record; I have had no time to read it; I have great confidence in the judgment and common sense of the jury; therefore I will deny the motion," it would not be questioned that these reasons, however excellent in themselves, would not justify the court's action, and that it would be the duty of this court to reverse the order. But such a case would be less aggravated than the present; for there it might well be that upon reading the testimony the court might justly deny the motion, whereas here his study of the record led him to the conclusion that he ought to grant it, but he nevertheless denied it for an obviously invalid reason.

No useful purpose would be served by a further discussion of this subject. In conclusion, however, it might be said that the error in abuse of discretion of the trial court had the effect of depriving the defendant of its substantial right of a trial by jury with all its incidents, one of which embraces the privilege of having the verdict controlled by the judge. "The very definition of 'trial' carries with it the idea of superintendence of the judge." Capitol Traction Co. v. Hof, 174 U. S. 1, 13, 19 Sup. Ct. 580, 585 (43 L. Ed. 873); Horne v. Rogers, 110 Ga. 362, 35 S. E. 715.

For the reasons given, I am of the opinion that the judgment should be reversed, and a new trial granted.

---

61 Cal. App. 150

WOOD et al. v. BUFFORD et al.
(Civ. 4397.)

(District Court of Appeal, First District, Division 1, California. Feb. 27, 1923.)

1. Injunction ⚷135—Refusal of temporary injunction in suit against majority stockholders not an abuse of discretion.

In a suit by minority stockholders of a corporation against majority stockholders and a majority of the board of directors, to enjoin the extending time of payment on a note for $25,000 due the corporation, alleged to have been executed by a majority stockholder to get money to aid him in gaining control of a majority of the stock, where affidavits filed by defendants showed a prosperous financial condition of the corporation, and that its indebtedness was being reduced, refusal to grant a temporary injunction was not an abuse of discretion of the trial court, such refusal not causing an irreparable injury.

2. Appeal and error ⚷954(2)—Refusal of temporary injunction not disturbed on appeal, in absence of showing of abuse of discretion.

A decision of a trial judge, refusing a temporary injunction, will not be disturbed on appeal, in absence of a clear showing of an abuse of discretion.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Suit by Hazel E. Wood and others against Charles M. Bufford and others. From an or-

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

der refusing a temporary injunction, plaintiffs appeal. Affirmed.

Walter G. Bonta, of San Francisco, and Edward W. Engs, of Oakland, for appellants.

Robt. B. Gaylord, of San Francisco, Wm. R. Geary, of Oakland, and Fred C. Peterson and Charles M. Bufford, both of San Francisco, for respondents.

PER CURIAM. [1] This is an appeal by the plaintiffs from an order denying a temporary injunction, by which plaintiffs sought to enjoin the majority stockholders and the majority of the members of the board of directors of the San Francisco Laundry Association, a corporation, from dismissing two of the employees of said corporation, and also from extending the time of payment of a certain promissory note executed by one of the defendants, Charles M. Bufford, to said corporation for the sum of $25,000, dated May 13, 1918, payable two years after date.

Upon this appeal the appellants make no point of the refusal of the trial court to enjoin the dismissal of said two employees, but they do claim that the court erred in denying the injunction to restrain the defendants, pending trial, from extending the time of the payment of said loan. In this respect appellants, in their opening brief, say:

> "As to this order, while we believe it to be erroneous as a whole, we have no desire specially to urge error, in so far as the court refused to restrain the removal from their positions of the two persons above named. What we do urge upon this court as error is the refusal of the court below to restrain any and all corporate action extending the time of payment of the loan to defendant Bufford."

The record upon which the motion for the injunction was made consists of the verified complaint and of certain affidavits presented by the respective parties.

The allegations of the complaint cover many extraneous matters which are unnecessary to relate here, but the substance of the allegations which are pertinent to the issue raised by this appeal may be stated as follows: The entire capital stock of said corporation consisted of 1,000 shares, of the par value of $100 each. The board of directors was composed of five members. It is then alleged that some time prior to February, 1917, the defendant Charles M. Bufford, who then owned or controlled 259 shares of the capital stock, planned to gain control of said corporation; that, pursuant to said plan, he bargained with certain stockholders for the support of 214 shares belonging to them, and that he purchased 109 shares more from another stockholder named Wells, for which he paid some cash, and to secure the payment of the balance pledged the stock so purchased, together with an additional 25 shares of which he was the owner; that he then forced the resignation of the president and general manager of said corporation and was himself elected to those positions; that he was afterwards unable to make the payments on the purchase price of the Wells stock, and said stock was consequently sold, but that some time afterwards Bufford obtained from the new owner an option for the repurchase of said stock for the sum of $12,471, and that May 13, 1918, at 3 o'clock p. m., was fixed as the time limit for the exercise of said option; that an annual meeting of the stockholders had been called for the day following, May 14, 1918. It is then alleged that, at a directors' meeting held the day previous, to wit, May 13, 1918, at which were present three directors, including Hazel E. Wood, one of the plaintiffs, a proposition in writing was submitted by Bufford and accepted by the directors—director Wood alone voting against the proposition—whereby Bufford agreed to assume the active management of said corporation at a salary to be thereafter fixed, providing said corporation would loan him the sum of $25,000; that thereafter Bufford's salary was fixed at $60 a week for a period of two years.

The complaint further alleges that, in order to make such loan to Bufford, it became necessary for said corporation to increase its incumbered indebtedness from $40,000 to $65,000; that, as security for the payment of said loan to said corporation, Bufford pledged with said corporation 447 shares of capital stock, part of which belonged to him and the balance to Frances V. Wagner and Lawrence Bufford; that with the money thus borrowed Bufford completed the purchase of the Wells and other stock, and that he also liquidated a private debt and thereby obtained the release of certain other stock he had previously pledged.

Said complaint further alleges that Bufford continued to act as president and general manager of said corporation until December 13, 1920, at which time he was removed. Upon information and belief it is alleged that the defendants Frances V. Wagner and Lawrence Bufford have, in writing, bound themselves, jointly and severally with the said Charles M. Bufford, to pay said loan of $25,000; that no interest has been paid on said loan since March 6, 1919, and that said corporation is much in need of said money for the development and successful operation of its business.

Plaintiffs further allege that on May 2, 1921, the board of directors left to its then president, A. P. Wagner, the matter of the enforcement of the payment of said loan, and that a directors' meeting would be held on May 12, 1921, at which time, it is alleged, directors Bufford, Wagner and Schilling had threatened to, and unless restrained by the court, would extend the time of the payment of said loan, and that irreparable injury would thereby result to the said corporation.

On behalf of seven of the defendants, including the defendant Charles M. Bufford, certain affidavits were filed in opposition to said motion, in which the facts alleged in the complaint were in the main controverted.

By those affidavits it is, among other things, made to appear that the San Francisco Laundry Association was organized by the respective parents of the Bufford and Schilling families in 1868, and was operated by Bufford's father for 40 years prior to 1908, and that the defendant Charles M. Bufford, prior to 1917, had been a director of said company for 15 years and was thoroughly conversant with all of its business; that in 1917 the defendant Bufford realized that the business of said corporation had greatly decreased, and that its plant was deteriorating and depreciating in value; that its gross income had gradually fallen from $218,267 in 1912 to $180,022 in 1917, and that its net gain during those five years was only $5,129; that, foreseeing the disastrous future of said corporation and desiring to rehabilitate its business, the said Bufford and Schilling interests, which represented 473 shares of the capital stock, sought to reorganize said business and place it on a sound footing and paying basis; that in order to do so it was necessary, in the interest of harmony, to acquire the Wells stock, which they finally accomplished on May 13, 1918. But it is averred that said stock was purchased by Bufford prior to the directors' meeting of May 13, 1918, and with "funds in which the laundry company had no interest, present or future, direct or indirect, but which funds were under the sole control and in the ownership" of said Charles M. Bufford. It is also averred that the loan of $25,000 was made to said Bufford "on, and not before, May 15, 1918." It is also stated in said affidavits that, under the management and direction of said Bufford, the business of said company steadily increased, and that for the years 1918, 1919, and 1920 showed a net profit of $25,891.-25; that the gross income for 1920 was $347,-806.51, as against $180,022.02 for 1917. It is further stated, in said affidavits, that at the time the loan of $25,000 was made the valuation of all property of said company, over all liabilities, was $211,513; that at the time of the hearing of said motion the weekly income from said business was $7,000, and that the indebtedness of said company amounted to $52,000, and no more, and was being reduced at the rate of $500 per month; that the value of the net assets of said company at the time of the hearing of said motion was in excess of $200,000, and that the book value of the capital stock amounted to a sum in excess of $200 a share. It is further averred that the said loan of $25,000 was amply secured by the pledge of the said 447 shares of capital stock.

The complaint was filed on May 10, 1921. The motion was heard on June 3, 1921, and was by the court denied on August 15, 1921. The defendants, in the interim, were restrained from taking any corporate action concerning the matters covered by plaintiff's complaint.

The prayer of the complaint is that defendants be not only enjoined from taking any corporate action concerning the dismissal of said employees, and the extension of the time of the payment of said loan, but also that the defendant Bufford be foreclosed from redeeming the pledged stock, and that said stock be sold to satisfy the amount due on said promissory note.

Much of the briefs of the respective parties is devoted to a discussion of the question of the validity of said loan. In this respect appellant argues that the transaction was in violation of "the fundamental principles of our corporate law," in that it enabled the defendant Bufford, while acting as a director and the president of the company, to buy additional stock in the corporation for himself with the corporation money; and, furthermore, that it was unlawful, in that it was in violation of the provisions of section 309 of the Civil Code, because the loan was in effect an unlawful distribution to Bufford of a part of the capital stock of the corporation.

We are not concerned on this appeal, we think, with either of those questions, but only with the propositions of whether or not the time for the payment of the loan was likely to be extended pending the trial of the action on the merits, and, if so, whether such extension would result in an irreparable injury to the corporation.

As to the latter propositions, the defendants deny that they intend to extend the time of the payment of said loan. And from the statements contained in their affidavits as to the prosperous financial condition of said corporation at the time the motion was heard, it is apparent, we think, that the corporation will suffer no irreparable injury by the refusal to issue such temporary injunction. In that state of the record the order of the trial court must not be disturbed. Moriyama v. Veysey (Cal. App.) 198 Pac. 225; Martin v. Danziger, 21 Cal. App. 563, 132 Pac. 284.

[2] It is the well-established rule that the decision of the trial judge in refusing a temporary injunction will not be disturbed upon appeal in the absence of a clear showing of an abuse of discretion. Pellissier v. Whittier Water Co. (Cal. App.) 209 Pac. 593; Miller & Lux v. Madera Canal, etc., Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A. (N. S.) 391; Asiatic Club v. Biggy, 160 Cal. 713, 117 Pac. 912. In this respect the rule is stated in Schwartz v. Arata, 45 Cal. App. 596, 188 Pac. 313, as follows:

> "It is as firmly settled as is any rule of law that whether in a particular case a restraining order or an injunction pendente lite should be granted or refused is a matter resting largely in the discretion of the trial court before which the application is made and heard. See Raub v. Los Angeles T. Ry. Co., 103 Cal. 473, 37

Pac. 374; Rogers v. Tennant, 45 Cal. 184; Patterson v. Board of Supervisors, 50 Cal. 344; Parrott v. Floyd, 54 Cal. 534; White v. Nunan, 60 Cal. 406; Porters Bar Dredging Co. v. Beaudry, 15 Cal. App. 751, 754."

We are satisfied that there has been no abuse of discretion shown in this proceeding and therefore the order of the trial court is affirmed.

---

61 Cal. App. 32

BOU et ux. v. WILLITS, City Clerk, et al.

(Civ. 4278.)

(District Court of Appeal, First District, Division 1, California. Feb. 19, 1923.)

1. Deeds 🔑147—Deed to city held not void, as made on unlawful conditions of exemption of donor from assessments.

A deed to a city, from a street railroad company for a right of way over land, containing a recital that the city, in consideration of the dedication of the right of way by resolution of its counsel had agreed that the company should not be called upon to pay any portion of the cost of any paving or other street improvements, but that any assessments would be paid by the city, was not void as containing a covenant violating Street Improvement Act, § 20, subd. 10, requiring land to be assessed in proportion to benefits to be received, as the dedication was not made upon the consideration that no assessment be levied, but that the city would pay all such charges.

2. Deeds 🔑145—Grantee's agreement to do certain things construed as covenant, not as condition.

A provision to the effect that a deed is given and accepted on an express agreement on the part of a grantee to do certain things, imports a personal covenant rather than a condition.

3. Deeds 🔑155—"Conditions subsequent" not favored.

"Conditions subsequent" in a deed are those which in terms operate upon an estate conveyed, and render it liable to be defeated for breach of the condition, and are not favored in law because they tend to destroy estates, and no condition in a deed will be interpreted as a condition subsequent, if its language will bear any other reasonable construction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Condition Subsequent.]

4. Dedication 🔑1—Deed to city held supported by consideration.

In a deed to a city from a street railway company, of a right of way over land in an avenue, reciting, with another consideration, the consideration of the benefits to accrue from widening the street by reason of the dedication of the land, the latter consideration was good and valid and in itself sufficient to support the dedication.

5. Municipal corporations, 🔑293(2)—Publication of notice of intention to order improvements held sufficient, though name of street misspelled.

Where resolution of intention to order street improvements designated among others "Easton avenue" and "Masson avenue" as streets to be improved, but in subsequent proceedings, including the publication, such streets were described as "Easton Mason avenue," such error in publishing the names of the streets did not render the notice to property owners insufficient, for the misspelling of the word "Masson" was not misleading, and the word "avenue" implies a public street, so that the omission of such word after the word "Easton" was immaterial, as the resolution called for the improvement of streets "hereinafter referred to, * * * to wit," followed by the words "Easton Mason avenue."

6. Names 🔑16(1)—Rule of idem sonans applies to legal proceedings.

Under the rule of idem sonans, absolute accuracy in spelling names is not required in legal proceedings; and if the word as spelled, though different from the correct spelling, conveys to the ear when pronounced a sound practically identical with the sound of the correct name, the name as thus given is a sufficient designation, and no advantage can be taken of the clerical error.

7. Municipal corporations 🔑293(2)—Error in publication of notice of intention to make improvements immaterial, where plans and specifications referred to in notice cured the error.

Misspelling of name of avenue to be improved, in published notice of intention, did not invalidate the proceedings, where, in the resolution of intention, the plans and specifications were referred to and made a part of the same, and therein the name of the avenue was correctly spelled, for the Improvement Act requires the act to be liberally construed, and provides that irregularities not going to the jurisdiction shall not invalidate proceedings.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Prosper Bou and wife against Nettie A. Willits, as city clerk of the city of San Bruno, and others. From judgment for defendants, plaintiffs appeal. Affirmed.

J. W. Coleberd, of South San Francisco, for appellants.

H. A. Mason, City Atty., and Kirkbride & Gordon, all of San Mateo, for respondents.

TYLER, P. J. This action was one brought by a property owner to enjoin the doing of certain street work in the city of San Bruno, county of San Mateo, under the Improvement Act of 1911 (St. 1911, p. 730). Judgment went for defendant city officials, and the owner appeals.

The facts giving rise to the controversy are as follows: On the 25th day of May, 1921, the board of trustees of the city of

San Bruno passed its resolution of intention to order certain street improvements. The resolution described the work to be performed on "Hensley avenue, Green avenue, Easton avenue, Masson avenue, Mills avenue, Huntington avenue and * * * Euclid avenue. * * *" By subsequent proceedings a contract for such improvements was awarded to respondent Municipal Improvement Company. Prior thereto, and on the 29th day of May, 1917, the United Railroads of San Francisco, a corporation, had executed to the city a deed purporting to convey to it a right of way over the land designated in the resolution of intention as "Huntington avenue." This deed contains a recital to the effect that the city, in consideration of the dedication of the right of way, had, by resolution of its council, agreed that the company should not be called upon to pay any portion of the cost of any paving or other street improvements whenever it might be deemed necessary to cause work of that character to be done under the local assessment plan, but that in such case any assessments which might be levied against the property would be paid by the city. Further recitals are to the effect that, in consideration of the premises and of the benefits to accrue therefrom, the company dedicates the land to the city for the purpose and use of a public highway.

Under these conditions appellant contends that the agreement on the part of the city that the company should not be called upon to pay any portion of the cost of the work on the strip of land dedicated was void, for the reason that there is no provision of law which permits such an exemption, but, on the contrary, the covenant is in direct violation of subdivision 10 of section 20 of the Street Improvement Act, requiring the land to be assessed in proportion to the benefits to be received. From these premises it is argued that the deed is void as against public policy, and that there never was a dedication of the land to public use, from which the conclusion is drawn that the work provided by the resolution of intention to be performed on Huntington avenue was ordered to be done on private property not dedicated to public use, for which no valid assessment can be levied, citing Spaulding v. Wesson, 115 Cal. 441, 47 Pac. 249.

[1-3] We are of the opinion that there is no merit in this contention. Conceding, for the purpose of the argument, that the covenant in the deed to hold the railroad harmless from any assessment by reason of its dedication to be void, it by no means follows that the deed itself is void, or that the grant or dedication was affected thereby. It is to be noticed that the dedication is not made upon the consideration that no assessment be levied on the land, but that the city will pay all such charges; and it is to be presumed that the officer making up the assessment will perform his duty. A donor of land to public use cannot, as a rule at least, annex any condition which will have the effect to take from the proper local authorities the power to improve the way granted; but, as we have seen, such is not the case presented here. A provision to the effect that a deed is given and accepted on an express agreement on the part of a grantee, to do certain things, imports a personal covenant rather than a condition. 8 R. C. L., p. 1101. The mere recital, therefore, in a deed that the grantee shall do things specified therein does not create an estate upon condition Conditions subsequent in a deed are those which in terms operate upon an estate conveyed, and render it liable to be defeated for breach of the condition. They are not favored in law, because they tend to destroy estates, and no condition in a deed will be interpreted as a condition subsequent, if its language will bear any other reasonable construction. Hawley v. Kafits, 148 Cal. 393, 83 Pac. 248, 3 L. R. A. (N. S.) 741, 113 Am. St. Rep. 282; Fitzgerald v. County of Modoc, 164 Cal. 493, 129 Pac. 794, 44 L. R. A. (N. S.) 1229; Behlow v. S. P. R. R. Co., 130 Cal. 16, 19, 62 Pac. 295; Dillon on Mun. Corp. (5th. Ed.) § 1075.

[4] The deed herein recites two considerations, one of which includes the objectionable covenant; that other "the benefits to accrue" from the widening of the street by reason of the dedication of the land in question, and the forfeiture provided for in it is upon the sole condition that the highway be abandoned. This additional consideration is good and valid, and is in itself and apart from the other sufficient to support the dedication.

[5] Appellant argues the further point that the resolution of intention to order the improvement work was not published as required by law. This contention is based upon the fact that, among the names of the streets mentioned in the resolution of intention appear "Easton avenue" and "Masson avenue," whereas in the proceedings subsequent thereto, including the publication, the streets are described as being "Easton Mason avenue." It is apparent that the errors consist in the omission of the word "avenue" after the word "Easton," in omitting a comma after the word "avenue," and in the omission of the letter "s" in the word "Masson." It is claimed that this error in the publishing of the names of the streets to be improved is misleading and does not give the notice contemplated by law to which the property owner is entitled.

The mere omission of the word "avenue" cannot have the claimed effect. If there was an entire absence of such word following all of the names of the different streets mentioned in the resolution of intention, we do not see how a party could be misled. It is manifest that the object of publication and posting is to give notice to the property owners affected by the improvement. The language of the resolution of intention imports that certain streets are to be improved. Lexicographers have defined the word "avenue" to mean a principal street. Standard Dict. The word implies a public street. People v. Underhill, 144 N. Y. 316, 39 N. E. 333. So that in the present case, the names which follow the words "to wit" in the resolution of intention which provides for the improvement of "the streets hereinafter referred to are the following, to wit," etc., are streets, without being specifically described as streets or avenues or any other designation indicating a public thoroughfare.

[6] Nor do we think that the misspelling of the word "Masson" by the omission of the letter "s" could in any manner mislead plaintiff. Under the rule of idem sonans absolute accuracy in spelling names is not required in legal proceedings; and if the word as spelled, though different from the correct spelling, conveys to the ear when pronounced a sound practically identical with the sound of the correct name, the name as thus given is a sufficient designation, and no advantage can be taken of the clerical error. Kelly v. Kuhnhausen, 51 Wash. 193, 98 Pac. 603, 130 Am. St. Rep. 1093.

[7] However this may be, it is a question which we are not called upon to and do not here decide. In the resolution of intention, the plans and specifications are referred to and made a part of the same, and therein the name of said avenue was correctly spelled, so that the property owner, upon an examination of such plans and specifications, or of the original resolution of intention, could fully inform himself of the situation of the work proposed to be done. Federal Construction Co. v. Wold, 30 Cal. App. 360, 362, 158 Pac. 340. Mistakes of this character are discussed in Perine v. Erzgraber, 102 Cal. 234, 36 Pac. 585. In that case the resolution of intention, as here, was in proper form. The error there made was in the printing of the notices posted by the street superintendent—a jurisdictional matter. The resolution of intention provided "that the roadway thereof be paved by bituminous rock, where not already so paved." The notice provided "that the roadway where not already so paved crossing." This misprint was held to be not fatal. See, also, McGarry v. Ellis (Cal. App.) 202 Pac. 463.

While the objections to the notices in the cases cited referred to the character of the work to be done rather than to a description of the property, the same reasoning, in our opinion, applies, and such defect is cured by a reference to the plans and specifications. There can be no question of the importance of properly publishing a resolution of intention as a basis for obtaining jurisdiction over property sought to be impressed with an assessment so as to constitute due process of law; but minor defects, such as are here involved in such notice, ought not to be allowed to constitute a failure of publication, where such notice is manifestly sufficient to call the attention of the property owner to what is proposed to be done and does not have the effect of misleading him. Such an objection does not constitute a failure of publication.

The Improvement Act under which these proceedings were had provides that the act shall be liberally construed, to the end that its purposes may be effected, and that no error or irregularity of any procedure taken thereunder, which does not directly affect the jurisdiction of the city council to order the improvement shall avoid or invalidate such proceeding or any assessment for the cost of the work thereunder, and that the exclusive remedy of any person affected or aggrieved thereby shall be by appeal to the city council.

We conclude, therefore, that the deed from the United Railroads to the city of San Bruno in no manner affected the validity of the proceeding; and that the defect shown in the description of the work subsequent to the original notice of intention and the specifications therein referred to are minor and trivial, and that neither of the objections affect the validity of the proceedings.

The judgment is affirmed.

We concur: RICHARDS, J.; ST. SURE, J.

---

61 Cal. App. 226

Ex parte BERGEN. (Cr. 930.)

(District Court of Appeal, Second District, Division 2, California. Feb. 28, 1923.)

Weapons 🔑**17(1)—Complaint for carrying concealed weapon held defective; "carry."**

A complaint that accused did willfully and unlawfully conceal on his person a pistol without a license to carry such firearm did not state an offense under the statute providing that every person who carries a pistol or other firearm concealed on his person, without a license, shall be guilty of misdemeanor, the absence of allegation of carrying leaving the complaint defective in form and substance; "carry" in an indictment conveying to a defendant the thought of going about armed, as well as the further proposition that he is charged with transporting it with intent to use.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Carry.]

Original application by M. J. Bergen for a writ of habeas corpus, against the Chief of Police of Bakersfield. Writ granted.

F. E. Borton, of Bakersfield, for petitioner.
J. R. Dorsey, Dist. Atty., and E. F. Brittan, both of Bakersfield, and M. G. Brittan, of Los Angeles, for respondent.

CRAIG, J. This is a petition for writ of habeas corpus. The complaint, in so far as it is material here, reads as follows:

> "Personally appeared before me this 11th day of August, 1922, George Hudson, of Bakersfield, in the county of Kern, state of California, who, being first duly sworn, complains and accuses M. J. Bergen of the crime of misdemeanor, to wit, carrying concealed weapon, committed as follows: That said M. J. Bergen, on or about the 10th day of August, 1922, within the corporate limits of the said city of Bakersfield, county of Kern, state of California, did then and there willfully and unlawfully conceal upon his person one Iver-Johnson .38 pistol, without a license to carry such firearm."

Petitioner contends that this complaint does not state facts sufficient to constitute a public offense. The language of the section of the statute (St. 1917, p. 221) under which the charge is made reads as follows:

> "Sec. 3. *Carrying Firearms Without License, Misdemeanor.* Every person who carries in any city, city and county, town or municipal corporation of this state, any pistol, revolver, or other firearm concealed upon his person without having a license to carry such firearm as hereinafter provided in section six of this act, shall be guilty of a misdemeanor."

Section 1426 of the Penal Code requires that the complaint through which an action for a public offense is begun must set forth "the offense charged, with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint."

It seems apparent that in any accusation the name given the offense by the pleader is separate from the charging part of the instrument. This was held to be the rule in People v. Cuddihi, 54 Cal. 53. In that case the prosecution was by way of indictment, but the same reason is equally applicable to a complaint. A person of ordinary understanding who reads a formal accusation of crime, and finds himself charged with an "assault with intent to commit murder," "committed as follows," would know that he must look to what follows to discover the alleged facts, and, if they were to the effect that he had administered to some one a large quantity of a certain deadly poison with intent to murder such person, he would understand the offense charged to be that named in section 216 of the Penal Code, and he would pay no further attention to the name erroneously applied to the alleged offense by the pleader. Likewise, one reading the complaint in the instant proceeding passes on from the designation of the offense. There is no suggestion that the name is intended to be part of the charge, but, on the contrary, upon its face it purports to be nothing more than a name. When the complaint says, "committed as follows," we look to that which follows to see what it is alleged that Bergen did to commit an act violative of the law. There we find it said that he did "willfully and unlawfully conceal upon his person" a certain pistol "without a license to carry such firearm." Two facts are contained in this charge: First, that he concealed the pistol on his person; and, second, that he had no license to carry the same. But the act under which the prosecution is brought does not make it an offense to conceal a weapon upon one's person without a license to carry it, unless the concealment is joined with the carrying of the same. Without doubt, the purpose of the Legislature in enacting this law was to prevent citizens going armed in such fashion as to constitute a danger to the public; we think it was not designed to prohibit the concealment of a weapon upon one's person on his own premises or in his own home.

The technical meaning of the word "carry" seems not to have been given extended consideration in the cases involving this class of public offense. Webster's dictionary defines it as "to act as bearer; to convey anything; as to fetch and carry. To have or exert propulsive power." At common law the offense of carrying concealed weapons involved riding or going about, and not merely holding or possessing a weapon. State v. Huntly, 25 N. C. 418, 40 Am. Dec. 416.

The use of the word "carry" in an indictment conveys to a defendant the thought of going about armed, as well as the further proposition that he is charged with transporting the weapon with intent to use it as such. State v. Larkin, 24 Mo. App. 410; State v. Murray, 39 Mo. App. 127; State v. Gilbert, 87 N. C. 527, 42 Am. Rep. 518; Mangun v. State, 15 Tex. App. 362. The absence of an allegation of "carrying" leaves the accusation defective, not merely in form, but in substance; the complaint is lacking in an essential allegation, and therefore cannot confer jurisdiction upon any court to require the defendant to submit himself to processes in connection with any proceeding based upon it.

But it is said that, from the fact that the complaint alleges that petitioner was without a license "to carry" such firearm, it might be understood that the pleader intended to charge the defendant with having carried as well as concealed the pistol. This would be overstraining even the "squint" doctrine announced in Re Avdalas, 10 Cal. App. 507, 102 Pac. 674.

The complaint in the Matter of the Application of Winston, 160 Cal. 18, 116 Pac. 390, contained every element of the statute. As the opinion points out, it clearly charged a simple battery, and disclosed the "character" of the offense charged. It was therefore unlike the one in this proceeding which, as already stated, makes no mention of the element of "carrying" the weapon in question, which is surely essential to the statement of the offense attempted to be charged. There is nothing in the Matter of Winston, supra, or Ex parte Mansfield, 106 Cal. 400, 39 Pac. 775, which authorizes holding a defendant on a complaint entirely omitting the allegation of a fact essential to the statement of such offense.

The petitioner is discharged.

We concur: FINLAYSON, P. J.; WORKS, J.

---

61 Cal. App. 282

BROWN et al. v. MONROE, Judge.

(Civ. 3919.)

(District Court of Appeal, Second District, Division 2, California. March 6, 1923. Hearing Denied by Supreme Court May 5, 1923.)

Appeal and error 🔑607(1)—Court's refusal to certify purported transcript of evidence not error where appellant had not given clerk notice requiring transcript.

Where appellant had not served notice to the clerk of the court requesting a transcript of the evidence, as required by Code Civ. Proc. § 953a, the court did not err in refusing to certify transcript tendered by appellant.

Mandamus by Alma Brown, as administratrix of the estate of Sarah Lee, deceased, with the will annexed, and the estate of Sarah Lee, deceased, against Judge Charles Monroe, Judge of the Superior Court of the County of Los Angeles. Writ denied.

Charles S. Darden, of Los Angeles, for petitioners.

Ford & Bodkin, of Los Angeles, for respondent.

CRAIG, J. This is a proceeding of mandamus to compel the defendant to attach his certification to a purported reporter's transcript.

It appears that a case entitled Louis Armelin and Alice Armelin, His Wife, v. Alma Brown, Administratrix, etc., was tried in the department of the superior court presided over by the defendant, and judgment was rendered by him therein on September 20, 1921, in favor of the plaintiff; that on the 6th of the following October the defendant served and filed a notice of appeal; that on October 15, 1921, defendant in said action served and filed a notice to the clerk of the court stating that the defendant had appealed from the final judgment entered and requesting "a transcript of the following documents, to wit: Complaint, answer, judgment, Defendant's Exhibits 1, 2, and 3, notice of intention to move for new trial, tender of installment payment and interest due under agreement of sale of real estate, and notice of appeal"—that on the 26th day of January, 1922, defendant delivered to the clerk of the said court a document purporting to be a reporter's transcript of the trial, and asked the defendant to certify to it as provided in section 953a of the Code of Civil Procedure, whereupon the court, after objection by the plaintiff in said action, refused to certify to said alleged reporter's transcript. The above are the facts essential to a determination of this petition.

[1, 2] It must be held that the defendant in said action, petitioner in this proceeding, having served notice of appeal, at least from that time had notice of the rendition of judgment. Estate of Keating, 158 Cal. 113, 110 Pac. 109; Fiske v. Gosbey, 168 Cal. 334, 143 Pac. 611. She served a notice to the clerk within 10 days, as required by section 953a, Code of Civil Procedure, but in it made no mention of a reporter's transcript. By this method of appeal the phonographic report of the trial must "after due proceedings pointed out in the section" be authenticated by the judge. Williams v. Lane, 158 Cal. 39, 109 Pac. 873. It is not intended or required that the trial judge shall settle, allow, and certify any purported transcript that may be presented to him by the defendant. A transcript produced "after due proceedings pointed out in section 953a," ordinarily requires no personal detailed examination by the judge to satisfy him of its correctness. An appellate court will not compel the trial judge to attach his certification to a document presented to him in entire disregard of the proceedings clearly provided to be pursued as precedent to such certification.

The petitioner, a long time after the notice had been served and filed, made a motion in the trial court for relief under section 473 of the Code of Civil Procedure, asking that the notice to the clerk be corrected by adding the words "transcript of testimony," which motion was denied. This fact has no bearing upon the decision of the instant mandamus proceeding.

Petitioner places much reliance upon what is said in Smith v. Jaccard, 20 Cal. App. 280, 128 Pac. 1023, 1026. In that case a notice to the clerk requiring a phonographic report was served in time, but the report was filed subsequent to the time prescribed by section 953a, Code of Civil Procedure. It was held that the failure of the reporter to file the transcript within the period allowed is not jurisdictional, and that the trial court did not abuse its discretion in certifying to its correctness.

In the instant proceeding the record shows that the trial court refused its certification, not only because the phonographic transcript was not presented in time, but because no notice requiring such a transcript had ever been served or filed, and hence the one presented to the court had no standing; "due proceedings" had not been taken to furnish it with legal credentials sufficient to require its recognition as the transcript which it purported to be.

The petition is denied.

We concur: FINLAYSON, P. J.; WORKS, J.

190 Cal. 673

BURGESSER et al. v. BULLOCK'S et al.
(L. A. 6847.)

(Supreme Court of California. March 23, 1923.
Rehearing Denied April 21, 1923.)

1. **Municipal corporations 🔑705(2) — Neither pedestrian nor automobile has superior right of way on street.**

Neither a pedestrian nor an automobile has a superior right of way on a street; each is entitled to its use, and the conduct of both must be regulated with reference to this fundamental rule.

2. **Municipal corporations 🔑706(7)—Whether one crossing street in front of automobile was contributorily negligent held for jury.**

Where one injured by an automobile saw it approaching as he was crossing the street before he entered its path and continued to observe it thereafter, but apparently misjudged its speed, the question whether he was negligent was a question for the jury.

On Rehearing.

3. **Evidence 🔑265(17) — Admissions of employee driving automobile held not binding on corporation employer.**

In an action against a corporation for injuries sustained when struck by one of its automobiles driven by an employee, admissions by such employee that he was exceeding the speed limit, and that his brakes were defective, and that for that reason he could not stop or avoid the collision, are not binding on the corporation.

4. **Municipal corporations 🔑706(6)—Whether defendant was negligent, resulting in injury to pedestrian, held for jury.**

In an action against a corporation for injuries sustained from being struck by an automobile driven by its employee, testimony that the automobile traveled 50 or 60 feet after the collision, and that at a speed of 20 miles an hour, with the brakes in good condition, it could have stopped in 20 or 25 feet, and evidence that the brakes had not in fact been working well, *held* sufficient to make defendant's negligence a question for the jury.

5. Municipal corporations 🔑706(5)—Automobile driver, unable to stop within distance illuminated by car lights, held not free from negligence as matter of law.

Though the rule making it negligence as matter of law to operate an automobile at night at such speed that it cannot be stopped within the distance that the highway is illuminated by its lights has never been adopted, it cannot be said that it is no negligence whatever for a driver of an automobile to travel at a speed of 20 miles an hour with his lights so dim that he is unable to see more than 10 feet in advance of his headlights, and when he cannot stop within 20 or 25 feet, and particularly where the evidence shows that he did not in fact stop for 50 or 60 feet.

6. Courts 🔑104—Supreme Court not obligated to distinguish between decisions of District Court of Appeal apparently inconsistent with its own opinion.

There is no obligation on the part of the Supreme Court to interpret and distinguish decisions of the District Court of Appeal, merely because it is contended that the rule there laid down is inconsistent with the one adopted by the Supreme Court, either in its previous opinions or in the opinion then pronounced.

7. Negligence 🔑136(5)—Question for jury.

Negligence is ordinarily a question of fact for the jury, where there is substantial evidence; but the court may withdraw the case from the jury and direct a verdict, where the evidence is undisputed, or is of such conclusive character that in the exercise of a sound discretion, it would be compelled to set aside a verdict returned in opposition to it.

In Bank.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Ada M. Burgesser and others against Bullock's, a corporation, and another. From a judgment for defendants, plaintiffs appeal. Reversed.

Norman A. Bailie and Michael F. Shannon, both of Los Angeles, for appellants.

Haas & Dunnigan, S. F. MacFarlane, and Clair Tappaan, all of Los Angeles, for respondents.

WILBUR, C. J. This is an action by the heirs of John Q. Burgesser, deceased, to recover damages due to his death. The trial court instructed the jury to bring in a verdict for the defendants. Plaintiffs appeal. The question presented on the appeal is whether or not there was sufficient evidence to go to the jury.

The decedent was killed by a collision between himself and an automobile belonging to the defendant Bullock's, a corporation, and operated by defendant Clopton, its employee. The accident occurred November 29, 1919, at the intersection of West Jefferson street and Budlong avenue, in the city of Los Angeles. About 6:15 p. m. of that day the deceased alighted from the front end of a west-bound Jefferson street car, passed around the front end of such car and in front of the headlight of the car, and was walking across Jefferson street in a southerly direction towards the curb on the south side of Jefferson street, when he was struck by the defendant's automobile, proceeding easterly on Jefferson street. The trial court granted the motion for an instructed verdict in favor of the defendants upon the ground that the decedent was negligent as a matter of law. The trial court evidently arrived at this conclusion because of the testimony of the decedent given by deposition in an action to perpetuate his testimony to the effect that he looked to the left and then to the right toward the defendant's automobile and saw the headlights of the approaching automobile, and continued to observe them while he walked rapidly toward the curb. The opinion of the trial court in granting the motion for the instructed verdict is incorporated in the transcript, and it appears that the trial judge was of the opinion that the decedent, having observed the approaching automobile before he entered its path, and having continually observed it thereafter, and having apparently misjudged its speed, was therefore guilty of contributory negligence. The fallacy of the conclusion reached by the trial court results from the assumption that the automobile had the right of way, and that it was the duty of the pedestrian to assume that the automobile would continue in its direction without diminishing its speed or yielding to the pedestrian.

[1] The law is that neither the pedestrian nor the automobile has a superior right of way, and that each is entitled to use the highway, and that the conduct of both must be regulated with reference to this fundamental rule. The decedent testified that when he first saw the defendant's automobile it was about 25 feet on the other side of Budlong avenue, and that he had just passed around the front of the street car and had looked toward the rear of the street car before starting to cross, and then, looking to his right, saw the headlights of defendant's machine. These lights, he testified, were "low down," apparently meaning that they were dim. He stated it was "very dusk" and he could not see the automobile itself.

[2] Whether or not the decedent was negligent in crossing the street in front of the approaching automobile was primarily a question of fact for the jury, and for that reason we do not wish to enter into a further

discussion of the matter, for it is sufficient for us to say that the jury might have concluded that the decedent was not negligent in so doing.

This case was transferred to the District Court of Appeal, Second Appellate District, Division 2, and an opinion was rendered by that court affirming the judgment of the trial court. That court, in affirming the judgment, relied upon a rule of law which it stated as follows:

> "A foot traveler is negligent who fails to look both ways before crossing a highway where vehicles frequently pass. Niosi v. Empire Steam Laundry et al., 117 Cal. 257, 49 Pac. 185; Hamlin v. Pac. Electric Ry. Co., 150 Cal. 776, 89 Pac. 1109; Spring v. Tawa, 49 Cal. App. 100, 192 Pac. 1051."

It is true that an instruction to that effect was given in the first case cited, Niosi v. Empire Steam Laundry et al., supra, and also in the case of Sheldon v. James, 175 Cal. 474, 478, 166 Pac. 8, 2 A. L. R. 1493. The same rule is also stated in the case of Davis v. Breuner Co., 167 Cal. 683, 140 Pac. 586, but these cases must all be read in the light of the facts involved in the particular case. In the case of Niosi v. Empire Steam Laundry et al., supra, the jury had rendered a verdict in the defendant's favor. The plaintiff's own testimony showed that he stepped into the street intersection where the cross street was about 20 feet wide, without looking toward the left, from which traffic would be expected to come on the side of the street he was entering, and that he was almost instantly struck by the right hub of the front wheel of the laundry wagon, so that apparently the horses drawing the laundry wagon had passed him when he stepped into the street and directly into the side of the wagon. The plaintiff had his attention directed towards some boys fighting further up the cross street to his right, and did not look at all in the direction from which traffic was to be expected as he stepped from the curb. The real question therefore involved was whether or not it was the duty of the pedestrian in entering the street to look toward the direction from which he would expect traffic to approach if it was traveling on the right-hand side of the street he was about to enter. Under these circumstances the approval of the trial court's instruction amounted to no more than an approval of the rule that, where a pedestrian steps from a curb into a narrow street where the traffic is heavy, it is his duty to look in the direction from which such traffic would be likely to come before stepping from the curb.

In the case of Davis v. Breuner Co., 167 Cal. 683, 140 Pac. 586, supra, this court was considering the question as to whether or not there was sufficient evidence to justify the finding of the trial court that the pedestrian was negligent. The statement in that case that it was the duty of the foot passenger to look both ways before starting to cross the street in entering a busy thoroughfare, was directed to the propriety of the jury's finding of fact. The jury in that case had found that the pedestrian was negligent.

In the case of Sheldon v. James, supra, the instruction given in the case of Niosi v. Empire Steam Laundry et al., supra, was given. A verdict was rendered in favor of the defendant, and the plaintiff appealed, claiming that the instruction was erroneous. In passing upon that instruction the court, having in mind the circumstances as disclosed by the evidence, said:

> "We construe it to be no more than a declaration that in the exercise of ordinary care it is the duty of such a pedestrian to look to the right and to the left whenever he has voluntarily put himself in a position which may be one of peril coming from either direction, and in particular where he has received adequate warning of the likelihood of peril. * * *"

The statement just quoted concerning adequate warning related to the evidence in the case that the defendant had blown a horn, and that the pedestrian, in disregard of this warning, had nevertheless stepped from the sidewalk in front of defendant's approaching machine.

The question of whether or not the pedestrian is negligent in crossing a street is one which, in the absence of express statutes regulating his conduct, must ordinarily be left to the jury; for the conduct of an ordinarily prudent person under such circumstances must be largely determined by the condition of the traffic at the particular time and place in question. There may be circumstances under which it can be said that the pedestrian is negligent as a matter of law. For instance, in the case of Finkle v. Tait (Cal. App.) 203 Pac. 1031, in the case of a directed verdict, the District Court of Appeal affirmed the decision, but, in denying the transfer to this court (Finkle v. Tait, 203 Pac. 1034), we sustained the conclusion of the District Court of Appeal solely for the reason that the pedestrian was crossing the street without looking and under such circumstances that he could not see in the direction from which traffic might be expected.

In the case of Mann v. Scott, 180 Cal. 550, 182 Pac. 281, we adopted a portion of the opinion of Mr. Justice Finlayson, written in deciding the case in the District Court of Appeal (180 Cal. 550, 554, 182 Pac. 281, 282), as follows:

> "There is no positive duty to stop, look, and listen when a pedestrian is about to cross a city street. * * * And it may be that if the jurors in this case rejected, as improbable, respondent's testimony that she looked and saw no approaching automobile, they, nevertheless, concluded—as well they might—that if she did see the automobile before leaving the sidewalk, she reasoned that its driver would comply with

the city ordinance, referred to in the court's instructions, requiring an automobile traveling behind a street car to stop 10 feet in the rear of the car if it stops to let off or take on passengers, until the passengers have safely alighted from or boarded the car. Whether, if she saw the automobile, respondent would have been warranted in going toward the street car without further watching the automobile approach, relying upon a compliance by the appellants with the requirements of the ordinance, was a question upon which men's minds might well differ, and hence it was properly a case for the jury. * * *"

In the late case of Reaugh v. Cudahy Packing Co., 208 Pac. 125, we had occasion to again consider the rule with reference to the obligations of a pedestrian in crossing a business street. It is there pointed out that the question of whether or not a pedestrian is negligent is to be determined from all the facts and circumstances in evidence in the case, and whether or not it was the duty of the pedestrian to look in a given direction at a given time was a question for the jury. See, also Haines v. Fewkes (Cal. Sup.) 213 Pac. 490. On the other hand, in Klusman v. Pac. Elec. Ry. Co. (Cal. Sup.) 213 Pac. 38, we sustained the trial court in holding that the pedestrian was negligent as a matter of law in failing to look for an approaching interurban car.

It is sufficient for the purposes of a new trial in this case to say that, where the evidence showed that the decedent looked in the direction of the approaching automobile and saw the automobile, and nevertheless proceeded to cross the street, it is for the jury to say whether or not his conduct with reference to the approaching automobile was, under all the circumstances at the time and place and conditions of the traffic, negligence on the part of the decedent.

We have not discussed the question of the negligence of the defendants for the reason that it seems to be conceded by the parties and is assumed by the trial court that there was sufficient evidence of such negligence to go to the jury.

Judgment reversed.

We concur: KERRIGAN, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.; WASTE, J.; MYERS, J.

On Rehearing.

WILBUR, C. J. [3, 4] The defendants petition for a rehearing on the ground that the question of their alleged negligence is not sufficiently disposed of in the opinion. The defendant Clopton, who was driving the automobile, admitted that he was exceeding the speed limit and that his brakes were defective, and that for that reason he could not stop or avoid the collision. It is conceded that upon this statement there was sufficient evidence of his negligence to go to the jury. It is pointed out, however, that these admissions were not binding upon the respondent Bullock's Company, and this is true. We will, therefore, give further consideration to the claim of respondent Bullock's. In respondents' brief the facts are thus stated:

> "It appears affirmatively that the deceased saw the automobile in time to avoid the accident, and it also appears without contradiction that the driver of the automobile did not see the deceased until he was within 10 feet of the radiator, when he used every effort to avoid the accident. The driver of the automobile had the headlights of the street car shining in his face, and both the driver and the deceased testified that under the existing conditions visibility was low."

The appellants state additional facts in their reply brief bearing upon the question of the negligence of the defendants as follows:

> "It is admitted that the defendant Clopton was the driver of the car that struck the deceased, Burgesser, and that at the time of the accident Clopton was acting within the scope of his employment for the defendant Bullock's. Clopton testified that he was driving a Ford speedster; that it was heavy twilight, and that he could not see an object very well; that he was driving about 20 miles an hour; that his brakes did not respond; that they were either worn or strained; that on other stops that day his brakes appeared to be somewhat lax or loose; that when he first saw the deceased he was about a foot or a step south of the street car; that the headlight on the street car did not affect him much; that he observed a number of persons getting off the street car just about the time he struck the deceased; that they all flashed up like a pistol shot; that when he hit the deceased it somersaulted him. * * *
>
> "The automobile, Clopton testified, was traveling 20 miles an hour. According to the testimony of Clopton, the deceased traveled more than half way across Jefferson street while he (Clopton) traveled 10 feet in his automobile, the automobile traveling at a speed of 20 miles an hour. * * *"

The respondents are in error in stating that there was no direct statement as to the speed of the automobile. The driver Clopton was asked:

> "How fast were you traveling at the time of this accident when you saw Mr. Burgesser? A. I think about 20 miles an hour and possibly less."

There was other evidence from which the jury might have inferred the speed of the automobile, which we need not state in detail. There was testimony that the automobile traveled 50 or 60 feet after hitting the deceased and that at the speed of 20 miles an hour with the brakes in good condition the automobile could have been stopped in from 20 to 25 feet. There was also other evidence that the brakes were not working well. The defendants' automobile crossed an intersecting street after it was first observed by the deceased. In view of the necessity of a new trial, we refrain from a careful analysis of the testimony, for the reason that the question of negligence and contributory negligence is essentially one for the jury.

In view of the fact that respondents so earnestly insist that there is no substantial evidence of negligence on their part, it should perhaps be said that in many jurisdictions it is held negligence as a matter of law for a person to operate an automobile in the night time at such speed that he cannot stop the machine and avoid an obstruction or other traveler within the distance that the highway is illuminated by his lights. These cases are collated in the note to section 307 of Huddy on Automobiles, 5th edition, wherein the rule is stated as follows:

> "Reasonable care requires in many cases that the driver of a motor vehicle drive at a slower speed at night than during the day. It may be true that in a busy street in a large city a greater speed would be justified at night, for then the other traffic would be lighter, but ordinarily a greater speed is allowed in the daytime. One restriction on his speed is that he shall keep the machine under such control and operate it at such speed that he can stop the machine and avoid an obstruction or other traveler within the distance that the highway is illuminated by his lights. As was said in one case: 'It was negligence for the driver of the automobile to propel it in a dark place in which he had to rely on the lights of his machine at a rate faster than enabled him to stop or avoid any obstruction within the radius of his light, or within the distance to which his lights would disclose the existence of obstructions. * * * If the lights on the automobile would disclose obstructions only ten yards away it was the duty of the driver to so regulate the speed of his machine that he could at all times avoid obstructions within that distance. If the lights on the machine would disclose objects further away than ten yards, and the driver failed to see the object in time, then he would be conclusively presumed to be guilty of negligence, because it was his duty to see what could have been seen.' This proposition applies when the driver is making a turn in the road, and is applicable when the bright light from another machine is shining in the face of the driver. Moreover, the rule applies where the regular lights are not working and the driver is using a lantern hung in front of his radiator. The same principle is involved when, on account of a blinding snowstorm, the driver can see but a short distance ahead of his machine."

[5] While this court has never adopted that rule, we are certainly not prepared to go to the other extreme of holding that it is no evidence of negligence whatever for a driver of an automobile to travel at a speed of 20 miles an hour with his lights so dim that he is unable to see a pedestrian more than 10 feet in advance of his headlights when he cannot stop within 20 or 25 feet and when the evidence shows that he does not in fact stop for 50 or 60 feet. We repeat the question of the negligence of the defendants was one for the jury to determine under the evidence. In defendants' petition for a rehearing it is urged that it is our duty to at least mention and repudiate the doctrine announced by the First District Court of Appeal in Mayer v. Anderson, 36 Cal. App. 741, 173 Pac. 174, if that is the effect of our decision, and it is also urged that the decision of that court in Spring v. Tawa, 49 Cal. App. 100, 192 Pac. 1051, is directly in point and was entitled to consideration.

[6, 7] While we do not recognize any obligation on the part of this court to interpret and distinguish decisions of the District Court of Appeal because it is contended that the rule there laid down is inconsistent with the one adopted by this court, either in its previous opinions or in the opinion pronounced, in view of the respondents' insistence, it is proper to say that both cases are readily distinguishable from the case at bar. In Spring v. Tawa, 49 Cal. App. 100, 192 Pac. 1051, the pedestrian was standing in a position of safety and being frightened by the approaching automobile ran toward it and into its side as it passed her. Moreover, the rule stated in that case as to the duty of the trial court in directing a verdict is incorrectly stated as follows:

> "The rule has been laid down, both in the Supreme Court and in this court, that the ruling of a trial court as to whether a given state of facts presented before it does or does not amount to negligence as a matter of law will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion. Mayne v. San Diego Elec. Ry. Co., 179 Cal. 173, 175 Pac. 690; Diamond v. Weyerhaeuser, 178 Cal. 540, 174 Pac. 38; Charves v. S. F. O. T. Ry., 186 Pac. 154."

The authorities cited do not sustain the rule laid down. The case of Mayne v. San Diego Elec. Ry. Co., supra., cited by the District Court in support of its statement was one involving the alleged contributory negligence of a child of 14 years of age and it was in this connection that it was stated:

> "That as a rule courts upon appeal have not interfered with the discretion of trial courts in referring or in refusing to refer to juries the question as to whether the contributory negligence of children of the age of 14 years or under was such as to prevent their recovery for injuries sustained by them." 179 Cal. 177, 175 Pac. 692.

The correct rule is stated in Diamond v. Weyerhaeuser, 178 Cal. 540, 174 Pac. 38, supra:

> "If there was any substantial evidence tending to show that the collision was caused by negligence on the part of defendant's driver, the action of the court in directing a verdict was, of course, erroneous. The existence or nonexistence of negligence is ordinarily a question of fact to be determined by a jury. On the other hand, the court may withdraw the case from the jury and direct a verdict where the evidence is undisputed, 'or is of such conclusive character, that the court, in the exercise of a

sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.' Davis v. California St. C. R. R. Co., 105 Cal. 131; Estate of Baldwin, 162 Cal. 471."

With reference to the case of Mayer v. Anderson, supra, respondents earnestly insist that the case is "not distinguishable and is in direct conflict with the principle of law announced in the case at bar." To distinguish that case from this it is only necessary to note that the plaintiff in that case walked across Kearny street on the north side of Market street in San Francisco at 5 o'clock in the afternoon when the traffic was very heavy, "looking straight ahead, without glancing to either side, and was absolutely oblivious to the proximity of the automobile right up to the moment of the impact, at which time he had traversed about three-quarters of the distance across the street." The court properly held that the pedestrian was bound to do more than this, in the exercise of due care, to avoid colliding with an automobile traveling no faster than the pedestrian was walking.

Rehearing denied.

We concur: KERRIGAN, J.; LENNON, J.; SEAWELL, J.; LAWLOR, J.; MYERS, J.

---

61 Cal. App. 300

PEOPLE v. CRAWFORD. (Cr. 673.)

(District Court of Appeal, Third District, California. March 7, 1923.)

1. Criminal law 🔑511(1)—Evidence held to sustain conviction.

In a prosecution for forgery, evidence *held* to sustain conviction as against contention that there was not sufficient testimony to corroborate an accomplice.

2. Criminal law 🔑780(3)—Instruction as to corroboration of accomplice's testimony in language of statute held sufficient.

In a prosecution for forgery, instruction as to necessity of corroboration of accomplice's testimony in the language of Pen. Code, § 1111, as amended, *held* sufficient.

3. Criminal law 🔑1064(7)—Blanket claim of error that instructions invaded appellant's substantial rights held insufficient.

Appellant's blanket claim of error reading, "The refusal to give these instructions invaded the substantial rights of the defendant, deprived him of his liberty, and for that reason a new trial should be granted," *held* sufficient.

4. Criminal law 🔑829(1)—Refusal of requested instructions covered by those given not error.

The refusal of proposed instructions, where the statements of law contained therein were substantially included in the instructions given by the court, was not error.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Robert Crawford was convicted of forgery, and, from the judgment of conviction and from the order denying his motion for a new trial, he appeals. Affirmed.

H. L. Ford and E. M. Frost, both of Eureka, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of forgery, and prosecutes this appeal from the judgment and the order denying his motion for a new trial.

Frank Thomas testified that he and the defendant entered a poolroom, where the defendant procured a pen and ink from the proprietor; that they then retired to another part of the poolroom, where the defendant wrote and signed the check alleged to have been forged; that the defendant handed the check to the witness, who cashed it at another place of business; and that he gave a part of the money received on the check to defendant. The proprieter of the poolroom testified that he gave the defendant a pen and ink and that the defendant and Thomas then went to another part of the poolroom. Two other witnesses compared the signature attached to the check with the proven handwriting of defendant and testified that in their opinion the signature was in defendant's handwriting. The check and the exemplars of defendant's handwriting were before the jury for comparison. Other witnesses testified to the passing of the check by Thomas.

[1] It is contented that, since Thomas was an accomplice, there was not sufficient, or any, corroboration of his testimony to sustain a conviction. The foregoing statement of the evidence shows, not only that there was sufficient corroboration, but that, independent of the testimony of Thomas, the evidence was sufficient to support the verdict.

[2] The court refused to give one of defendant's proposed instructions in the language of section 1111 of the Penal Code as it read prior to the amendment thereof in 1911, but instructed the jury in the language of that section as it now reads. The instruction given was sufficient.

The court refused to give five other instructions proposed by defendant.

[3, 4] Appellant's only attempt to point out error in such refusal is the statement that "the refusal to give these instructions invaded the substantial rights of the defendant, deprived him of his liberty, and for that reason a new trial should be granted." While such a blanket claim of error is wholly insufficient, an examination of the proposed instructions shows that any correct state-

ments of law contained therein were substantially included in the instructions given by the court.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

61 Cal. App. 158

SIEBOLD v. BERDINE et al. (Civ. 4369.)

(District Court of Appeal, First District, Division 2, California. Feb. 27, 1923.)

1. Fraud 🔑58(1)—Findings on specifications of fraud supporting judgment sustained.

In an action by the purchaser of a bakery business against the sellers for fraud and deceit, evidence *held* to support the findings on the specifications of fraud which were sufficient to support the judgment.

2. Fraud 🔑35—Fraud in sale of business held not waived.

Where plaintiff purchased a bakery business under certain representations relating to the income thereof, and to the cost of materials and equipment, the payment of the full purchase price in reliance on defendant's offer to repurchase *held* not a waiver of fraud; such offer to repurchase relating solely to the matter of income from the business.

3. Partnership 🔑371—Special partner held liable for fraud in sale of partnership property.

Where a special partner in a bakery business fails to comply with Civ. Code, §§ 2477 and 2501, relating to special partnerships, and the limitation of their liability on a sale of the business, and the purchaser subsequently sues the partnership for damages from fraud and deceit, the special partner is liable for such damages, notwithstanding that he has only a limited interest in the partnership which had been returned to him on the consummation of the sale; a general partner's liability being the same as that of a principal for the fraud of his agent while acting within the scope of his authority.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Action by John E. Siebold against E. S. Berdine and others, for damages for fraud and deceit. Judgment for plaintiff, and defendants appeal. Affirmed.

Ernest K. Little, of San Francisco, and James P. Montgomery, of Oakland, for appellants.

Jesse Robinson and Robinson & Sizer, all of Oakland (Clarence De Lancey, of San Francisco, of counsel), for respondent.

NOURSE, J. This is an action for damages for fraud and deceit arising out of the sale of a bakery. The sale was made on the 14th day of January, 1920, at which time $7,598.81 was paid to the defendants as part of the total purchase price of $12,598.81, the balance of which ($5,000) was agreed to be paid on or before January 28th of the same year. Plaintiff entered into possession on the 15th day of January, and on the 29th of January paid to the defendants the sum of $4,677, which at that time the parties agreed was the proper amount to be paid after making certain deductions following their inventory of the stock in trade. Plaintiff elected to stand upon his contract and to sue for the fraud. Evidence was offered that the market value of the property at the time of the sale was $7,500 and thereupon the court rendered judgment in favor of the plaintiff in the sum of $5,098.81.

The plaintiff relied upon four specifications of fraud, consisting of representations made by the defendant Berdine to the plaintiff as inducements for the sale: (1) That the business had been yielding an average net profit of $200 or more per week; (2) that there was on hand as part of the inventory of said business 120 sacks or 60 barrels of "Minodak flour"; (3) that the cost of certain fruits inventoried at the time of the sale was 147 cases at $7.25 per case; and (4) that the actual and true cost of equipping and installing said business, plus cost of fixtures, stock and trade, and baking materials, was the sum of $12,598.81.

The trial court found that all the allegations of the complaint containing the specifications of fraudulent representations were true, that these representations were false, and that there was no waiver on the part of the plaintiff. The judgment which followed is attacked upon the ground that the evidence does not support these findings, and also that whatever fraud was committed and whatever misrepresentations were made were waived by the respondent before he made his final payment upon the contract.

[1] Upon the first specification of fraud there is evidence in the record to support the finding that at the particular time in question the average weekly net profit of the business did not amount to $200. There was evidence to show that respondent took possession of the premises at a particularly unfavorable period of the year, and that both the receipts and profits were higher at different periods of the year, a fact which was made known to the respondent before he consummated the purchase. However, there is evidence to support the finding of the trial court that these representations made by the appellants were untrue, and that the respondent relied upon them to his injury. The same may be said as to the finding relating to the representations covering the number of sacks of flour which were included in the sale, although it is evident that these representations resulted from mistake on the part of appellants rather than fraud, and that

they had no possible connection as an inducement for the sale, the mistake having been discovered long before the sale was consummated, and having been adjusted by the parties before the final payment was made.

The finding relating to the cost of certain fruits inventoried at the time of the sale is not supported by the evidence. The claim is that the appellants represented to the respondent that the cost of this fruit was $7.25 per case, whereas the cost was $7.25 for two cases, or one dozen. The evidence is that, when the parties were going over the inventory, the respondent inquired as to the cost of this fruit, and one of the appellants showed him an invoice from a dealer for the sale of baker's apples at $7.25 a dozen. The evidence, then, was that the parties agreed upon a sum of $7.25 a case for all the 147 cases of fruit, which the respondent testified consisted of apples, peaches, cots, squash, blackberries, and various other fruits. It is in evidence, however, that the true cost price of some of these fruits ranged from $10 to $16 a dozen (two cases), which would make the cost price of such fruits from $5 to $8 a case. The court found that the value of the 147 cases was at the rate of $7.25 for two cases, and, as we have said, there was no evidence to support this finding.

The fourth specification of fraud relates to a misrepresentation as to the cost of equipping and installing the business, plus cost of fixtures, stock in trade, and baking material. Upon this issue the evidence took a wide range, and consisted mainly of the opinions of witnesses as to the value of the equipment, fixtures, and stock. The trial court found that the cost was less (how much less does not appear) than the sum which the appellants represented it to be. There was some evidence to support the finding, and, in view of the conflict which arose, this finding should not be disturbed. The findings on specifications 1, 2, and 4 are sufficient to support the judgment.

[2] The appellants insist that the judgment should be reversed as to all the appellants upon the ground that the alleged fraud was waived, and that it should be reversed as to the appellant Hogarty, as he was a partner who had no part in or knowledge of the alleged fraud. The claim of waiver is based upon the fact that, after respondent had made the first payment upon the purchase price, and had entered into possession of the premises, and while title still remained in the appellants, he discovered the facts upon which his allegations of fraud are based, but nevertheless completed the transaction by making the payment and accepting from the appellant Berdine his offer to repurchase the property if the representations regarding the income proved to be untrue. The weakness of the position of appellants is that there is no evidence to show that at the time the transaction was completed the respondent had any knowledge that the true cost of equipping and installing the business, plus cost of fixtures, stock in trade, and baking materials, was less than the sum represented by appellants. It does appear that prior to that time respondent knew or had the means of knowing that the representations relating to the profits and income of the business and to the quantity of flour were untrue. It is in evidence that respondent made complaint regarding these representations in a very few days after he took possession of the premises on January 15, 1920, and that it was because of his knowledge of those facts that he demanded and received from the appellant Berdine the offer to repurchase. This, however, cannot be taken as a waiver of all the fraudulent misrepresentations specified in the complaint. The offer to repurchase related solely to the matter of income from the business. It was given at a time of the year when the income from the bakery business was confessedly below the ordinary, and was simply an additional inducement to persuade the respondent to complete his contract during this period, and before he would have an opportunity to convince himself that at a later time in the year this income would increase. It was nothing more than an assurance in writing that the alleged misrepresentations regarding the income would prove true upon investigation and experience after the contract had become fully executed. It is insufficient in itself to constitute evidence of waiver of the alleged fraud or misrepresentations.

[3] As to the appellant Hogarty, it appears that he was a special partner having a limited interest of $500 in the partnership, and that upon the consummation of the sale that sum had been returned to him. There is no evidence, however, that he had complied with the provisions of the Civil Code (sections 2477 and 2501) relating to special partnerships and the limitation of their liability. It is in evidence that he took no part in the transactions leading to the sale, and had no knowledge of the alleged fraud or misrepresentations upon which the action is founded. However, a general partner's liability is the same as that of a principal for the fraud of his agent while acting within the scope of his authority, and this principle applies in cases involving fraud or misrepresentation by a partner in connection with the sale of the partnership property. 20 R. C. L. pp. 916, 917.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

61 Cal App. 242

PEOPLE v. FOUTS. (Cr. 923.)

(District Court of Appeal, Second District, Division 2, California. March 3, 1923.)

1. Criminal law 🔑532(1), 1158(4)—Court's duty in first instance to determine if confession was voluntary.

Where testimony on the question whether a confession was voluntary is in conflict, it is the duty of the trial judge in the first instance to determine whether the evidence shows beyond a reasonable doubt that the confession was free and voluntary, and, the judge having resolved the question, his action cannot be disturbed on appeal.

2. Burglary 🔑31—Exclusion of testimony of instructions to accused concerning care of an alleged accomplice, a drug addict, held not error.

In a prosecution for burglary alleged to have been committed by accused and another, both of whom were frequenters of a Salvation Army hall, the exclusion of testimony that accused had been instructed by the Salvation Army officer to watch his alleged accomplice, and stay with him, and keep him out of trouble, he being at the time under her care as an alleged narcotic addict, *held* not error.

3. Witnesses 🔑337(5)—Evidence of former conviction held admissible for purpose of impeachment.

Where accused has taken the witness stand and testified to matters occurring after his arrest, and affecting the question whether a confession by him had been free and voluntary, the admission of testimony by the state for the purpose of impeachment that accused had previously been convicted of several felonies *held* not error; such evidence being admissible as affecting his credibility.

4. Witnesses 🔑337(5)—Where previous convictions for felonies have been shown, naming of such felonies not error.

Where, for the purpose of impeachment, the people have been permitted to show that accused was previously convicted of felonies, it was not error to permit the naming of each of such felonies.

5. Criminal law 🔑1141(2)—Burden on appellant to show error.

It is always incumbent upon an appellant to show error.

6. Criminal law 🔑1178—Points not argued on appeal not considered.

Points made by appellant, but on which no argument is made, cannot be considered.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

A. G. Fouts was convicted of burglary, and he appeals. Affirmed.

Carleton R. Bainbridge and S. S. Hahn, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

WORKS, J. This is an appeal from a judgment of conviction of burglary, and from an order denying defendant's motion for a new trial.

[1] The first point made by appellant is that the trial court erred in receiving evidence of a confession of appellant, and this upon the ground that, as put in the brief, "the evidence clearly shows that such confession was involuntary." We have examined the testimony bearing upon this question, and there can be no doubt that there was a substantial conflict upon it. Under such circumstances it was the duty of the trial judge, in the first instance, to determine whether the evidence showed beyond a reasonable doubt that the confession was free and voluntary. People v. Zarate (Cal. App.) 201 Pac. 955. The judge having resolved the question, we can no more disturb his action than we could the action of judge or jury on any disputed question of fact.

[2] The burglary in question was committed by appellant in company with one Avogadro. A part of the defense of appellant was that, although he was at or near the place of the burglary, he did not participate in the commission of the crime, but attempted to dissuade Avogadro from committing it. Appellant himself testified that he endeavor- to persuade Avogadro not to enter the store which was burglarized. Immediately preceding the burglary both appellant and Avogadro were inmates or frequenters of a place called Salvation Army Hall, an institution then in charge of an officer of the Salvation Army. This officer testified that Avogadro, an alleged narcotic addict, was "under her care" at the hall. The officer was then asked various questions by appellant's counsel for the purpose of eliciting from her a statement of certain "instructions" which it is claimed she gave to appellant when he and Avogadro left the hall together some hours before the burglary was committed. Objection was made to all these questions, and the trial court ruled that they were improper. These rulings are complained of as error. Appellant says in his brief that he expected to show by the Salvation Army officer that she had told him "to watch Avogadro and stay with him and keep him out of trouble." We shall assume that this was the purpose of the questions, but, even so, we must at once remark that we cannot perceive that they were proper. What the Salvation Army officer said to appellant can cast no light upon the truth or untruth of his story as to what he did at the scene of the burglary. That she did tell appellant to watch over Avogadro would have been no evidence whatever that he limited his operations at the scene of the burglary to acting as his brother's keeper, or that he ever watched over Avogadro at all. Such testi-

mony of the Salvation Army officer would have been no evidence of the intent of appellant. This is all too palpable to require argument.

[3] Appellant took the witness stand, and testified to matters occurring after his arrest, and bearing upon the question whether the confession made by him was free and voluntary. Thereupon the people, over appellant's objection, and for the purpose of impeachment, showed that appellant had theretofore been convicted of several felonies. It is now contended that this evidence should not have been received. There is no merit in the point. When appellant testified upon the issue preliminary to the offer of his confession, the question of his credibility was at once before the judge, who was in the first instance to determine the admissibility of the confession, but it was as well before the jury, for that body is always to determine in the last analysis whether a confession is freely and voluntarily made. People v. Zarate, supra.

[4] As already observed, the people, for the purpose of impeaching appellant as a witness, showed that he had been convicted of various felonies. Not only so, but the people were permitted to show the name of each of those felonies. Appellant contends that the right to impeach in this manner goes no further than to inquire whether a defendant ever has been convicted of "a" felony. The authorities are directly opposed to this view. Not only may the number of felonies be shown, but they may be named to the jury. People v. Eldridge, 147 Cal. 782, 82 Pac. 442.

[5] The point is made, but sparingly argued, that the trial court erred in questioning appellant concerning a certain photograph of himself. In presenting such argument as is made upon the question appellant refers to but a single page of the reporter's transcript of the evidence, and the page shows nothing as to the point, which relates to a condition of the record. As appellant fails to point to any part of the transcript showing the condition of the record which he asserts to exist, and as it is always incumbent upon an appellant to show error, we must say that no error was committed.

At the close of the case of the people appellant moved to dismiss the action on the ground that the evidence was insufficient to sustain the charge against him. The motion was denied, and the ruling is assigned as error. In a case recently decided (People v. Clark, 214 Pac. 248), we passed upon the same point in language which fits the present action exactly:

> "The ruling was proper, as the motion did not come within the provisions of Penal Code, § 1382, fixing the grounds upon which such a motion may be made. If we view the motion as one asking the court to advise the jury to acquit, under Penal Code, § 1118, although we do not decide that it can be so regarded, it is enough to say that the evidence of the people was such that the court could not have given the jury that advice."

[6] Appellant states one other point, but makes no argument in support of it. Points so presented cannot be considered.

Judgment and order affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

61 Cal. App. 284

CALIFORNIA HIGHWAY COMMISSION OF DEPARTMENT OF PUBLIC WORKS v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 4430.)

(District Court of Appeal, First District, Division 2, California. March 7, 1923.)

Master and servant 🔑375(2)—Employee hurt while riding to dinner in fellow employee's automobile held not to have sustained injury in "course of and out of employment," within Compensation Act.

An employee of the Highway Commission injured during noon hour while riding in a defective automobile belonging to a fellow employee from the place of employment to a camp maintained by the employer about two miles distant, where he intended to purchase his dinner, *held* not to have sustained an "injury in the course of and arising out his employment," within the Workmen's Compensation, Insurance and Safety Act; nor would the employer's failure to furnish transportation be creative of any liability for risks connected with the means adopted, though it was a custom for the employees to ride employer's truck to and from camp.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

Proceeding under the Workmen's Compensation Act by Harry Maloney, opposed by the California Highway Commission of the Department of Public Works of the State of California. Application by the Highway Commission for a writ of review to annul an order of the Industrial Commission making an award for injuries. Award annulled.

Frank J. Creede and John J. Taheny, both of San Francisco, for petitioner.

A. E. Graupner, of San Francisco, and Hickcox, Crenshaw & Trude, of El Centro, for respondents.

LANGDON, P. J. This matter is before us upon a writ to review an award of the Industrial Accident Commission against petitioner, allowing to Harry Maloney $248.70, accrued compensation and $18.52 weekly until termination of disability, together with reasonable medical expenses, the amount to be determined later by said Commission.

The one question presented is whether or not the finding of the Commission that applicant sustained his injuries "in the course of and arising out of his employment" is sustained by the evidence in the record.

The facts are practically undisputed and are, broadly, as follows: On January 29, 1922, which was Sunday, the applicant, Harry Maloney, was in the employ of the defendant as a rock-drill operator. He was engaged, with other employees of the petitioner, in working upon the highway between Jacumba and Mountain Springs, in the state of California, at a point on the road about 1½ or 2 miles from Mountain Springs. The applicant and some of the other employees lived at Mountain Springs, where the petitioner supplied them with tents, but not with bed nor blankets, and sold them their meals if they desired to purchase them. Applicant's contract of employment did not obligate him to live at the camp at Mountain Springs, but he had chosen to do so for his own convenience. Some of petitioner's employees lived at Jacumba, about 10 miles distant. Applicant might have done likewise and might have brought his lunch with him each day, but he found the Mountain Springs camp more convenient. While applicant was employed by the petitioner, he had always ridden back and forth from the camp to his place of work during his lunch hour in one of his employer's conveyances. Also, he had been transported by his employer to his work in the morning and to camp in the evening, except upon one or two occasions when he had walked from his place of work to the camp because there was no conveyance at hand at the close of the day's work. The road from the place of work to Mountain Springs is downhill all the way. There was no express agreement between applicant and his employer as to transportation to and from the camp, but the truck drivers employed by petitioner understood that it was permissible for the employees to get on any truck that happened to be going to camp and to ride down to camp for lunch. The employees were free from work during the hour between 12 and 1 o'clock so that they might eat their lunch. At 12 o'clock noon on the day of the accident, applicant was told by a fellow employee that the only truck on duty that day had departed for Jacumba at about 10 minutes to 12. Applicant was not informed that the truck would not return, but concluded that it could not do so in time to take him to his luncheon, and so he started to walk to Mountain Springs for his lunch. After walking a few hundred yards, an automobile belonging to a fellow employee, and driven by another fellow employee, who had asked permission of the owner to use the same, caught up with the applicant as he was walking along the road. The driver of the car invited the applicant to get in the automobile and go to camp and applicant and another employee of the petitioner, who was walking with him, stepped into the automobile, which continued toward Mountain Springs. Petitioner had nothing to do with this automobile which the applicant entered, and did not know that it was to be used as a conveyance for its employees and had no opportunity to inspect or right of inspection or control over the same.

Due to some defect in the steering mechanism, the automobile, in rounding a turn in the road, went over the embankment and applicant was very seriously injured.

We do not think that these facts bring the applicant within the benefits of the Workmen's Compensation Insurance and Safety Act of this state (St. 1917, p. 831). In the case of Ocean Accident, etc., Co., v. Industrial Accident Commission, 173 Cal. 313, 322, 159 Pac. 1041, 1044 (L. R. A. 1917B, 336), it was said:

> "In the very broadest sense, of course, it is true that an injury which happens to a man who is on his way to his place of employment is an injury 'growing out of and incidental to his employment,' since a necessary part of the employment is that the employee shall go to and return from his place of labor. But it is to be noted that the right to an award is not founded upon the fact that the injury grows out of and is incidental to his employment. It is founded upon the fact that the service he is rendering at the time of the injury grows out of and is incidental to the employment. Therefore, an employee going to and from his place of employment is not rendering any service, and begins to render such service only when, as has been said, arriving at the place of his employment, he proceeds to use some instrumentality provided, by means of which he immediately places himself in a position to perform his tasks."

The case of Clapp's Parking Station v. Industrial Accident Commission, 51 Cal. App. 624, 197 Pac. 369, is also pertinent here, for while the court was unable to conclude from the facts before it that the deceased was on his way to his lunch at the time he was injured, the language of the decision clearly indicates that if such had been the case, no recovery could have been had as the injury would not have arisen out of and in the course of the employment.

In the case of Dominguez v. Pendola, 46 Cal. App. 220, 188 Pac. 1025, this court said:

> "The logical difference between a situation where the employee is proceeding to work in a conveyance or by a means used by the general public, and where he is proceeding to work by means of an instrumentality furnished to him as an employee, by his employer, is indicated in one of the English cases discussed in the Ocean Accident case, supra. Leach v. Oakley Street & Co., 4 B. W. C. C. 91. In the quotations from this English case which is inserted in the

Ocean Accident decision, it is indicated that in order to recover under the Workmen's Compensation Act, it is necessary for the employee to have suffered his injury not because of a danger to which he was exposed as a member of the general public, but by reason of a danger to which he was exposed as an employee in his particular employment. And it seems to us that this is not only the logical dividing line, but it is the dividing line contemplated by the very purpose of the compensation laws in their effort to place upon an industry the burdens of injuries directly due to the hazard incidental to the industry. In the present case, if deceased had been riding upon a public conveyance, although he was on his way to his work, he would have been subject to the same dangers as any other member of the general public, and if he suffered an accident, it would be as a member of the general public and due to a risk which he, in common with other members of the public, ran. But when he enters a vehicle provided by his employer for the purpose of conducting him to the place of his employment, he enters that vehicle not as a member of the public, but as an employee of the defendant. In other words, the danger to which plaintiff's decedent was exposed in riding in this automobile, alleged to have been unprotected, and without guards or rails, and driven by a negligent driver, was a danger to which he was exposed, not as a member of the public, but because, and only because, he was an employee of the defendant."

The respondents herein admit that the present case does not fall within the rule of the last cited case, but maintain that the award in the present case was made "upon a logical and reasonable extension of the doctrine" of that case. We are of a different opinion. The logic and reason of charging an employer in a case where an employee is injured while riding on an instrumentality provided by said employer is that said employer has such instrumentality under his control. He may inspect and repair it; he must see that it is driven by competent and careful drivers. It is his business to look after such a conveyance, just as it is his business to look after the safety of the premises where his employees work. But when the employer does not own nor control the vehicle, does not even know that the employee will elect to use it, does not know whether it shall be driven by a reckless or a careful driver, or by a man who is intoxicated, or by one who is sober, how can it be either logical or just to hold him responsible for injuries ocurring to the employee while riding to and from his work in such a vehicle? Had applicant entered a conveyance provided by his employer to take employees to lunch, the risk attendant upon riding therein might be a risk incident to his status as an employee because only in that capacity would he enter the vehicle; but when he chose to accept an offer from a driver of a passing vehicle to take him to lunch—a matter of personal concern to himself—all possible connection with his employment was severed.

But respondent urges that because the employer failed to furnish transportation to take applicant to his lunch, the employer is responsible for all risks connected with the means of transportation which applicant adopted. Does the failure to furnish customary transportation to an employee enlarge the employer's liability to such an almost limitless extent? If, upon the neglect of the employer to furnish transportation, the employee may seize upon a passing automobile which has a defective steering apparatus for his means of transportation, and charge the employer with damages for the consequences, where is the line to be drawn? May he not also elect to ride with an intoxicated driver, no other being at hand, or, in the absence of any automobile, might he board an airship? If we answer these queries by saying he may adopt a "reasonable" means of transportation, we enter a maze of uncertainty in each instance, in attempting to define a word with so variable a meaning. Is it "reasonable" to enter a conveyance with a defective steering mechanism? Was such defect patent? What kind of an examination would have revealed it? What examination on the part of the employee is necessary before he adopts any means of conveyance in order to make his choice "reasonable"? These and the many questions that crowd upon one in adopting the rule contended for by respondents plainly demonstrate its impracticability, as well as its gross injustice to an employer who would be charged because of something of which he had no knowledge and over which he had no possible control. We think it is not a logical extension of the rules already announced in this state governing the liability of an employer, under the Workmen's Compensation Insurance and Safety Act, for injuries occuring to an employee while going to his work or returning therefrom. The general subject was carefully considered by our Supreme Court in the case of Ocean Accident, etc., Co. v. Industrial Accident Commission, supra, and, recently, in the case of California Casualty Indemnity Exchange v. Industrial Accident Commission (Cal. Sup.) 213 Pac. 257 (decided February 17, 1923), Justice Waste speaking for the court in the last-cited case, said:

"It was not intended by the Compensation Act that the employer who comes within its provisions shall be the insurer of his employee at all times during the period of his employment. The employer is liable for compensation only when an injury occurs to the employee while performing some act for the employer in the course of his employment, or incidental to it. Fairbank Co. v. Ind. Comm., 285 Ill. 11, 13, 120 N. E. 457. There must be some connection between the injury and the employment other than the mere fact that the employment brought the injured party to the place of injury. There must be some causal connection between the employment and the injury in the sense that, by reason of the employment, there was an unusual or additional exposure of the injured party to the kind or character of hazard and danger (in this case an ordinary street risk) which caused the injury. The injury must have its origin in a risk connected with the employment, and must have flowed from that source as a rational and natural course. In re Betts, 66 Ind. App. 484, 118 N. E. 551."

This court is ever zealous to give to the Workmen's Compensation Insurance and Safety Act a broad and liberal meaning to effectuate its purposes, and we are not insensible to the very unfortunate situation of the applicant in the present case; but we feel that the facts do not show that his injury was sustained in the course of and arising out of his employment within the meaning of the statute, and we find no authority in any of the decisions which have been called to our attention in this or any other jurisdiction to warrant the award made herein.

The award of the Industrial Accident Commission is annulled.

We concur: NOURSE, J.; STURTEVANT, J.

---

61 Cal. App. 800

CALIFORNIA HIGHWAY COMMISSION OF DEPARTMENT OF PUBLIC WORKS v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 4431.)

(District Court of Appeal, First District, Division 2, California. March 7, 1923.)

Proceeding under the Workmen's Compensation Act by H. H. Newberry, opposed by the California Highway Commission of the Department of Public Works of the State of California. Application by the Highway Commission for a writ of review to annul an order of the Industrial Commission making an award for injuries. Award annulled.

Frank J. Creede and John J. Taheny, both of San Francisco, for petitioner.

A. E. Graupner, of San Francisco, and Hickcox, Crenshaw & Trude, of El Centro, for respondents.

LANGDON, P. J. This matter comes to us upon a writ of review, and we are asked to annul an award of the Industrial Accident Commission made to respondent H. H. Newberry because of injuries sustained by him and which said Commission has found were sustained "in the course of and arising out of his employment."

Applicant was injured in the accident out of which arose the case of California Highway Commission of the Department of Public Works of the State of California v. Industrial Accident Commission of the State of California and Harry Maloney (No. 4430 of the records of this court) 214 Pac. 658, in which a decision has been filed this day. It was stipulated that the law and the facts in that case and in this one were identical. It is unnecessary, therefore, to set out the facts herein, as they are discussed in the opinion filed in the parallel case. Upon the authority of that decision, and for the reasons stated therein, the award of the Industrial Accident Commission made herein is annulled.

We concur: NOURSE, J.; STURTEVANT, J.

---

60 Cal. App. 773

McDEVITT v. JONES, Sheriff. (Civ. 4403.)

(District Court of Appeal, First District, Division 1. California. Feb. 14, 1923. Hearing Denied by Supreme Court April 12, 1923.)

1. New trial 🔑151—For newly discovered evidence held not sufficiently shown by the affidavits.

In an action by a mortgagee of a cotton crop against a sheriff for conversion, a new trial for newly discovered evidence *held* properly denied on the affidavits and counter affidavits.

2. Chattel mortgages 🔑157(2)—Evidence held to show lessor acquired possession of cotton seed under crop mortgage.

In an action against a sheriff for conversion of cotton seed stored in a warehouse in S.'s name, and sold under execution by sheriff to satisfy a creditor's claim against S., who harvested the crop, under a lease from plaintiff to whom S. gave a crop mortgage, and subsequently defaulted, evidence *held* to show that plaintiff, after S.'s default, took possession of the cotton seed under the mortgage.

3. Chattel mortgages 🔑106—Evidence held to show that cotton crop mortgage was given for loan and additional advances.

In an action by a mortgagee of a cotton crop against a sheriff, for conversion of cotton seed stored in a warehouse in mortgagor's name, and sold by the sheriff under execution to satisfy a creditor's claim against mortgagor, evidence *held* to show that the crop mortgage was given to secure a loan of $22,500 and additional future advances.

4. Landlord and tenant 🔑79(4)—Assignee of leasehold of defaulting cotton grower could incur necessary expenses in protecting property, and was owner of collateral as against assignor or his creditors.

Where plaintiff was assignee of a leasehold interest of defaulting cotton grower, he had the right to incur such expenses at the charge of the property as were necessary to protect it from forfeiture or depreciation, and to the extent of his interest he was the owner of collateral as against the assignor and those claiming under him or against attaching creditors of the assignor.

5. Landlord and tenant 🔑79(4)—Mortgagee's right to possession of crop and seed held not affected by statutes pertaining to crop mortgages where he was also owner by assignment of leasehold.

Where plaintiff mortgagee of a cotton crop was also the owner by assignment of a leasehold, there could be no termination of his right to possession of the crop and seed by reason of any statute pertaining to crop mortgages, even though he removed the crop from the land as provided in Civ. Code, § 2972.

6. Parties 🔑95(6)—Amendment of complaint against sheriff by inserting word "as" before word "sheriff" held proper.

Defendant sheriff was named in the original complaint as "W. F. J.," and then "sheriff of Fresno County," but the conjunction "as" was not interposed in the title; contention that action was not brought against sheriff, and hence stated no cause of action, *held* not tenable where, at the commencement of the trial, defendant objected to plaintiff's prayer to amend, on the ground that the amendment would state a new cause of action, and it appeared from defendant's answer that he fully understood the character of the action and all the issues raised; such amendment being proper to conform to the technical requirement.

Appeal from Superior Court, Fresno County; D. H. Cashin, Judge.

Action by T. W. McDevitt against W. F. Jones, as Sheriff of Fresno County. Judgment for plaintiff, and defendant appeals. Affirmed.

S. C. Schaefer, of San Pedro, and Everts, Ewing & Wild and J. R. Fitch, all of Fresno, for appellant.

Gallaher, Simpson & Hays, of Fresno, and C. H. Hartke, of Los Angeles, for respondent.

ST. SURE, J. Appeal by the defendant, W. F. Jones, as sheriff of the county of Fresno, from a judgment rendered against him in the sum of $7,890.13, in an action for conversion as the result of a sale by the sheriff of certain cotton seed of which plaintiff claimed to be the owner.

On the 20th day of February, 1919, McDevitt Cotton Company, a corporation, leased to E. D. Skinner 931 acres of land in Fresno county for the purpose of raising cotton. Prior to August 14, 1919, plaintiff advanced in excess of $10,000 to Skinner to purchase seed for planting and pay labor and finance farming operations on the land. On August 14, 1919, Skinner informed plaintiff that through lack of funds he was unable to continue the farming operations, and offered to surrender the lease to plaintiff; whereupon an arrangement was made between the parties whereby plaintiff advanced to Skinner the sum of $22,500, and Skinner gave to plaintiff his promissory note, a crop mortgage, and an assignment of the lease as security for the note and all other moneys to be advanced by plaintiff to complete the work of producing and harvesting the cotton crop. On December 15, 1919, plaintiff assigned the crop mortgage to Geo. H. McFadden Bros.' Agency; the consideration named in the assignment was $10, but the evidence shows that the real consideration was the note of plaintiff for $22,500, which amount plaintiff had borrowed from the agency and loaned to Skinner. This mortgage, with Skinner as party of the first part and plaintiff as party of the second part, contained, among other provisions, the following:

"And the party of the first part does hereby covenant and agree to and with the said party of the second part, his heirs and assigns that he will well and carefully tend, take care of and protect the said crop while growing, and until fit to harvest and then faithfully and without delay, harvest and gin the same, and deliver the same immediately into the possession of the said party of the second part, or his assigns, to be by him held and disposed of for the payment of the debt hereby secured; that in default of either of the above acts to be done by the said party of the first part, the said party of the second part, or his assigns, may enter upon the premises and take all necessary measures for the protection of said crop, and may retain possession thereof, harvest, gin the same, and all expenses so incurred and all that may become necessary, in the keeping and care of said crop, as well as the hauling, storing and delivery thereof, shall be secured by this mortgage, and shall be first payable in United States gold coin, out of the money realized from the sale of said crop; that said party of the second part, or his assigns, shall and may at all times enter into the premises to view the same, or to take measures necessary for the protection of said crop, or his interests therein, and that upon harvesting thereof, he shall be entitled to the immediate possession of the same, and may haul and store the same, at the expense of the said party of the first part; and said party of the first part does for the purposes aforesaid, make, constitute and appoint the said party of the second part, and his assigns, his true and lawful attorney irrevocable, with full power to enter upon said premises and take possession of said crop, and take care of, protect, harvest and gin the same, in case of any default on his part of the covenants herein contained; and he does further authorize said party of the second part or his assigns to take possession of said crop when harvested and ginned to haul and store the same, to sell and dispose of the same, or any part thereof, at such time and times, and for such sum or sums of money as he may deem proper, and for the best advantage of all concerned, and out of the proceeds of said sale, first, to retain the costs and charges thereof, and any and all expenses by the party of the second part incurred in the care and protection, harvesting, hauling or storing the same, and commission for selling the same; second, to apply the residue to the payment of said note, rendering the overplus, if any there be, to the said party of the first part or assigns."

Skinner defaulted. Plaintiff was forced to carry on, which he did, advancing the necessary money to pay all expenses, which reached a total sum in excess of $50,000. The crop was harvested and placed in the warehouse of the California Products Company at Fresno in Skinner's name, likewise the seed after the cotton had been ginned. At the trial it was stipulated:

> "That the California Products Company did business and handled the cotton seed and other products of the McDevitt Ranches and carried the products that were stored with it in the names of the various tenants of the McDevitt Cotton Company and T. W. McDevitt, for the purpose of the designation of the particular account to which they were to be charged."

After the cotton was ginned, plaintiff, on or about the 8th of January, 1920, entered upon negotiations for the sale of the seed. He had several conversations with Skinner, and it was arranged to sell the seed to Robert Hume, president of the California Products Company, for $77 per ton, the proceeds to be credited to Skinner's account, then in excess of $20,000, due to plaintiff. Hume was in New York at the time that the offer was accepted by him, but he confirmed the sale by wire on January 9th. On the 13th day of January, 1920, plaintiff deposited a demand draft on the California Products Company for the sum of $9,625 for 125 tons of seed sold to the Products Company at $77 per ton. The secretary of the Products Company returned the draft with the statement that no instructions had been received from Hume to pay for the seed, and stating that Hume was at that time on his way from New York to California. Upon Hume's arrival in California plaintiff's local manager and Skinner interviewed him, and he confirmed the purchase and instructed his cashier to make a check for the full amount of the seed in the name of Skinner. The manager of plaintiff requested the check to be made payable to plaintiff. Skinner objected to this, but stated that if plaintiff would let him have $5,000 he would consent to have Hume deliver the check to plaintiff immediately; otherwise he would go out and see what money he could get for the seed. Skinner's creditors were pressing him. The following day the seed was attached. Thereafter Hume refused to pay for the seed because of litigation. The seed remained in the warehouse of the California Products Company. On January 23, 1920, plaintiff repaid the McFadden Agency the sum of $22,500 which he had theretofore borrowed and loaned to Skinner, and on the following day the crop mortgage which he had hypothecated with the agency as security was reassigned to him.

On the 30th day of January, 1920, Philip M. Gaffey brought suit in the superior court of Los Angeles county against Skinner to recover on a promissory note, and at the same time an attachment was issued and levied upon all the seed stored in said warehouse in the name of Skinner. On the 19th day of February, 1920, plaintiff filed a third-party claim with the defendant as sheriff, alleging that he was the sole owner of the property under attachment, and that the same was sold to him on the 26th day of November, 1919. There is some evidence that on November 26, 1919, Skinner wrote the California Products Company, requesting it to forward "all original gin receipts, gin reports and cardoor receipts for cotton ginned in my name" to California Cotton and Factorage Company, Los Angeles, of which company plaintiff was president. The court found, however, that plaintiff took possession of the seed on the 8th day of January, 1920. Thereafter, on the 19th day of February, 1920, judgment by default was entered in the suit of Gaffey v. Skinner, and thereupon an execution was issued, and on the 12th day of April, 1920, the seed was sold by the sheriff for the sum of $4,000. The trial court gave judgment for plaintiff as above stated.

Defendant moved for a new trial upon the grounds of newly discovered evidence, insufficiency of the evidence to justify the decision, and that the decision was against law. The motion was denied.

[1] In support of the motion defendant presented affidavits of H. A. Stanton, S. C. Schaefer, and E. D. Skinner. Plaintiff filed counter affidavits. All of the affidavits are before us for consideration. H. A. Stanton, the secretary of the California Products Company, was a witness called by defendant, and testified at the trial. Stanton's affidavit is a belated attempt to show ownership and right to possession of the seed in Skinner. Determinative of this question is the crop mortgage under the terms of which plaintiff harvested and took possession of the cotton and the seed after the default of Skinner. Further, it was stipulated at the trial that Skinner's name was connected with the seed by the California Products Company merely for convenience in bookkeeping.

The affidavit of Schaefer, one of the attorneys for the defendant, shows that C. H. Hartke, one of the attorneys for the plaintiff, prepared an affidavit which he requested Skinner to sign, and that Schaefer had come into possession of the unsigned affidavit within the week prior to the making of the affidavit by Schaefer. He states in his affidavit:

> "That said E. D. Skinner refused to acknowledge and execute the same for the reason that the statements contained therein relative to the alleged ownership and right of possession of the cotton seed was in T. W. McDevitt, were untrue."

In his affidavit Skinner only states in refutation of the proposed affidavit that he

(Skinner) was the owner of the seed, and that he exercised control over it. Hartke's affidavit contains a denial of both of these statements.

We are of opinion that there was no abuse of discretion on the part of the trial court in denying the motion for a new trial upon the ground of newly discovered evidence.

Defendant attacks what he is pleased to designate the "so-called sale of the property in question by Skinner to McDevitt [plaintiff herein] on the 8th day of January, 1920," as being fraudulent, and therefore void as against creditors.

[2] The court did not find that there had been a sale of the seed, but it did find, and we think its decision is fully supported by the evidence, that—

> "On or about the 8th day of January, 1920, the said E. D. Skinner, in consideration of said sum of $22,500, which the said plaintiff herein did advance to the said Skinner on said 14th day of August, 1919, and of said other sums of money advanced by plaintiff herein to said E. D. Skinner on account of said farming operations, instructed and authorized the plaintiff herein to sell and deliver all said cotton seed at whatever price the plaintiff could procure therefor, and to credit the amount received for said cotton seed upon said note secured by said crop mortgage, and said moneys owing from the said Skinner to the said plaintiff herein, and the said Skinner did then and there authorize the plaintiff herein to take possession of said cotton seed and to deliver possession thereof to the plaintiff herein, and the plaintiff herein accepted the possession thereof."

Plaintiff was in the possession of the seed pursuant to the terms of the mortgage. The undisputed evidence shows that plaintiff, after the default of Skinner, took possession of the cotton, harvested the crop, shipped it to the California Products Company warehouse, and stored it there (for convenience of bookkeeping) in the name of Skinner, paying all charges for ginning, insurance, taxes, and storage. Skinner never had possession of the cotton or the seed after he abandoned his contract.

[3, 4] The uncontradicted evidence further shows that the crop mortgage was given not only to secure the note for $22,500, but also for additional and future advances. Langerman v. Puritan Dining Room, 21 Cal. App. 637, 657, 132 Pac. 617. Plaintiff was also assignee of the leasehold interest of Skinner. As such he had the legal right to incur such expenses at the charge of the property as were necessary to protect it from forfeiture or depreciation. 5 C. J. 957, 958; Hill v. Eldred, 49 Cal. 398. To the extent of his interest he was the owner of the collateral as against the assignor and those claiming under him, or against attaching creditors of the assignor. 5 C. J. 957; In re Phillips, 71 Cal. 285, 12 Pac. 169; Frink v. LeRoy, 49 Cal. 314.

[5] Defendant contends that the mortgage lien of plaintiff terminated with the removal of the crop from the land, citing section 2972 of the Civil Code. Since plaintiff was also the owner by assignment of the leasehold, there could be no termination of his right to the possession of the crop and the seed by reason of any statute pertaining to crop mortgages. Summerville v. Kelliher, 144 Cal. 155, 77 Pac. 889; Crosby v. Fresno, 30 Cal. App. 308, 158 Pac. 1070.

[6] The final point urged by defendant is that the action was not brought against the sheriff of the county of Fresno, and upon that ground and for that reason no cause of action was stated. The defendant was named in the complaint "W. F. Jones," and then "Sheriff of Fresno County," the conjunction "as" not being interposed in the title. At the commencement of the trial plaintiff asked to be permitted to make an amendment so that there would be proper designation of the defendant as sheriff of Fresno county. Objection was made upon the ground that such an amendment would state a new cause of action. The record shows that before the trial defendant filed his answer in which he alleged that he at all of the times mentioned in the complaint was the duly elected, qualified and acting sheriff of the county of Fresno, and that he served the writ of attachment as such sheriff, and as such officer levied the writ upon the cotton seed in suit. It therefore appears that defendant fully understood the character of the action, the effect of his possession and disposal of the seed, and all of the issues sought to be raised by the pleadings. The complaint was amended to conform to the technical rule requiring it, the substantial rights of the defendant were in no way affected, and we think that the amendment was properly allowed by the court.

The judgment is affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

61 Cal. App. 41

KESSLER et al. v. YOUNG. (Civ. 3780.)

(District Court of Appeal, Second District, Division 2, California. Feb. 19, 1923. Hearing Denied by Supreme Court April 19, 1923.)

1. Appeal and error 🔑1170(10)—No reversal for miscarriage of justice merely because decision was contrary to preponderance of evidence.

Const. art. 6, § 4½, prevents reversal, unless, on examination of the entire case, including the evidence, a miscarriage of justice has resulted because of some error complained of, and does not require reversal, regardless of alleged errors, because the cause was decided contrary to the preponderance of the evidence.

2. Appeal and error 🔑1170(10)—Failure to find reasonable value of services not cause for reversal of judgment for plaintiff on express contract.

Where the court found on all the issues necessary to sustain a judgment for plaintiff on an express contract to pay for services rendered, failure to find on an issue as to the reasonable value thereof, as presented by a quantum meruit count, was not cause for reversal in view of Const. art. 6, § 4½.

3. Witnesses 🔑275(7)—Objection to question whether there was written memorandum of oral agreement sued on properly sustained.

Where no written agreement to pay for services rendered by plaintiff was alleged or claimed and a written memorandum was not essential to the validity of the oral contract proved, an objection to a question asked plaintiff on cross-examination as to whether there was a written memorandum of such agreement was properly sustained.

4. Trial 🔑397(5)—Finding on subject of community property unnecessary in wife's action for services rendered and money due on claims assigned by husband, a party plaintiff.

In an action for money due for services rendered, money advanced, and sums due on assigned claims for services rendered by plaintiff's husband, who was joined as a plaintiff as required by Code Civ. Proc. § 370, and another, no finding on the subject of separate or community property was necessary.

5. Parties 🔑88(3) — Misjoinder cannot be urged on appeal in absence of demurrer.

In the absence of a demurrer to the original or amended complaint, defendant, on appeal, cannot urge misjoinder of parties plaintiff in the amended complaint. Code Civ. Proc. § 434.

6. Contracts 🔑228—Assignee of claim for services as surety on claim and delivery bond may recover from principal, though bond was not approved by sheriff.

Assignee of a claim on a contract for services as surety on a claim and delivery bond may recover from the principal, though the bond was not approved by the sheriff, in the absence of any question as to the form or sufficiency thereof; the surety's liability having passed beyond her control on delivery of the bond.

7. Work and labor 🔑27(1)—Objections to questions whether plaintiff had gone to business college or been admitted to practice law properly sustained.

In an action for money due for services rendered in managing defendant's property and preparing certain lawsuits for trial, where it was shown that defendant was represented by an attorney throughout such litigation, and that plaintiff's services were not such as to require a license to practice law, objections to questions asked plaintiff as to whether she had been admitted to practice law, as well as to questions whether she had gone to business college, were properly sustained.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Mae H. Kessler and husband against Marie J. Young. Judgment for plaintiffs, and defendant appeals. Affirmed.

Charles Lantz, Winslow P. Hyatt, and Samuel M. Garroway, all of Los Angeles, for appellant.

S. R. Blake, of Los Angeles, for respondents.

SHENK, Justice pro tem. The plaintiff Mae H. Kessler brought this action alleging in the first count a balance due of $450 on an express contract for services rendered and $93 for money advanced; in the second count, a balance of $70 due on an assigned claim for services rendered by the plaintiff Frank P. Kessler, her husband; and in the third count a claim for $50 assigned to her by one Edith J. Thom, on a contract for services by the latter as surety on an undertaking in claim and delivery.

At the beginning of the trial, Mrs. Kessler was granted leave to amend by joining her husband as a party plaintiff, to satisfy the requirements of section 370 of the Code of Civil Procedure, and by adding an item of $15 to the first cause of action on account of money loaned. Plaintiffs were then granted additional leave to amend by setting up by way of a common count in quantum meruit the sum claimed to be due on the express contract alleged in the first cause of action. The defendant answered denying generally and specifically the allegations of the original complaint, and objected to the filing of the amendments. It was stipulated that the allegations of the amendments might be deemed denied. Judgment went for plaintiffs in the full amount prayed for, and defendant appeals, basing her appeal on certain alleged errors occurring during the course of the trial, but especially on the contention that—

> "On the examination of the entire cause, including the evidence, a miscarriage of justice has resulted from the judgment herein"—citing section 4½ of article 6 of the Constitution.

As to the principal contention, the argument of counsel for appellant seems to be that regardless of any of the alleged errors a miscarriage of justice has taken place in that the trial court decided the cause contrary to the preponderance of the evidence. To use counsel's language:

> "If there ever was a case in which the doctrine of the preponderance of evidence should prevail it is the case at bar."

The plaintiff Mrs. Kessler testified that the defendant engaged her to assist in the management of her property and in the preparation for trial of certain lawsuits then pending and in which the defendant was an interested party, and that defendant had agreed to pay her for such services the sum of $500; that she had performed the services required by her contract; and that $50 and no more of the contract price had been paid. Mrs. Kessler also testified as to the money advanced for the use and benefit of defendant, and at her request, and which had not been repaid. The assignors of Mrs. Kessler also testified positively as to their claims and the amounts due thereon. The defendant in her testimony denied the alleged or any contract for services. She testified that whatever moneys had been advanced had been repaid by her; that no agreements were ever made with the assignors of Mrs. Kessler; and that they were entitled to nothing. The evidence on behalf of the contending parties was positive and substantial but irreconcilably conflicting, and on such conflict the court found in favor of the plaintiffs.

[1] The constitutional provision referred to has no application to the contention of appellant, but on the contrary operates to prevent a reversal unless, because of some error complained of, a miscarriage of justice has resulted, and then only when the court on appeal shall so determine after an examination of the entire case, including the evidence. The errors complained of will therefore be examined with this application of the constitutional provision in mind.

Although objection was made at the trial to the amendments to the complaint, no argument attacking the ruling is made in appellant's brief, and from a consideration of the record the correctness of the ruling of the court is beyond question.

[2] It is claimed that the court failed to find on the issue of the reasonable value of the services rendered by Mrs. Kessler as raised by the second amendment to the complaint. This was on the common count and related to the same matters alleged in the first cause of action on the express contract. The court found in plaintiff's favor on the issue of the express contract. The finding on this issue rendered the issue as to their reasonable value immaterial, and if found upon would not have affected the judgment actually rendered. Murphy v. Bennett, 68 Cal. 528, 9 Pac. 738. All of the issues necessary to sustain the judgment were found upon, and therefore the failure to find on the issue as to the reasonable value of the services, presented by the quantum meruit count, is not cause for reversal. Hooker v. Thomas, 86 Cal. 176-178, 24 Pac. 941.

[3] In the cross-examination of Mrs. Kessler defendant's counsel endeavored to elicit from her a reason why the contract alleged in the first cause of action was not reduced to writing, and when a reason apparently unsatisfactory to counsel was given he inquired: "Well, you claim to be a good business woman, don't you?" This question was objected to on the ground that it was not proper cross-examination, and the objection was sustained. Counsel then asked: "Well, there was no memorandum in writing of any agreement that took place then in your house?" An objection to this question on the same ground was made and was sustained by the court in the following language: "Objection sustained. It is not claimed that there was any. You haven't that to meet." Inasmuch as a written agreement was not alleged or claimed by any of the parties, and a memorandum in writing was not essential to the validity of the contract proved, the objection was properly sustained.

[4, 5] There is no allegation in the complaint that the action concerned the separate property of the plaintiff Mrs. Kessler, and error is asserted because there is no finding on the subject of separate or community property. This was unnecessary. Mrs. Kessler was a proper party plaintiff as assignee under the second and third causes of action, and if the first cause of action concerned community property her husband, the coplaintiff, was brought in and joined with her. No demurrer was interposed to the original complaint nor to the complaint as amended, and defendant cannot now urge misjoinder. Sec. 434, Code Civ. Proc.; Schwarze v. Mahoney, 97 Cal. 131, 31 Pac. 908.

[6] As to the third cause of action, it was alleged and proved that the defendant agreed to pay Mrs. Thom the sum of $50 if she would act as a surety on an undertaking in one of the actions in which defendant was interested; that Mrs. Thom signed and qualified as a surety on the bond; that the same was delivered to the defendant or to her counsel for the purpose for which it was intended, and that it was filed. Exception is taken to the finding in favor of the plaintiff on this cause of action on the ground that the court sustained objections to questions interposed on behalf of the defendant tending to prove that the bond had not been approved by the sheriff, and that therefore the finding is not supported by the evidence. When she signed, qualified on, and delivered the bond Mrs. Thom did all that was requir-

ed of her under the contract. Her liability thereon then passed beyond her control, and she could not thereafter urge as a defense in an action on the bond that the sheriff had not approved the same. 9 C. J. 25; Carpenter v. Furrey, 128 Cal. 665, 61 Pac. 369; Mendocino County v. Morris, 32 Cal. 145; People v. Evans, 29 Cal. 432; People v. Shirley, 18 Cal. 121; Cobbey on Replevin, 2d Ed., par. 689. No question is raised by appellant as to the form or sufficiency of the bond, and under the circumstances we think the consideration for the execution thereof passed.

[7] The court sustained objections to questions propounded by defendant to the plaintiff Mrs. Kessler as to whether or not she had gone to business college or had been admitted to practice law, and the appellant predicates error on this ruling. An examination of the record discloses that the defendant was at all times represented by an attorney in the litigation referred to, and that the services rendered by Mrs. Kessler were not such as to require a license to practice law as a prerequisite to the performance thereof, and it is difficult to perceive why a business-college education was necessary. The materiality of these questions is not apparent, and the objections were properly sustained.

No other alleged errors merit discussion. The judgment is affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

61 Cal. App. 232

TITLE INS. & TRUST CO. v. CITY OF LOS ANGELES et al. (two cases).
(Civ. 3842, 3843.)

(District Court of Appeal, Second District, Division 1, California. March 1, 1923. Hearing Denied by Supreme Court April 30, 1923.)

1. Insurance 🔑426½—Guaranty as to title of realty held a "contract" enforceable on discovery of damage.

A certificate by a title insurance and trust company, stating that after examination of the records in relation to the title to certain real property the company "hereby guarantees" that the title to such property as it appeared from the records was vested in a certain party, *held* to constitute a contract upon which liability would accrue on discovery of loss incurred if the title was not as represented in view of Code Civ. Proc. § 339, as amended by St. 1917, p. 299, declaring that the cause of action upon a contract, obligation, or liability evidenced by a certificate, or abstract, or guaranty of title of real property, does not accrue until discovery of the loss or damage.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contract.]

2. Licenses 🔑11(1)—Certificate as to title of realty held contract of indemnity and insurance exempting title insurance company from city license tax.

A certificate by a title insurance and trust company guaranteeing that title to certain property was in a person named, running against future loss that might be incurred if the record title should prove to be different from that certified, *held* a contract of indemnity and of insurance, and hence the title insurance company paying a tax to the state under Const. art. 13, § 14, as an insurance company, was not liable for a city license tax imposed upon title and abstract companies not insuring title.

3. Insurance 🔑126—Statutory provision as to constructive notice held not to make record title uninsurable.

Civ. Code, § 1213, providing that every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder is constructive notice of the contents thereof to subsequent purchasers and mortgagees, does not prevent the record title to realty from being the subject of insurance, but, on the other hand, constitutes a reason for insurance in favor of one who is affected by such constructive notice and who relies upon a title insurance company and its certificate as protection against the legal consequences of such notice.

4. Insurance 🔑2—Title guaranty certificate held insurance contract, although not specifying all facts required by statutory provision as to insurance generally.

A guaranty certificate issued by a title insurance company is not deprived of its character as an insurance contract merely because it does not specify all the facts set forth in Civ. Code, § 2587, providing that a policy of insurance must specify the parties between whom the contract is made, the rate of premium, the property or life insured, the interest of the insured in property insured if he is not the absolute owner thereof, the risks insured against, and the period during which the insurance is to continue.

5. Insurance 🔑4—New form of insurance business held within constitutional provisions relating to insurance.

A business having the characteristics of insurance business coming into existence after the enactment of Const. art. 13, § 14, relating to insurance, is nevertheless subject to such provision.

Appeals from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Separate actions by the Title Insurance & Trust Company against the City of Los Angeles and others to recover license fees paid under protest. Judgment for plaintiff in each case, and defendants appeal. Affirmed.

Jess E. Stephens, City Atty., and Wm. P. Mealey, both of Los Angeles, for appellant.

O'Melveny, Millikin, Tuller & Macneil, of Los Angeles, for respondent.

CONREY, P. J. These are two actions in each of which the plaintiff seeks to recover an amount paid by it as a license fee demanded under the provisions of Ordinance No. 39600 (N. S.) of the city of Los Angeles. The payments were made under protest. Judgment has been entered in each case in favor of the plaintiff, and the defendant city appeals therefrom. The cases have been submitted jointly, for the reason that the questions involved in them are identical.

Section 12 of said ordinance provides for a license tax to be paid by "every person, firm or corporation conducting, managing or carrying on the business of examining, searching or investigating titles to real estate and issuing abstracts, statements or certificates, showing or purporting to show or certify to the condition or state of the title to any particular property or properties as disclosed by an examination of the public records, but which abstract, statement or certificate does not insure or purport to insure the title to real property or any interest therein."

Section 14 of article 13 of the Constitution of the state of California was adopted on the 8th day of November, 1910. It provides for taxes to be levied against certain classes of corporations therein named. Subdivision (b) of that section declares that—

> "Every insurance company or association doing business in this state shall annually pay to the state a tax of one and one-half per cent. upon the amount of the gross premiums received upon its business done in this state, less return premiums and reinsurance in companies or associations authorized to do business in this state; provided, that there shall be deducted from said one and one-half per cent. upon the gross premiums the amount of any county and municipal taxes paid by such companies on real estate owned by them in this state. This tax shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property of such companies, except county and municipal taxes on real estate, and except as otherwise in this section provided. * * *"

It is not claimed that any question arises in these cases concerning any exception provided in said section of the Constitution.

Respondents contend that their business is solely an insurance business, and that it is not subject to the obligation to pay any tax or license fee on account of such business, other than their tax to the state. Appellant, on the other hand, contends that a part of the business of respondents is not insurance business, and that the city has the right to impose a license tax based upon and growing out of the right to conduct that business. It will be noted that the ordinance itself excepts from its operation any business in which the contract insures, or purports to insure, the title to real property or any interest therein. The question at issue here is not a question concerning the validity of the ordinance, but rather is a question of fact concerning the nature of the business transacted by respondents.

It is conceded that respondents do transact an insurance business. In the course of that business they issue a form of certificate whereby the insurer purports to guarantee and insure the insured person or persons against loss or damage not exceeding a stated sum, for a stated term of years, "which the said insured shall sustain during the life of this policy, by reason of any loss suffered affecting the title of the insured to the lot or tract of real estate hereinafter described: whether said loss is caused by failure of title, or by reason of any defects in, or liens or incumbrances on said real property." There follow, however, in this policy, certain exceptions relating to outstanding rights of persons in possession, or interests existing by virtue of instruments not recorded. But a considerable part of the business of respondents consists in the issuance of certificates of title directly limited to the condition of the record title, and wherein the certificate states that—

> "After a careful examination of the official records of the county of Los Angeles, state of California, and of the records of the federal offices located at Los Angeles, in relation to the title of that certain real property hereinafter described, the ——— Company, a corporation, having its principal place of business in the city and county of Los Angeles, state of California, hereby guarantees that the title to said property as it appears from said records, is vested in ———."

Counsel for the respective parties have argued these cases upon the theory, which we approve, that the decision depends upon the construction to be given to the certificate last above mentioned. If the business of issuing certificates of that kind is insurance business, then the license taxes in question have been wrongfully imposed, and respondents are entitled to recover the same.

Title insurance had become a recognized form of insurance in California and elsewhere prior to the year 1910, although it is more modern in its origin than are many other branches of insurance business. It has been defined as an agreement whereby the insurer, for a valuable consideration, agrees to indemnify the insured in a specific amount against loss through defects of title to real estate, wherein the latter has an interest, either as purchaser or otherwise. 38 Cyc. 344. Generally, in other kinds of insurance, the policy protects the assured against matters that may arise during, and only during, a stated period after the issuance of the policy; but the risks of title insurance, although they may be referable to the contingency of future loss, are only designed to save the assured harmless from loss through defects, liens, and incumbrances that may affect or burden the title at the time when the certificate or policy is issued.

There is no implied agreement to go beyond the conditions existing at the time the policy is issued and to assume a general liability to indemnify against future incumbrances. 38 Cyc. 349, 350. But the distinction thus existing does not deprive title insurance of any of the essential elements which characterize the contract of insurance.

"Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability, arising from an unknown or contingent event." Civ. Code, § 2527. "Any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against, subject to the provisions of this chapter." Civ. Code, § 2531. Counsel for appellant, in support of their contention that the certificate here in question is not a contract of insurance, go further and assert that it is not a contract at all. They rely upon the decision of Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115, which they say presented "an exactly similar question." In that action it appeared that, under employment for that purpose, the defendants furnished to the plaintiff a certificate which stated that from a careful examination of the records concerning the title to the described property "we find the same vested in Jacob Birnbaum free from all incumbrances." It was held that the certificate did not contain any obligation or contract, but was merely the evidence of an act done in purported satisfaction of the obligation assumed in accepting the employment.

[1] But we think that the certificate now under consideration is itself a contract. The words "hereby guarantees" are words of contract, whereas the words "we find," in the certificate in the Lattin Case, were only a statement of fact covering the contents of the record and the opinion of the parties issuing the certificate regarding the effect thereof. There was not, as there is in the present case, a contract guaranteeing that the record and its legal effect were as stated in the certificate. In the Lattin Case there was merely the contract implied in the acceptance of the employment, that the records would be carefully examined, and that the defendants would in good faith state their opinion concerning the effect of the records. They would be liable for negligent or other failure to perform that contract. The right of action would accrue at once upon issuance of the certificate, and it would be an action to recover damages for breach of contract. But in the case of a certificate like that now before us, the party entitled to the benefit of the guaranty has a right of action to recover upon the contract contained in the certificate itself, and the liability is one that does not accrue until discovery of the loss that may be incurred if the title is not represented in the certificate. Section 339 of the Code of Civil Procedure, as amended in the year 1913, and by the same words as repeated in the further amendment of that section in the year 1917 (St. 1917, p. 299), declares that—

> "The cause of action upon a contract, obligation or liability evidenced by a certificate, or abstract or guarantee of title of real property or policy of insurance shall not be deemed to have accrued until the discovery of the loss or damages suffered by the aggrieved party thereunder."

[2] Appellant contends that the guaranty certificate of the plaintiffs is not an insurance contract, because it does not contain the element of indemnity and because it does not comply with certain sections of the Civil Code and especially does not comply with section 2587. That section states that a policy of insurance must specify the parties between whom the contract is made; the rate of premium; the property or life insured; the interest of the insured in property insured if he is not the absolute owner thereof; the risks insured against, and the period during which the insurance is to continue.

A contract in writing implies a consideration. Since the guaranty, as we have indicated, runs against future loss that may be incurred if the record title shall prove to be different from that certified, it is a contract of indemnity.

[3] Appellant contends that in the record title to property there is no such thing as an unknown or contingent event and that therefore record title is not the subject of an insurance contract. In support of this proposition, reliance is placed upon section 1213 of the Civil Code. "Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees. * * *" That section exists for the protection of those who acquire interests in real property by virtue of duly recorded written instruments. This is far from preventing the record title from being the subject of insurance. On the contrary, it is the reason for insurance in favor of one who is affected by such constructive notice and who relies upon a title insurance company and its certificate as protection against the legal consequences of such notice. This was recognized by the Supreme Court in the case of Bothin v. Cal. Title Ins. & Tr. Co., 153 Cal. 718, 722, 96 Pac. 500, 502 (Ann. Cas. 1914D, 634), where the court said:

> "Necessarily the record title is all that a title insurance company can safely or judiciously insure. While the title to real property may be disclosed by the record to be in one person, it may, in fact, be in another through adverse possession or in one in occupation of the property under an unrecorded conveyance. It is the possibility of the existence of these conditions as to the title which an insurance com-

pany provides against by insuring the record title, and none other."

[4] The fact that the form of guaranty certificate issued by the plaintiffs does not specify all of the facts set forth in section 2587 of the Civil Code does not deprive it of its character as an insurance contract. Since, as written, it is sufficiently defined as a contract of indemnity for which a consideration exists, we think that the insurer could not defend against liability as an insurer on such contract, which it made with a known party, simply because the certificate does not name the insured or specify his interest in the property (unless he be the person in whom the title is certified to be vested), or state the rate of premium or the period during which the insurance is to continue.

[5] Anticipating that respondents might rely upon the provisions of section 453v of the Civil Code, defining title insurance policies, and which was added to that Code in the year 1913, appellant contends that the section may not be construed as applicable to the questions of taxation presented in this case, because the section of the Constitution to which we have referred is in its application limited to such insurance business as was known to the law in the year 1910, when section 14 of article 13 was adopted. But if, in accordance with the opinion which we have expressed, the issuance of these certificates of guaranty does constitute insurance business without the aid of said section 453v, then the point stated is of no importance in this case. It is worthy of note, however, that subdivision (b) of said section 14, which we have quoted, refers to "every insurance company or association doing business in this state," and not to any selected or particular kinds of insurance business. It readily may be conceded that the Legislature could not by its mere enactment of a statute effectually transform into insurance business a business lacking in the elements of insurance. But we think that if a business having the characteristics of insurance business should for the first time come into existence within this state after the year 1910, it would nevertheless be subject to the provisions of said section of the Constitution.

The judgments are affirmed.

We concur: JAMES, J.; HOUSER, J.

---

61 Cal. App. 184

COLLINS et al. v. EKSOOZIAN. (Civ. 2564.)

(District Court of Appeal, Third District, California. Feb. 28, 1923.)

1. Vendor and purchaser 🔑95(1) — Vendor estopped from rescinding land sale contract because of purchaser's nonpayment of taxes.

Where one of the grounds for rescinding a land sale contract, of which time was the essence, was that purchaser had failed to pay taxes due, and the evidence showed that purchaser was a foreigner, unfamiliar with the English language, and that it was arranged that tax bill would be sent to purchaser in vendor's care, withholding of the tax bill by vendor was such fraud as estopped him from asserting his right to have the contract rescinded for nonpayment of the taxes.

2. Estoppel 🔑72—General principle of equitable estoppel stated.

The doctrine of equitable estoppel rests on the general principle that when one of two innocent persons—that is, persons each guiltless of an intentional, moral wrong—must suffer a loss, it must be borne by that one of them who by his conduct, acts, or omissions has rendered the injury possible.

3. Contracts 🔑318—Forfeitures not favored.

Forfeitures are not favored in law, and one should not be divested of valuable rights by way of forfeiture for default in complying with a contract by which those rights have been acquired, unless it clearly appears that the other party has suffered or will suffer serious detriment or damage by reason of the default, or unless the default was intentional or willful.

4. Vendor and purchaser 🔑104—Purchaser's evidence that vendor did not tell him that taxes were due held competent.

In suit for rescission of a land sale contract, of which time was the essence, for purchaser's failure to pay the taxes, where there was an agreement that the tax bill should be sent in vendor's care, purchaser's evidence that vendor did not tell him when the taxes were payable was competent.

5. Vendor and purchaser 🔑104—Evidence of tax collector that taxes were paid by vendee in accordance with contract held competent.

In suit to rescind a land sale contract for purchaser's failure to pay taxes, wherein purchaser alleged that, after he had ascertained that taxes were payable, he paid them together with the penalties incurred, evidence of the tax collector that the taxes had finally been paid after they had become delinquent was competent.

6. Evidence 🔑427—Evidence as to purchaser's nonpayment of taxes held not to modify contract but to excuse delay in payment.

In suit to rescind a land sale contract, of which time was the essence, for purchaser's failure to pay taxes when due, where the effect of purchaser's testimony regarding the payment of taxes and penalties incurred was not to change or modify the terms of the contract, but was intended only to show an excuse for his failure to comply within the time required by the agreement as would or might be sufficient to entitle him in equity to be relieved of the consequences thereof, a contention that such evidence tended to vary the terms of the contract was without merit.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by W. D. Collins and another against Manoog H. Eksoozian. Judgment for defendant, and plaintiffs appeal. Affirmed.

Karl A. Machetanz, of Exeter, for appellants.

Earl A. Bagby, of Visalia, for respondent.

HART, J. The plaintiffs instituted this action for the purpose of securing a decree foreclosing, or declaring forfeited, all rights acquired by the defendant under a written contract whereby the former agreed to sell and convey to the defendant, and the latter agreed to purchase from said plaintiffs, a certain tract of land situated in Tulare county.

The defendant was given judgment, from which the plaintiffs appeal on a bill of exceptions.

The agreement was entered into on the 22d day of September, 1919, and contains, among others, the following provisions and terms: That the purchase price of the land, to wit, the sum of $10,700, is to be paid on or before five years from the date of the agreement, the interest thereon (7 per cent. per annum) payable annually; that, upon the payment by the defendant of the principal and interest, as so provided, the plaintiffs are to execute and deliver to the defendant a deed conveying to him a good and complete title to the said real property, free and clear of all incumbrances; that the plaintiffs were to "dig a sufficient pit where the present well is on said land to present water level, and will install the 4-inch centrifugal pump which he now has, together with a 7½ power motor, at his own cost and expense," all of which work was to be done and finished before the 1st day of March, 1920; that said plaintiffs were to lay 1,200 feet of 10-inch cement pipe from the said pit "up the east side line of said land to the north line thereof"; that said pipe line "is to be completed and capable of running water through the same from the said pit to the said north line of said land on or before the 1st day of March, 1920," all said work to be done at the expense of said plaintiffs. It is further agreed that, on or before the 1st day of February, 1921, the defendant should level and prepare the north 20 acres of said land for the planting of Thompson seedless grapes, said leveling to be such that water "will run from the north to the south lines of said land," and that he should plant such grape vines "on said land on or before the 1st day of April, 1921, and after said grapevines are planted, he will take care of, irrigate, and cultivate said grapevines at the seasonable times during the year in a careful and husbandlike manner," etc. It is further provided that the defendant, for a like purpose, should, on or before the 1st day of February, 1920, likewise level and put in shape the south 20 acres of said land, plant the same to like grapevines, and take care of the same as above indicated. The defendant was to have immediate possession of said real property and was to pay all state, county, school district and other taxes levied or imposed on said property, and "said second party agrees not to allow the same or any part thereof to become delinquent." The plaintiffs agreed to pay the taxes for the years 1919 and 1920.

The agreement further provided that failure by the defendant to comply with the foregoing terms and provisions thereof or default by him in the payment of the agreed principal of the purchase price of the premises and the interest on said principal as prescribed in the agreement was to have the effect of releasing the parties of the first part (plaintiffs) from "all obligations in law or in equity to convey said real property," or any part thereof, to the defendant; that any rights acquired by the defendant under and by virtue of the agreement should thereupon cease, and the first party invested with the right to re-enter said property and remove all persons therefrom and take possession of the same. It is also provided that "time is of the essence of this agreement, and of each covenant thereof."

The complaint, inter alia, charges that the defendant defaulted in the payment of the taxes assessed against the property in question for the years 1920–21; that the same became delinquent "and are still unpaid," and that thus he violated a vital covenant of the agreement, for which he forfeited any rights he might have had thereunder. This is the gravamen of the complaint. It is further alleged that the "plaintiffs have kept and performed all the covenants and agreements in said contract to be kept and performed."

The execution of the contract, and the fact that defendant entered into the possession of the land described in the agreement and has ever since the making thereof been, and at the time the answer was filed was still in the possession of the premises, are admitted by the answer. As to the alleged failure of the defendant to pay the taxes on the premises for the years 1920–21 and allowing the same to become delinquent, the answer alleges, in substance, as follows: That the plaintiff W. D. Collins, upon the making of the contract, directed the county assessor to assess the property in the name of the defendant, but directed and requested the assessor to send the tax statement or tax bill to said defendant in his (said plaintiff's) care "box 413, Exeter"; that said plaintiff informed the defendant that he had directed all tax statements affecting the property in dispute sent in his (said plaintiff's) care, and that he assured the defendant that whenever the tax bills against the property were sent to him (defendant) in his (said plaintiff's) care he (said plaintiff) would notify defendant of that fact and at the same time inform him of the amount of the taxes and when the same would become payable; that the said plaintiff did receive from the tax collector a statement of the amount of the taxes assessed against the premises for the years 1920 and 1921, but that he willfully and deliberately withheld the same from defendant and likewise failed to notify the latter of the amount of said taxes and when they were due and payable, and that this conduct on the part of said plaintiff was with the wrongful and fraudulent purpose and intent to cause defendant to default in the payment of the taxes assessed against the premises for those years and thereby cause defendant to forfeit all rights acquired by him under and by virtue of the provisions of said contract. It is further alleged, in this connection, that the defendant is a foreigner; that he does not understand the English language; that he is not and never has been familiar with the laws of this state regarding the time for the payment of taxes, and that he relied solely upon the promise of said plaintiff to furnish him with information as to the amount of taxes he would be required to pay and of the time when the same should be paid in order to prevent them from becoming delinquent; that immediately upon learning that said taxes were delinquent the defendant paid the same, together with all interest, penalties, etc. These facts are alleged in characteristic or appropriate legal nomenclature and given in more minute detail than we have stated them here, but our statement is sufficient to disclose the defense to the real ground upon which a forfeiture is sought.

The answer also denies that the plaintiffs have complied in all respects with the terms of the contract and then proceeds to allege wherein the plaintiffs failed in that particular. These matters are set up as special defenses and particularly as grounds upon which to predicate the proposition advanced by the defendant that the plaintiffs had waived the provision of the contract that time is an essential or of the essence thereof. The findings, which are, in all respects, in accord with the allegations of the answer, contain a statement of the matters to which we are now referring, and we will take the same from the findings instead of reproducing the allegations of the answer with respect thereto. There is, however, one matter set up as a special defense to which we may here refer, to wit, that subsequent to the execution of the contract the same was changed by an oral agreement thereafter executed in the following particular: "That, although the contract provided that the defendant should plant the north 20 acres of said land to grapevines, it was orally agreed between the parties that he need not comply with said provision, but would be required to plant 15 only of the said 20 acres to grapevines and plant the remaining 5 acres to alfalfa and that, relying upon said oral agreement, the defendant did plant 15 acres only of said 20 acres to grapevines and the remaining 5 acres to alfalfa.

The findings may, in substance, be stated as follows: That the defendant is of a nationality foreign to the United States; that he neither speaks nor understands clearly the English language, and that he is not familiar with business methods and is entirely unfamiliar with the tax laws of the state of California and their requirements; that plaintiff W. D. Collins directed the property in question to be assessed in the name of the defendant, but at the same time instructed the assessor to send the tax statements as to said property in the name of defendant in his (said plaintiff's) care, at his postoffice address, and that said plaintiff informed defendant of the instruction he had so given the county assessor, and that he (said plaintiff) would notify defendant of his receipt of said statement when he received the same and of the amount of the taxes and the time of payment thereof; that defendant relied upon this statement by said plaintiff, and that the latter well knew that defendant solely relied upon him to furnish him (defendant) with such information; that the tax collector sent by mail the tax bills on said property to defendant in care of said Collins; that the latter received said tax bills and—

> "did willfully withhold the same from the defendant; that the defendant, prior to said taxes becoming delinquent, did ask plaintiff W. D. Collins for said tax bill, but that the said W. D. Collins did not deliver the same to the defendant nor inform him as to the amount thereof nor as to the time when the same should be paid, all for the express purpose of permitting and allowing the defendant to become in default as to the provisions of said contract providing for the payment of taxes; that the defendant was at all times after said taxes became due, ready, willing, and able to pay said taxes, and desired to pay the same, and did actually pay said taxes to the tax collector of Tulare county immediately upon receiving notice of this action; that plaintiffs or either of them did not pay said taxes or any portion thereof, and that neither of said plaintiffs has been damaged in any amount whatsoever or at all by reason of the failure of the defendant to pay said taxes prior to the delinquency thereof; that, in addition to paying said taxes, the defendant paid all fines and penalties in relation thereto and that the lien of said taxes was by the defendant wholly discharged; that other than the nonpayment of said taxes * * * the defendant has fully complied with each and every term, covenant and condition of said contract to be by the second party (defendant) therein complied with and is not in any manner in default on account of said contract."

The court further found that the plaintiffs have not kept and performed the covenants and agreements in said contract to be by them kept and performed; that the plaintiffs failed to dig a sufficient pit on said land and install a 4-inch centrifugal pump, together with a 7½ power motor at their own expense, and that they failed to build and lay the 1,200 feet of 10-inch cement pipe from the said pit up the east line of the land described in said contract to the north line of said land within the time prescribed by the contract, to wit, the 1st day of March, 1920, but that the work thus referred to was not done until a long time after said date; that by reason of the failure of the plaintiffs to dig a sufficient ditch and install the pumping plant and lay the cement pipe referred to as specified by the contract they waived, prior to the time at which said taxes became delinquent, the operative effect of the provision of the contract that time was to be considered of the essence thereof.

As to the oral agreement whereby the defendant was allowed by the plaintiffs to plant to grapevines 15 acres only of the north 20 acres above mentioned and the remaining 5 acres to alfalfa, the finding is in harmony with the allegations of the answer, as is also the finding with reference to the failure of the plaintiffs to install the motor pumping plant and to lay the cement pipe within the time expressly limited by the contract, all these matters having been set up in the answer and for the purposes above indicated.

In addition to these special findings, the court made a general finding that "all of the allegations of the plaintiffs' complaint, except as hereinbefore expressly found, are untrue, in that all of the allegations of the answer are true." Among the conclusions of law drawn from the findings of fact are the following: "That the defendant ought to be relieved and excused from his failure to pay the taxes on the property described in said contract and in plaintiffs' complaint," and that "the said contract should not be canceled and should not be null or void and should not be determined to be of no force and effect"; that the defendant is entitled to judgment, etc.

As above suggested, the failure of the defendant to pay the taxes within the time fixed by law for their payment and so allowing them to become delinquent involves the only breach of the agreement which the plaintiffs in their pleading complain about and upon which thus they solely rely, although the evidence, responding to certain purported special defenses set up by the answer and referred to above, took a wider range and disclosed other matters as to one of which, to wit, the act of the defendant in not planting the north 20 acres entirely to grapevines, might have been counted upon by the plaintiffs. As to these matters of special defense, it is the theory of the defendant that the plaintiffs, having themselves failed to pursue strictly the terms of the contract, waived the provision of the contract that time was an essential of the agreement or had by their conduct themselves not treated the agreement as one whose terms and provisions were to be strictly pursued by either of the parties thereto. While the evidence as to said matters is in positive conflict and the findings thereon are, therefore, put beyond the power of an appellate court to disturb, we do not regard them as important in the determination of this controversy. The real point at issue in the court below was whether the defendant, having breached that provision of the contract requiring him to pay the taxes assessed against the premises for the years 1920 and 1921 within the time prescribed by law, made such a showing by way of excuse for his default in that particular as to entitle him to be relieved therefrom by a court of equity, the action by the plaintiffs and the defense set up by the defendant being of equitable cognizance; and the questions for us to determine are: (1) Whether the findings as to the showing made by the defendant are sufficiently supported; (2) if so, whether the showing is sufficient as a matter of law to entitle the defendant to the relief granted him by the court below.

The land in dispute was originally the subject of a contract of sale between the plaintiffs and one Paul Ohannesian, who, after entering into said contract, transferred his interest therein to the defendant.

Upon the transfer of the contract to the defendant, the plaintiff W. D. Collins had the property described in the instrument assessed in the name of the defendant. It was stipulated at the trial that "in the Assessment Book for 1920, vol. N, p. 146, the entry of the assessment of the property is 'Eksoozian, M. H., care of W. D. Collins, Box 413, Exeter.'"

The defendant, according to his testimony, was a native of some foreign country, and, at the time the transaction here involved took place, had been in the United States about 10 years, for 6 years of which he had resided in the state of California. He had never attended school in this country and was unfamiliar with our language and system of tax laws. In fact, at the trial of this case, it seems it was necessary to take his testimony through an interpreter.

The defendant testified that said plaintiff told him of his intention of having the property assessed in his (defendant's) name and further told him that he (plaintiff) would instruct the assessor or the tax collector to mail the statement of the amount of the taxes assessed against the property in the name of the defendant, in care of said plaintiff; that the latter assured defendant that, upon receiving the statement, he would forward or deliver the same to him; that he and the plaintiff had a distinct understanding that the latter would, upon receiving the tax statement either pay the taxes himself and thereupon present the tax receipt to defendant, who was to reimburse him, or deliver the statement to defendant so that the latter could pay the taxes himself; that on one occasion he met the plaintiff on a public road near Exeter and then and there asked him about the taxes and inquired whether he (plaintiff) had received the statement as to the property, and that plaintiff declared that he had received no such statement; that thereafter he met the plaintiff in Exeter and again inquired about the taxes and whether the latter had received the tax statement, to which plaintiff replied in the negative; that he had never during his lifetime paid taxes; that he did not know when taxes became due in California, and that the plaintiff at no time informed him that they were due or when they would become delinquent, if not paid; that he had no knowledge that the taxes on the property had become delinquent until he received notice by summons of the filing of the complaint in this action, which was on the 25th day of May, 1921; that, after being served with summons herein, he, accompanied by his attorney, went to the county tax collector's office and paid the taxes, together with all the fines and penalties, etc., thereby releasing the property of the incumbrance subsisting upon it by reason of said delinquency. The defendant further testified regarding the oral agreement and as to the default of the plaintiffs in installing the pumping plant and laying the cement pipe above referred to within the time prescribed by the contract. These matters, as before stated, we regard as inconsequential in the decision of this case, and we may therefore waive further consideration of the facts in regard thereto.

Paul Ohannesian, the original conditional vendee of the real estate in question, and who, as stated, transferred to defendant his interest in the contract with the plaintiffs for the purchase of said property, testified that when the transfer was made, he said that W. D. Collins, the defendant, and the attorney for the plaintiffs were present; that a Mr. Tashjian on that occasion acted as interpreter for the defendant; that, after the present contract was signed, there was something said about recording it, and he (the witness) remarked to Collins and the latter's attorney that—

> "If this contract is not going to be recorded, the tax collector has got to assess the property in Mr. Collins' name. Mr. Collins gets the statement of the taxes and he ought to pay the taxes or turn it over to Mr. Eksoozian to pay the taxes. * * * I said this right in front of Mr. Machetanz (attorney for the plaintiffs) and Mr. Collins both. * * * I had this land under contract before Eksoozian. * * * I explained the contract to Eksoozian and so did other parties. I told him in that explanation that he had to pay the taxes."

The tax collector of Tulare county testified that she had occasion to investigate the matter of taxes assessed against the premises for the years 1920 and 1921; that the property was assessed to the defendant; that there was a notation on the assessment roll to the effect that the tax bill was to be mailed to Eksoozian, "in care of W. D. Collins, at Exeter." She further testified:

> "I do not know when it (the notation) was made in the book. * * * Where an address in care of some person is put on the assessment roll the bill is always sent in care of the person whose name appears on the assessment roll."

She stated that she did not personally know whether a tax statement as to the property in controversy was sent to W. D. Collins, "and I don't know whether he received any tax statement in regard to it."

The plaintiff testified that he did not instruct either the assessor or tax collector to send the tax statement as to the property to defendant in his (plaintiff's) care; that he never received any tax statement as to the property; that he met the defendant several times after the taxes fell due—once on January 20, 1920—and spoke to him about them and the necessity for paying them, but that defendant invariably declared to him that he (defendant) would not pay the taxes, and that the plaintiff would have to do so. Plaintiff stated that he paid the taxes on all the property belonging to him or assessed in his name. His testimony as to the oral agreement was positively contradictory to that of the defendant, and the excuse he offered for not installing the pumping plant and laying the cement pipe within the time called for by the contract was that, having attempted to do all this work in the month of February, 1920, the weather conditions were such that it could not be successfully done—that is to say, the cement pipe could not be laid because the ditch was full of water, and, while he dug the pit and installed the pump, the defendant would not permit him to set up the motor for the reason that he (defendant) had no facilities for housing it.

The foregoing comprises a fair statement, in substance, of the testimony received in the case, and there can be no doubt that therein there is to be found sufficient support to the findings. It is not necessary to point in detail to the circumstances developed by the evidence apparently justifying the court in concluding that W. D. Collins instructed the assessor to have the tax statement of the property mailed to him, and that he received said statement before the taxes became delinquent and for some reason failed or omitted to deliver the same to the defendant or to inform the latter of the fact that the taxes were due and payable, and when they would become delinquent if not paid. These inferences were fairly and reasonably within the evidence as produced, and we must assume, in support of the judgment, that the court did draw those inferences from the circumstances brought out by the evidence. Taylor v. Avila, 175 Cal. 203, 205, 206, 165 Pac. 533, and cases therein cited.

These significant observations may, however, be offered: That there is not shown any reason why the defendant should have willfully or purposely allowed the taxes to become delinquent. After taking possession of the property, he had improved it, and no doubt thus in some measure enhanced its value over that of the purchase price, assuming, as we may, that such price represented a reasonably fair value of the premises. In the absence of a clear showing to the contrary, it is reasonable to assume that he would not have sacrificed his interests in the premises or in the contract by purposely or negligently failing to pay the taxes. He knew that burden was upon him, because it was not only so written in the contract, but the instrument was so explained to him by the witness Ohannesian, his predecessor in interest in the contract. It may further be suggested that, if the plaintiff W. D. Collins intended good faith in his attitude towards the contract, it is most probable he would, whether he received this statement or not, have, in time to prevent their delinquency, voluntarily called the attention of the defendant to the fact that the taxes were due and payable. He knew when the taxes were to be paid. He had paid his own or those assessed against the property belonging to him and standing of record in his name, and at the same time was vitally interested in the contract by which he had agreed to sell the property herein involved to the defendant, and he knew that it was the duty of the defendant under the contract to pay the taxes thereon. The promise which the court found that W. D. Collins made to the defendant to notify him of the time for the payment of the taxes and the amount thereof was probably the outgrowth of his (plaintiff's) knowledge of defendant's want of an understanding and the use of the English language and his gross ignorance of the tax laws of the state. At any rate, the court could justly have so inferred. But it may be replied that the defendant is subject to the conclusive presumption that all persons know the law, and therefore are charged with knowledge of the time when taxes are required to be paid to prevent their becoming delinquent, and consequently there was no excuse for his failure to pay the taxes within the time prescribed, even though he had not been informed of the amount and the time of payment thereof by W. D. Collins. Of course, by going to the tax collector's office, the defendant could have learned the facts essential to prevent the delinquency of the taxes, and, under ordinary circumstances, every owner of property subject to the payment of taxes is charged with that duty, or, at any rate, with the duty of seeing that the taxes assessed against his property are seasonably paid. His failure to pay because of ignorance of the amount or the time of payment or both would not be sufficient to relieve him from the consequences of his default. But, although the time for the payment of taxes is fixed by law, still a taxpayer may, as may any person as to any legitimate transaction, commit to an agent the duty of looking after the payment of his taxes, and it was this very duty which W. D. Collins, undoubtedly prompted by his interest in the land, voluntarily took upon his own shoulders and likewise assured the defendant that he would personally attend to the payment of the taxes.

The appellant, however, stands upon the proposition that this case, as made by the findings, comes within the general rule that where a contract for the sale of real estate, in which time is made of the essence thereof, has been breached by the vendee by the nonpayment of the taxes, the latter can secure relief neither in law nor in equity from the consequences of his default. The rule is stated in 1 Pomeroy on Equity Jurisprudence (2d Ed.) § 455, as follows:

> "It is well settled that where the parties have so stipulated as to make the time of payment of the essence of the contract, within the view of equity as well as of the law, a court of equity cannot relieve a vendee who has made default."

From sections 1492 and 3275 of the Civil Code, construed, as they must be, by the light of each other, the same rule is deducible.

The doctrine has been stated and applied by our Supreme Court in several cases, notable among which is that of Glock v. Howard & Wilson Colony Co., 123 Cal. 19, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, the opinion having been prepared by Mr. Justice Henshaw. See, also, Gray v. Tubbs, 43 Cal. 359; Martin v. Morgan, 87 Cal. 203, 25 Pac. 350, 22 Am. St. Rep. 240; Woodruff v. Semi-Tropic, etc., Co., 87 Cal. 275, 25 Pac. 354; Vorwerk v. Nolte, 87 Cal. 236, 25 Pac. 412; Newton v. Hull, 90 Cal. 487, 27 Pac. 429; Bennett v. Hyde, 92 Cal. 131, 28 Pac. 104.

[1, 2] There is some language used in the above cases, however, which implies that, even where such a contract expressly or by reasonable inference from its language provides that time is of the essence thereof, relief may be granted from the consequences of the default by the vendee in the payment of the purchase price or any installment thereof, if a showing such as would appeal to equity be made. What is such a showing as would justify equity to interpose its remedial power in favor of the defaulting vendee in such a case none of the cases—at least, none coming under our immediate observation—has pointed out. But, however this all may be, we do not think that the present case falls within the doctrine of the rule above

adverted to. The determination of this case, upon the findings as made, rests rather upon the doctrine of estoppel than upon the rule stated by Mr. Pomeroy and applied in the cases above named. Even if it be true that the plaintiff, having received the statement of the taxes assessed against the property for the years 1920 and 1921, and having promised defendant that he would, on receiving the statement, deliver the same to him or let him know the amount of the taxes and when the same were to be paid, did not willfully and fraudulently refuse and fail to deliver to the defendant said statement or inform him of the amount of the taxes against the property and when they were due and payable, as the court found was the fact, still he (the plaintiff) should, under the circumstances as disclosed by the findings, be estopped from asserting his claimed right to have the contract forfeited because of the nonpayment by the defendant of said taxes. This follows from the doctrine of equitable estoppel. This doctrine rests upon the general principle that "when one of two innocent persons—that is, persons each guiltless of an intentional, moral wrong—must suffer a loss, it must be borne by that one of them who by his conduct, acts or omissions, has rendered the injury possible." 1 Pom. Eq. Jur. (2d Ed.) § 803. We must, however, accept as verity the findings of the court as to the facts of the matter and, so viewing them, it must be accepted as the fact that the conduct of the plaintiff with respect to the nonpayment of the taxes by the defendant was characterized by fraud—that is to say, that he, having received said statement, designedly and with the intent of causing the defendant to become in default in the matter of compliance with a vital provision of the contract, withheld said statement from the latter so that he would forfeit whatever rights he had acquired by reason of the convention.

[3] The law does not favor forfeitures, and a party should not be divested of valuable rights by way of forfeiture for default in complying with the provision of a contract by which those rights have been acquired, unless it is clearly made to appear that the other party to the contract has suffered or will suffer serious detriment or damage by reason of such default, or unless it is made to appear that the default was intentional or willful.

While we are not to be understood as holding to the view that, under certain circumstances, the rule invoked and applied in the above-named cases may not be invoked and applied as to a default by a conditional vendee in failing to pay the taxes assessed against the property which is the subject of a contract of sale of real property and as to the terms and conditions of which time is made an essential, it is, nevertheless, a fact of some significance that the default from the effect of which the defendant here seeks to be relieved is not, like that in the cases above mentioned, in his failure to pay the purchase price of the property within the prescribed time. The taxes, penalties, etc., having finally been paid by the defendant, the plaintiffs have not, as might be true were the default of the defendant in the failure to pay the purchase price, or the interest thereon, within or at the time specified, suffered any injury or damage by reason of the fact that the payment of the taxes was delayed to a time at which they had become delinquent. The only sufferer from the default was the defendant himself, he having, in addition to the taxes, been compelled to pay the fines, penalties, etc., accruing against the property because of the failure to pay the taxes within due and proper time. Nor is there any showing here that the default of the defendant in the payment of the taxes was willful or intentional or the result of gross or any negligence on his part. It has been shown why the taxes were not paid when due and payable, and the defendant testified and the court found that he was at all times willing, ready, and able to pay them and would have done so had he known when to have paid them to prevent their becoming delinquent. In view of all these considerations and of the evidence, of which there has been presented herein a synoptical review, we think the application here of the equitable doctrine of estoppel is peculiarly appropriate. Indeed, to our minds it is manifest that to sanction the forfeiture sought in this case would be to approve a palpable injustice; and it may well be remarked that, since the plaintiffs themselves were the first to breach the provision of the contract making time an essential by failing to install the pumping plant and lay the cement pipe, within the time expressly limited by the contract, they having had from September, 1919, to March, 1, 1920, within which to do so, the equities of the case are certainly with the defendant.

[4, 5] The court permitted the defendant to testify, on direct examination, over objection by counsel for the plaintiffs, that W. D. Collins did not tell him (defendant) when the taxes were payable. The court also allowed the tax collector to state, on cross-examination, over objection by counsel for the plaintiffs, that the taxes had finally been paid, although after they had become delinquent. It is here urged that these rulings were erroneous and prejudicial. We think, as must be implied from the above discussion, that the testimony was competent and pertinent to the issues of the case.

[6] It is contended generally that the oral testimony regarding the matter of the nonpayment of the taxes by the defendant within the time prescribed by law tended to vary the terms of the written contract. This con-

tention is not tenable. The effect of the testimony regarding that matter was not to change or modify the terms of the agreement in any respect. The testimony was intended only to show such an excuse for the defendant's failure to comply within the time required with a vital provision of the agreement as would or might be sufficient to entitle him in equity to be relieved of the consequences thereof.

For the reasons hereinabove stated, the judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

---

61 Cal. App. 200

Ex parte HIXSON. (Cr. 905.)

(District Court of Appeal, Second District, Division 2, California. Feb. 28, 1923.)

1. **Intoxicating liquors 🔑10(2)—Municipal ordinance limiting sale of alcoholic liquor as medicine to very small amount not invalid.**

A municipal corporation, in the exercise of its police power, may absolutely prohibit the sale of alcoholic liquor as a medicine, and hence an ordinance limiting the amount to be sold to a very small amount cannot be deemed invalid as unreasonable.

2. **Constitutional law 🔑81—That article is useful for some purpose does not prevent prohibiting its sale.**

Though an article is useful for some purpose, its harmfulness to the public from its general use may be such that legislation of absolute prohibition is warranted.

3. **Constitutional law 🔑211—Provision in liquor ordinance as to medical prescriptions not discrimination against alcoholic liquors in favor of drugs.**

An ordinance dealing solely with alcoholic liquors, and providing for filling liquor prescriptions, is not objectionable as discriminating between the filling of prescriptions for alcoholic liquors and for drugs and other curative agencies, as one violating an ordinance cannot complain that evils of a different character, but equally pernicious, have not been similarly regulated or prohibited.

4. **Intoxicating liquors 🔑6, 13; 🔑2½, New, vol. 8A Key-No. Series—Both state and nation may prohibit use, but cannot nullify Eighteenth Amendment.**

The state, or a political subdivision thereof, in the exercise of the police power which is inherent in the state and preserved to it by the tenth amendment to the federal Constitution, and the federal government, in the exercise of the delegated power which it derives from the eighteenth amendment, may each enact laws to secure prohibition, with the one limitation that no legislation can give validity to acts prohibited by the eighteenth amendment, and each may exercise an independent judgment in selecting and shaping measures to enforce prohibition.

5. **Municipal corporations 🔑111(4)—Statutes 🔑64(1)—If statute or ordinance valid when enacted, change of conditions invalidating part of enactment does not raise question of partial invalidity.**

Where a statute or ordinance is valid when originally enacted, subsequent change of conditions rendering a part invalid does not raise the question of partial or total invalidity, that is, whether the void part carries down the remainder.

6. **Intoxicating liquors 🔑132—Volstead Act does not confer rights, but limits and regulates them.**

The Volstead Act, enacted pursuant to Const. U. S. Amend. 18, is a prohibition statute solely, and limits and regulates existing rights or privileges, and does not confer any rights.

Application of M. W. Hixson for writ of habeas corpus prayed to be directed to the Chief of Police of the City of Los Angeles to secure the release of petitioner from custody after conviction of filling a prescription for alcoholic liquor in violation of the Gandier ordinance. Writ denied.

Ray E. Nimmo and Lloyd W. Moultrie, both of Los Angeles, for petitioner.

W. D. McConnell, City Prosecutor, J. Friedlander, Asst. City Prosecutor, J. D. Taggart, Deputy City Prosecutor, and S. W. Odell, all of Los Angeles, for respondent.

FINLAYSON, P. J. Petitioner, a licensed pharmacist, doing business in the city of Los Angeles, asks a discharge on habeas corpus from imprisonment under a sentence convicting him of filling a prescription for alcoholic liquor in violation of an initiative measure adopted by the electors of the city and commonly known as the Gandier ordinance. The ordinance was adopted prior to the ratification of the Eighteenth Amendment and the passage of the National Prohibition Law (41 Stat. 305). A complaint was filed in the police court, charging petitioner with filling a physician's prescription calling for more than eight ounces of alcoholic liquor, in violation of the city ordinance. He was convicted in that court, and on his appeal to the superior court the judgment of conviction was affirmed on June 5, 1922—all of which antedated the state law commonly known as the Wright Act. The single question presented for decision is whether the ordinance in so far as it relates to the filling of prescriptions by licensed pharmacists, is valid and enforceable since the adoption of the Eighteenth Amendment and the enactment of the National Prohibition Law, commonly known as the Volstead Act.

The Gandier ordinance, so far as its provisions are germane to the question provides:

"Sec. 2. It shall be unlawful to sell, serve, or give away any alcoholic liquor within the city of Los Angeles, except as hereinafter provided. * * * Sec. 5. Nothing in the preceding sections of this ordinance shall be construed as rendering unlawful * * * (c) the filling only, at pharmacies, on the date of issuance, but not the refilling of prescriptions calling for not to exceed eight ounces of alcoholic liquor each. Every such prescription shall be * * * signed * * * by a duly licensed physician, and shall have endorsed upon it by such physician * * * the statement that in his opinion the liquor prescribed is required by such person as a medicine."

The Volstead Act, in section 7, tit. 2, contains this provision:

> "No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. * * * Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days, and no prescription shall be filled more than once."

It will be noticed that, while the city ordinance limits to eight ounces (half a pint) the amount which may be prescribed and sold at any one time for medicinal use, it places no limitation upon the number of prescriptions which may be made and filled for the same person within any fixed period of time. So that, at the time of the adoption of the ordinance, a physician, if in good faith he deemed it necessary, could every day, and perhaps more than once on every day, issue for any patient a prescription for alcoholic liquor, provided each prescription called for not more than eight ounces. This he could continue to do until such time as his patient no longer needed the stimulant. And it was not unlawful for a licensed pharmacist to fill such daily prescriptions, provided no one of them called for more than eight ounces. It further will be noticed that, though the Volstead Act permits a pint (sixteen ounces) of spirituous liquor to be prescribed by a physician for the use of a patient, not more than that amount may be prescribed for the same person within any period of ten days, and no prescription shall be filled more than once.

We have not deemed it necessary to set forth all of the provisions of the Volstead Act which relate, directly or indirectly, to liquor prescriptions. When all of its provisions are considered, there may be some question as to whether the act permits a physician to issue any number of prescriptions to the same person in any period of ten days, if the aggregate of the amounts so prescribed does not exceed one pint. Petitioner claims that when all the provisions of the National Prohibition Act are read together, that law must be construed as meaning that but one prescription may be issued to the same person within the ten-day period, regardless of whether such prescription calls for a pint or for less than a pint. For the purpose of this decision, but for the purpose of this decision only, we shall assume that in this respect petitioner's construction of the Volstead Act is correct.

At a hearing had before this court on the return made to our writ of habeas corpus, six physicians were examined as expert witnesses for the purpose of aiding us in determining the medicinal value of alcoholic liquors. All of them agreed that such liquors do possess some medicinal value. Some of the physicians testified that there are certain substitutes for alcoholic liquors which make the use of such liquors unnecessary and even undesirable. Others testified that in their opinion there is no substitute which can effectually take the place of alcoholic stimulants in certain cases, as in pneumonia, for example. Of these latter witnesses two or three testified that not even a pint of whisky in ten days (the maximum amount permitted by the Volstead Act) would be sufficient in some cases.

[1] Petitioner's principal contention is that while a state or a political subdivision thereof, in the exercise of its police power, may *regulate* the sale of alcoholic liquors for medicinal uses, it cannot *prohibit* their sale for such uses. This proposition constitutes the major premise of petitioner's argument on his first point. He argues that the restrictions in the Gandier ordinance, when taken in conjunction with those in the Volstead Act, so limit the amount of alcoholic liquor which pharmacists in the city of Los Angeles may now sell in filling prescriptions that the combined effect of the operation of the ordinance and the national act has been to prohibit the sale in Los Angeles of an amount of alcoholic liquor sufficient to serve the purposes of a medicine. That is to say, though the Gandier ordinance does not forbid the issuance of more than one prescription to the same person in any period of ten days, it does make it an offense for a pharmacist to fill any single prescription calling for more than eight ounces; and under petitioner's construction of the Volstead Act no physician is allowed to issue more than one prescription for the same person in any ten-day period. Therefore it is claimed that the practical effect of the combined operation of the national act and the city ordinance is to make it unlawful for a licensed pharmacist in the city of Los Angeles to sell to any one person, on a physician's prescription, more than eight ounces of alcoholic liquor in any period of ten days, which amount, it is claimed, is so small as to be valueless for medicinal purposes. Assuming, without conceding, that such is the result of the operation of the city ordinance and the national law, we still do not think that the ordinance has been rendered unreasonable. For reasons presently to be stated, we think that the ordinance would not have been unreasonable

and void if it had entirely prohibited the sale of alcoholic liquor as a medicine. And if the city possessed the power entirely to prohibit its sale as a medicine, then, a fortiori, the limitation to eight ounces in ten days, would not have been an unreasonable restriction.

It may be said in limine that if the argument whereby petitioner would strike down the city ordinance be tenable, then his argument would seem to be equally fatal to the national enactment, in so far as the prescription of alcoholic liquor for medicinal use is concerned. For, according to the testimony of petitioner's medical experts, the maximum amount which it is assumed the Volstead Act permits to be prescribed—one pint, or sixteen ounces, in ten days—has but little, if any, more medicinal value than would be possessed by eight ounces administered in the same period of time; and neither amount, according to those witnesses, is sufficient to meet the exigencies of certain cases, as, for example, where the patient has been stricken with pneumonia. But waiving this consideration, and assuming that the restriction which the Volstead Act imposes on the prescription and sale of spirituous liquors for medicinal use is within the authorized powers of Congress under the Eighteenth Amendment—and we are fully convinced that it is—and assuming also that petitioner's construction of the National Prohibition Law is correct, still we do not agree with his premise that a municipal corporation, in the exercise of its police power, may not absolutely prohibit the sale of alcoholic liquor as a medicine.

That the state, or any political subdivision thereof vested with local police power, may prohibit all traffic in intoxicating liquors for beverage purposes is no longer a debatable proposition. It is possible that such drastic prohibitory legislation, however well-intentioned, may prove to be a Pandora's box from which may escape new and unforeseen social ills to afflict humanity. But that is a consideration to be addressed solely to the lawmaking branch of the government. With it the courts have no concern.

Not only may the sale of intoxicants as beverages be prohibited, but it also is well established that a state, or any of its political subdivisions invested with local police power, may adopt such measures having a real or substantial relation to the suppression of traffic in intoxicating beverages as it may deem necessary for that purpose in order to make its action effective. And though alcoholic liquor when used for certain purposes may be beneficial and useful, still its sale even for such beneficial and useful purposes may be prohibited if it can be seen that prohibitory measures of that nature have a real and substantial relation to the suppression of all traffic in intoxicants for beverage purposes. In Purity Extract Co. v. Lynch, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184, the United States Supreme Court stated the principle as follows:

> "That the state in the exercise of its police power may prohibit the selling of intoxicating liquors is undoubted. [Citing authorities.] It is also well established that, when a state, exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. [Citing authorities.] With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended."

See, also, People v. Velarde, 45 Cal. App. 520, 188 Pac. 59.

If wine, whisky, brandy, and the like are useful for medicinal and other nonbeverage purposes, still the evils which flow from their use as a beverage so greatly menace the health, peace, morals, and safety of society that the lawmaking branch of the government may with reason regard those evils as overwhelmingly outweighing the good services which such liquors may perform as medicines. If experience shows that the sale of intoxicating liquors for medicinal purposes opens the door to that train of evils which admittedly follows upon their general use as beverages, then why may not their use as medicines be absolutely prohibited? That the sale of such liquors for medicinal purposes does greatly facilitate the evasion of the whole scheme of prohibitory legislation is a matter of common notoriety. A city's entire scheme of prohibition might fail if pharmacists were to be permitted to sell alcoholic liquors for medicinal use. And because this is so, the city of Los Angeles, had it deemed it wise and expedient, could have forbidden the sale of such liquors as medicines, even though such sales, regarded as separate transactions, might be entirely innocuous.

[2] The fallacy of petitioner's position lies in the assumption that if an article is useful for any purpose its sale cannot be wholly forbidden. But notwithstanding an article may be useful for some purposes, its harmfulness to the public from its general use may be so great and widespread and its secret disposition may be so difficult to prevent that the Legislature, to protect the public, may absolutely forbid its manufacture or sale, or both, so as effectually to root out its evil effects altogether.

Though no case directly in point has been called to our attention, the principles announced in the following decisions of the United States Supreme Court are determinative: Bartemeyer v. Iowa, 18 Wall. 129, 21 L. Ed. 929; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989; Foster v. Kansas, 112 U. S. 205, 5 Sup. Ct. 8, 97, 28 L. Ed. 696; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346; Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253; Booth v. Illinois, 184 U. S. 425, 22 Sup. Ct. 425, 46 L. Ed. 623; Otis v. Parker, 187 U. S. 606, 23 Sup. Ct. 168, 47 L. Ed. 323, and Ah Sin v. Wittman, 198 U. S. 500, 25 Sup. Ct. 756, 49 L. Ed. 1142.

In Mugler v. Kansas the court went so far as to say that a state might prohibit the manufacture of intoxicating liquors by a person for his own use, if, in the judgment of the Legislature, such a measure is necessary. In Kidd v. Pearson the doctrines laid down in Mugler v. Kansas were approved and reaffirmed. Powell v. Pennsylvania directly presented the question of absolute prohibition, and the decision was in favor of the measure. That the substance in question in that case was oleomargarine cannot alter the principle, because it is conceded that the article was in itself useful, and not at all harmful. The reason of the prohibition was the great danger of fraud in its being mistaken for real butter. But there is nothing which is the subject of so much fraud as the sale of intoxicating liquors. Even physicians have been prosecuted for giving fraudulent prescriptions in order to assist their "patients" in obtaining intoxicating liquors unlawfully; and as to the frauds of druggists in handling liquors, it is said, in the Druggist Cases, 85 Tenn. 458, 3 S. W. 490, that the evasions of the law are frequent and notorious.

In Booth v. Illinois the court, having under examination the Illinois statute prohibiting options to buy or sell grain or other commodities at a future time, said:

> "The argument then is, that the statute directly forbids the citizen from pursuing a calling which, in itself, involves no element of immorality, and therefore by such prohibition it invades his liberty as guaranteed by the supreme law of the land. Does this conclusion follow from the premise stated? Is it true that the Legislature is without power to forbid or suppress a particular kind of business, where such business, properly and honestly conducted, may not, in itself, be immoral? We think not. A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

As having further bearing upon the right which the city would have had to prohibit absolutely the sale of intoxicating liquors for medicinal purposes, reference may be made to the following cases: State v. Fabbri, 98 Wash. 207, 167 Pac. 133, L. R. A. 1918A, 416; Re Crane, 27 Idaho, 671, 151 Pac. 1006, L. R. A. 1918A, 942 (affirmed in 245 U. S. 304, 38 Sup. Ct. 98, 62 L. Ed. 304); Schmitt v. Cook Brewing Co., 187 Ind. 623, 120 N. E. 19, 3 A. L. R. 270; Cureton v. State, 135 Ga. 660, 70 S. E. 332, 49 L. R. A. (N. S.) 182; Delaney v. Plunkett, 146 Ga. 547, 91 S. E. 561, L. R. A. 1917D, 926, Ann. Cas. 1917E, 685; Woods v. City of Seattle (D. C.) 270 Fed. 315; Page v. United States (C. C. A.) 278 Fed. 41; Piel Bros. v. Day (D. C.) 278 Fed. 223; Falstaff Corp. v. Allen (D. C.) 278 Fed. 643, and Massey v. United States (C. C. A.) 281 Fed. 293. Though none of these decisions is directly in point, their reasoning is persuasive and tends to uphold our conclusion.

Of all the cases to which our attention has been called, none is so nearly in point as State v. Durein, 70 Kan. 1, 78 Pac. 152, 15 L. R. A. (N. S.) 908 (affirmed in 208 U. S. 613, 28 Sup. Ct. 567, 52 L. Ed. 645), and Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L. R. A. 1916F, 177. True, much that is said in these cases respecting the right to prohibit the sale of alcoholic liquors as medicines is dictum. But the reasoning of the Kansas and Tennessee courts in these cases, even though much of it be dictum, is so cogent and logical as to form a solid foundation for the proposition that a city possessing local police power may entirely prohibit the sale of alcoholic liquor for a medicinal use.

In State v. Durein the Kansas court, from whose opinion we shall quote in extenso, states in the following forceful language the law which is determinative here:

> "The commodity in controversy is intoxicating liquor. It is not corn, or rye, or hops, or grapes, or any other product, the cultivation and use of which minister to the normal and necessary wants of mankind. * * * But the article is one whose use, even moderately, is taken into account by actuaries of insurance companies, and which bars employment in classes of service involving prudent and careful conduct; an article conceded to be fraught with such contagious peril to society that it occupies a different status before the courts and the Legislatures from other kinds of property, and places traffic in it upon a different plane from other kinds of business. There is, therefore, no question in this case of the power of the Legislature to say generally what beverages men shall drink, or what they shall

eat or wear, or when they shall rise or retire. The discussion must deal solely with a distinct article of trade, which already has earned a certain measure of reproach among civilized peoples. * * * It is true that intoxicating liquors may be devoted to sacramental, medical, scientific and mechanical uses, all conducive to the welfare of society. But this fact does not remove the stigma which has been fixed upon them. Intoxicating liquor is intoxicating liquor still, whether it be employed before the altar, at the bedside, in the laboratory, in the manufactory, or in the saloon. It is still the prolific source, of disease, misery, pauperism, vice, and crime. Its power to weaken, corrupt, debauch and slay human character and human life is not destroyed or impaired because it may be susceptible of some innocent uses, or may be used with propriety on some occasions. The health, morals, peace and safety of the community at large are still threatened, and under the form of government established for this state, and for the union of states of which it is a member, those are special subjects of local legislative cognizance. * * * The manufacture and sale of property in itself wholesome and harmless may be entirely prohibited merely to prevent deception and fraud. * * * In Mugler v. Kansas, 123 U. S. 623, * * * the private right to manufacture liquor for the producer's own individual use was contended for, a right of equal rank with that of manufacturing or selling for medical, scientific or mechanical purposes. But the court said: 'It will be observed that the proposition, and the argument made in support of it, equally conceded that the right to manufacture drink for one's own personal use is subject to the condition that such manufacture does not endanger or affect the rights of others. If such manufacture does prejudicially affect the rights and interests of the community, it follows, from the very premises stated, that society has the power to protect itself, by legislation, against the injurious consequences of that business.' * * * It is said, however, that in no case has it been decided that the sale of intoxicating liquors for medical, scientific and mechanical purposes may be entirely prohibited, when that was the question under discussion. But the principles announced are determinative of that question. Power to legislate for the health, morals, peace and good order of society being conceded to the Legislature, that body must determine the limits of its exercise, subject only to the condition that the measures adopted be reasonably appropriate to effect its purposes, and upon this question the court will rarely substitute its judgment for that of the Legislature. * * * No body of men can be so well informed regarding the composition, character and distribution of the state's citizenship, the origin, habits, customs, culture and ideals of the people, the modifying influences of their environment, the scope and possibilities of their industries, and all other facts relating to their welfare as a distinct political entity, as representatives of those people chosen from the various localities of the territory concerned. They understand better than any court possibly can the evils chargeable to the presence of intoxicating liquors among their own constituents; they know the extent to which intoxicating liquors are used and may be used by their own people, as medicine and in lawful business pursuits; they are able to judge what are and what are not desirable means to desirable ends; and if in their judgment, high license, low license, local option, state monopoly and all other methods of regulation and restraint are fruitless measures for the protection of the health, morals, peace and safety of the state against the use of intoxicating liquors; if under the best possible regulations drug stores or other dispensaries become in fact saloons; if such records of sales as are made at those places reek with rottenness; if by such expedients the door is merely opened to deception and fraud and perjury; if unpreventable infractions of the best liquor law devisable lead to a general disregard of law and contempt for its enforcement and administration; and if drunkenness still remains common—the Legislature may banish the traffic altogether. Whether as a matter of policy, the Legislature ought to go to any such length, the courts have no right to say. That it has the power, under the law, to do so, the courts cannot, under the law, do otherwise than declare."

In Motlow v. State, supra, the Tennessee court, after an exhaustive review of the authorities, state and federal, said that the weight of authority is in favor of total prohibition—a "Bone Dry" law—and against the proposition advanced by Freund and some other text writers to the effect that the Legislature does not possess the power to prohibit the prescription and sale of alcoholic liquors for medical use. There the court said:

"The fallacy of the whole argument [the argument that the thing prohibited must be in itself harmful and incapable of a harmless use] is in the assumption that, if an article is useful for any purpose, it cannot be wholly forbidden, no matter how greatly its evil capabilities and actual uses overbalance the good purposes it serves. The Legislature is the judge of the times and occasions when public danger threatens, and it is for the courts to apply the test of the constitutional limitations and restrictions, and these must be applied with a careful and discriminating judgment. * * * We are referred to section 223 of Freund's Police Power for the statement that the power of the Legislature to prohibit the prescription and sale of liquor to be used as a medicine does not exist, and that the exercise of this power would be purely arbitrary, based upon Sarrls v. Com., 83 Ky. 327. The legislation in question does not contain that prohibition, because the proviso permits the sale of alcohol which may be used for medicinal purposes. However, the weight of authority is against even this proposition, and in favor of total prohibition, as we shall presently show. Other text writers declare the right of absolute prohibition."

From the principles underlying the foregoing cases, it is apparent that though the sale of alcoholic liquors for medicinal purposes may not be in itself noxious, nevertheless the city of Los Angeles could have prohibited such sales because of the great opportunity afforded thereby for aiding those whose purpose and desire is to violate those provisions of the ordinance which prohibit the sale of intoxicants as beverages. Legislation prohibiting the sale of alcoholic liquor for medicinal use might be repugnant to our sense of justice, or it might even be regarded as unnecessarily oppressive to those desiring to use alcoholic liquor for that purpose; but if that is all which may be said against it, the appeal must be to the Legislature or to the ballot box, not to the judiciary. "This court," says the Supreme Court of Indiana in Schmitt v. Cook Brewing Co., supra, "has nothing to do with the wisdom or unwisdom of the legislative act. A law may be repugnant to general principles of justice, liberty and rights not expressed in the constitution, and yet the courts have no power to strike it down."

In support of his contention that the city does not possess the power to prohibit the prescription and sale of intoxicating liquor to be used as a medicine, petitioner cites us to Freund on Police Power (sections 222 and 223); Tiedeman on State and Federal Control of Persons and Property (page 512 of 1900 Ed.); Town of Selma v. Brewer, 9 Cal. App. 70, 98 Pac. 61; Commonwealth v. Fowler, 96 Ky. 166, 28 S. W. 786, 16 Ky. Law Rep. 360, 33 L. R. A. 839; McNulty v. Toof, 116 Ky. 202, 75 S. W. 258, 25 Ky. Law Rep. 430; Sarrls v. Commonwealth, 83 Ky. 327; and Ex. parte Cowert, 92 Ala. 94, 9 South. 225.

That the opinions of Freund and Tiedeman respecting the power to prohibit the prescription and sale of alcoholic liquor for medicinal purposes are unsound and fallacious is so clearly shown by the Tennessee Supreme Court in its able and exhaustive treatment of the subject in Motlow v. State, supra, that it would be supererogatory for us to attempt to add to that court's pregnant criticisms.

Town of Selma v. Brewer, supra, presented a question as to the true interpretation of a municipal ordinance. According to the sweeping terms of one of its sections, the ordinance under consideration in that case purported to make the keeping, possessing, or storing of intoxicating liquors unlawful, without any express reference to the disposition to be made of them by the keeper or possessor. In view of other provisions in the ordinance, this sweeping inhibition against keeping, possessing, and storing was construed as intended to prohibit the storing or possessing of such liquor with a view to engaging in its unlawful sale. What was said in that case about the lack of power to prohibit the sale of intoxicating liquors for medicinal use was not necessary to the decision, and was pure dictum. Nor was any attempt made to buttress the dictum by the citation of those authorities wherein the courts have discussed the principles of constitutional law which underlie the question. For these reasons we do not accept that decision as authority here. In each of the Kentucky cases cited by petitioner, the court upheld the particular statutory provision under which the accused was charged. What was said in those cases respecting the unconstitutionality of an inhibition against the sale of intoxicating liquors for medicinal purposes was, therefore, dictum pure and simple, and is not to be taken as authority upon the question before us. The same may be said of the Alabama case cited by petitioner—Ex parte Cowert. Like the Kentucky cases, it makes no attempt to sustain its dictum by reasoning based on any generally recognized principles of constitutional law applicable to the enactment of prohibitory legislation.

Concluding, as we do, that the city of Los Angeles, had it chosen to exercise the power, might have prohibited in the first instance all sales of alcoholic liquor as a medicine, it cannot be held that the city's restriction upon the filling of prescriptions by pharmacists has been so far augmented by the National Prohibition Law that it has now become unreasonable and void.

[3] Petitioner's second point is that subdivision c of section 5 of the Gandier ordinance—the subdivision relating to the filling of prescriptions by pharmacists—discriminates unlawfully between the filling of prescriptions for alcoholic liquors and the filling of prescriptions for drugs or other curative agencies. There is no merit in the contention. The ordinance deals only with alcoholic liquors. It is possible that there are ordinances of the city, not placed before us, which regulate in a similar manner the sale of drugs and narcotics. But even if the sale of drugs, poisons, and narcotics has not been similarly regulated, the ordinance in question does not arbitrarily discriminate between the sales of such articles and the sale of alcoholic liquors as medicines. No reasonable person will dispute the proposition that in view of the many evils which are peculiar to the consumption of intoxicating liquors regulations may be made which are specially applicable to the sale thereof. Police laws need not necessarily be omnibus in their character; and it is permissible to legislate against one form of evil even though other and similar evils have not been condemned. A person guilty of violating an ordinance regulating or prohibiting an evil of one character cannot complain that evils of a different character, but equally pernicious, have not been similarly regulated or prohibited.

> "The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to

impair that equal right which all can claim in the enforcement of the laws." Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145.

Thus, in Maguire v. Reardon, 41 Cal. App. 596, 183 Pac. 303, it was held that an ordinance which provides for the general demolition and removal of wooden buildings within the city's fire limits is not open to the objection that it is discriminatory because it does not refer to buildings made of other inflammable material. And in Philadelphia v. Brabender, 201 Pa. 574, 51 Atl. 374, 58 L. R. A. 220, it was held that an ordinance which prohibits the casting of handbills and advertisements into the vestibules of dwellings, although excepting newspapers and addressed envelopes, does not impair equal rights or make an unlawful discrimination. See also, Butte v. Paltrovich, 30 Mont. 18, 75 Pac. 521, 104 Am. St. Rep. 698, and Ex parte Hadacheck, 165 Cal. 416, 422, 132 Pac. 584, L. R. A. 1916B, 1248, affirmed in 239 U. S. 394, 36 Sup. Ct. 143, 60 L. Ed. 348, Ann. Cas. 1917B, 927.

It next is urged that the main purpose of the Gandier ordinance was to permit or legalize the sale of certain kinds of intoxicating liquors for beverage purposes, such as light wines and beers; that the legalization of the sale of these alcoholic liquors for beverage purposes has been rendered invalid by the Eighteenth Amendment and the Volstead Act; that subdivision c of section 5 of the ordinance was intended to be but an auxiliary provision—a mere incident to the authorization of the sale of beers and wines; and that this auxiliary provision would not have been enacted as a separate and independent regulatory measure, but only as an incident to what counsel are pleased to declare is the main purpose of the ordinance. From these premises it is argued that because what counsel claim was the main purpose of the ordinance—the legalization of the sale of light wines and beers—has been made illegal by the Eighteenth Amendment and the Volstead Act, the whole ordinance has become a nullity, and the auxiliary provision contained in subdivision c of section 5 falls with the rest. There is no merit in the contention.

One vice of petitioner's argument lies in the assumption that the main purpose of the ordinance was to legalize the sale of certain kinds of liquors—light wines and beers. On the contrary, its main purpose seems to have been prohibitory. In section 1 of the ordinance it is expressly declared that "it shall be unlawful to establish, maintain, or conduct within the city of Los Angeles any * * * place in which, or in connection with which, alcoholic liquor is sold, served, or given away, except as hereinafter provided." Section 2 provides that it "shall be unlawful to sell, serve, or give away any alcoholic liquor within the city of Los Angeles, except as hereinafter provided." Section 5 provides that nothing in the preceding sections "shall be construed as rendering unlawful" any of the following acts: The service of alcoholic liquors in private homes; the use of wine for sacramental purposes; the filling of prescriptions at pharmacies; the sale of pure alcohol by registered pharmacists for scientific or medicinal purposes; the sale between specified hours "of not less than one-fifth of a gallon of vinous and malt alcoholic liquors in sealed or corked containers or closed packages" at any place within a certain designated zone, provided the same shall not be consumed on the premises where sold; and the service of vinous and malt alcoholic liquors with bona fide meals at a club, restaurant, or hotel, the proprietor whereof holds a valid license. In section 9 it is provided that the term "vinous and malt alcoholic liquors" shall include all malted and fermented liquors which do not contain more than 14 per cent. by volume of alcohol, and which do not contain any distilled spirits.

[4] It will be noticed that the ordinance nowhere says that it shall be "lawful" to sell vinous or malt alcoholic liquors, or any kind of intoxicating liquor. What the ordinance does say is that the general and sweeping prohibitory provisions in sections 1 and 2, banning traffic in all alcoholic liquor, shall not be construed as rendering "unlawful" the specifically designated exceptions to those comprehensive prohibitory provisions. In other words, without intending affirmatively to legalize the sale of any intoxicating liquor, the ordinance, read as a whole, makes it unlawful to sell any but certain specified kinds of liquor or liquors used for certain defined purposes. Prohibition of traffic in certain kinds of strong drink is the principal object sought by the ordinance. The only criticism which might be made is that, while prohibition is the ordinance's main purpose, its inhibitions do not cover all of the zone now occupied by the Eighteenth Amendment and the Volstead Act. That, however, does not affect the validity of the ordinance's prohibitory features, nor does it affect such of its regulatory provisions as are not in conflict with the Eighteenth Amendment or the Volstead Act. Every inhibitory provision of the ordinance, including that which forbids the filling of a medical prescription calling for more than eight ounces of alcoholic liquor, may stand without obstructing or embarrassing the execution of the act of Congress. Thus, for example, the city could inflict the penal sanctions of the ordinance upon pharmacists who fill prescriptions calling for more than eight ounces of liquor, without in any wise interfering with the authority of the federal officials to invoke the penalties prescribed by

Congress if these same pharmacists should aid and abet a physician in violating that provision of the national law which makes it unlawful to prescribe for the same person more than one pint of intoxicating liquor in any period of ten days. The state, or a political subdivision thereof, in the exercise of the police power which is inherent in the state and perserved to it by the Tenth Amendment to the federal Constitution, and the federal government, in the exercise of the delegated power which it derives from the Eighteenth Amendment, may each enact laws to secure prohibition, with the one limitation that no legislation can give validity to acts prohibited by the Eighteenth Amendment. Each may exercise an independent judgment in selecting and shaping measures to enforce prohibition. These measures may vary in many particulars, but this is an inseparable incident of independent legislative action in distinct jurisdictions. United States v. Lanza, 43 Sup. Ct. 141, 67 L. Ed. ——.

[5] It also is urged that those provisions of the ordinance which declare that the sale of wines and beers shall not be unlawful—permissive provisions which were nullified by the Eighteenth Amendment and the Volstead Act—are so intimately interwoven with the other provisions of the ordinance that it must be assumed that the electors who voted for this initiative measure intended that the whole ordinance should fall if its provisions permitting the sale of wines and beers should subsequently be nullified by the paramount power of the federal government. We can see no merit in the contention. This is not a case where some parts of a whole statute or of a whole ordinance were beyond the legislative power when originally enacted. Where some substantial part of a law is unconstitutional and void when the law is first enacted, the rule is that the whole statute or the whole ordinance will fall if all of its parts are so mutually connected with and dependent on each other as to warrant the belief that the lawmakers intended them as a whole and that if all could not be carried into effect the residue would not have been passed independently. That rule is not applicable here. When this ordinance was adopted, all of its provisions were valid and strictly within the constitutional power of the city and of the electors who voted upon it as an initiative measure. As was said by the Massachusetts Supreme Judicial Court in Commonwealth v. Nickerson, 236 Mass. 302, 128 N. E. 282, 10 A. L. R. 1583, addressing itself to a similar proposition:

> "It [the state statute] was all operative and valid, and strictly within the constitutional power of the Legislature when enacted. The point now is to ascertain whether the parts under which the present complaint is brought still remain valid and enforceable. This point is not the same which would arise where a whole statute has been enacted, some parts of which are beyond legislative power under then-existing constitutional provisions."

The rule that the whole statute will fall if, when passed, some of its parts are unconstitutional, and if all of its parts are so dependent upon each other as to warrant the belief that the Legislature intended them as a whole, rests upon the presumed intent of the lawmakers. But here the intent of those who made this ordinance a city by-law must be ascertained as of the time when they voted for its adoption. At that time this initiative measure, in all of its parts, was a valid expression of the electors' legislative will and intent. Then the ordinance was altogether impregnable in its constitutional aspects, and there was then a complete and valid expression of the intent of the lawmakers. The precise question, therefore, is: How much of a statute or of an ordinance, perfectly valid throughout at the time of its adoption, remains enforceable when, since its adoption, a superior power has supervened with a fundamental governing law at variance with some of its terms? Such a situation is analogous to that where, after the passage of some perfectly valid and enforceable law, a change takes place in the conditions obtaining in the field of the law's activities, such, for example, as a change in certain physical facts, so that the practical enforcement of the law in all of its aspects is no longer a physical possibility. Such supervening alteration in the law's environment might afford a reason for its repeal by the lawmaking body, or a reason for its amendment to conform to the altered conditions, but it can afford no ground for judicial repeal.

The principle declared in Re Rahrer, 140 U. S. 545, 564, 565, 11 Sup. Ct. 865, 35 L. Ed. 572, is applicable here. There it was held that a state statute, invalid at the time of its enactment for the reason that it infringed upon the federal power, was rendered valid and enforceable without re-enactment simply by the subsequent passage of an act of Congress removing an impediment to the enforcement of the state law, and thus conferring jurisdiction in that particular upon the states. That decision upholds this ordinance to the extent to which we have decided it to be operative. In Commonwealth v. Nickerson, supra, will be found a logical and convincing discussion of this question. See, also, Ex parte Pappas (Cal. App.) 207 Pac. 483.

[6] Petitioner's final point is based upon a recent decision of the Florida Supreme Court —Hall v. Moran, 81 Fla. 706, 89 South. 104. Because the Volstead Act expressly permits physicians to prescribe for any one person one pint of spirituous liquor in any period of ten days, petitioner claims that there is thereby granted by Congress to citizens of the United States a "right" or a "privilege" which is protected by the Fourteenth Amendment, and that no state or political subdivision thereof may abridge such right or privilege. The decision of the Florida Supreme Court in Hall v. Moran, supra, seems to lend support to this proposition. We are unable to agree with the reasoning of that case. Because the Volstead Act declares that "it shall not be unlawful to possess liquors in one's private dwelling" for personal consumption by the owner, his family and guests, the Florida court held that permission was given by Congress to possess liquors, and that such permission confers "a federal right in the nature of a 'privilege' to lawfully possess, and an 'immunity' from punishment for such lawful possession"; and that a state statute making it unlawful for any one to have in his possession more than a certain defined quantity of liquor is a denial or curtailment of the "right" so conferred by Congress, and perhaps is also a violation of that provision of the Fourteenth Amendment which declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The vice of this argument, as we view it, lies in its assumption that Congress may grant the "right" to possess intoxicating liquors. The Eighteenth Amendment—the sole source of the power of Congress to deal directly with the liquor traffic—is a prohibitory, not a permissive, amendment. It declares that "the manufacture, sale, or transportation of intoxicating liquors * * * for beverage purposes is * * * prohibited"; and by the second section of the amendment Congress is given power to enforce such national prohibition by appropriate legislation. There is here no grant to Congress of the power to create or confer any "right" to possess intoxicating liquors. The sole power granted to Congress is the power to enforce the federal prohibition contemplated by the amendment. In the exercise of its power to prohibit the manufacture, sale, and transportation of intoxicating beverages, Congress unquestionably may regulate the possession of such liquors for private use, since the regulation of such possession has a substantial relation to the enforcement of the prohibition aimed at by the amendment. Page v. United States, supra. But its power so to regulate the possession of liquors is but an incident to its power to prohibit. Its power to regulate possession for private use exists solely because such regulation of possession is an appropriate means whereby the expressly granted power to prohibit the manufacture, sale, and transportation may be effectively carried into execution. So far from being the grant of a right, the congressional regulation of possession is a limitation upon right or privilege. It is a limitation upon that privilege of possessing liquors which, but for the federal regulation, would be unlimited, save in so far as it might be limited by state legislation. It is absurd to say that Congress, merely because it has the power to regulate the possession of intoxicating beverages as an incident to its expressly granted power to prohibit their manufacture, sale, and transportation, confers a "right" when, by appropriate regulatory provisions, it places limitations upon the privilege of possessing liquors.

We quite agree with the ruling of Judge Neterer in Woods v. City of Seattle, supra (D. C.) 270 Fed. 315, where it was held that the Eighteenth Amendment and the national prohibition act confer no right to sell Jamaica ginger in quantities not prohibited by the act, but were intended as limitations upon the privilege, and that, therefore, a state, under its police power, can prohibit sales in such quantities as are permitted by the National Prohibition Act. That was a case brought by a duly registered druggist to enjoin the defendants from interfering with the sale of Jamaica ginger, the sale whereof was made unlawful by a city ordinance. Under a regulation of the commissioner, authorized by the National Prohibition Act, druggists are permitted to sell Jamaica ginger in quantities exceeding one or two ounces at a time. In the course of his opinion Judge Neterer says: "The plaintiff asserts that article 18, supra, [the Eighteenth Amendment] and the National Prohibition Act grant him a right to do except that which is prohibited, and that this right overrides all police power of the state with relation to intoxicants. In this the plaintiff is in error. Instead of granting a right, the amendment and the Volstead Act are limitations upon privilege."

The writ is discharged, and the petitioner is remanded.

I concur: CRAIG, J.

WORKS, J. I concur in the judgment, but I am not in accord with the views expressed by the majority opinion in making disposition of the first point discussed therein. Considering the importance of the question mentioned, it is proper that I should state the grounds upon which I decline to concur in those views, presenting them in outline only, and not with the assiduity which characterizes the treatment of the subject in the majority opinion. I shall then state, with great brevity, the reasons which impel me to concur in the judgment.

If any proposition of law is well settled, in most jurisdictions, at least, it is that every person has the constitutional right to resort to such established and legalized school or system of healing as he pleases for relief from his ailments. When men differ, in opinion merely, as to the efficiency of different schools or systems, it is not a proper subject of legislation to attempt to control or limit the right of any to act pursuant to his opinions or beliefs by resorting to the school or system of his choice. Eastman v. State, 109 Ind. 278, 10 N. E. 97, 58 Am. Rep. 400; State v. Liffring, 61 Ohio St. 39, 55 N. E. 168, 46 L. R. A. 334, 76 Am. St. Rep. 358; State v. Biggs, 133 N. C. 729, 46 S. E. 401, 64 L. R. A. 139, 98 Am. St. Rep. 731; State v. Smith, 25 Idaho, 541, 138 Pac. 1107; Bishop on Stat. Crimes, sec. 988a; Freund, Police Power, sec. 16. As having a general bearing upon the question, see, also, State v. Gravett, 65 Ohio St. 289, 62 N. E. 325, 55 L. R. A. 791, 87 Am. St. Rep. 605; Louisiana State Board v. Charpentier, 140 La. 405, 73 South. 248; American School v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90. This principle has found frequent expression, not only in the cases cited, but in others, at the suit of the homeopath, the eclectic, the osteopath, the chiropractor, and the Christian Scientist.

A necessary corollary to the proposition just stated, so it seems to me, is that one may not be deprived, constitutionally, of his right to have alcoholic beverages prescribed for him as a medicine. If one may resort, without fear of legislative interference, to the duly qualified practitioners under the system in which that one believes, it must be true that he is also entitled, without fear of such interference, to use the medicines which his practitioner prescribes, as well as to submit himself to the rubbings or massage, or insist upon the benefit of the prayers, which are a part of the practitioner's system. Of what value is the patient's right to resort to the practitioner if he may be denied the services of the latter after he is called? Of what value is that right if the patient may be denied the medicines which the practitioner prescribes for his relief, whether alcohol or hot water? It appears to me, at least so far as the expressions of the majority opinion to the contrary are concerned, that a patient must have the constitutional right to resort, without stint or limitation, except as imposed by the practitioner in his prescriptions, to the medicine in which the school of the honest and qualified physician believes.

I am, therefore, impelled to the view that certain authorities which the majority opinion discredits are closer to the instant case than are those which it follows. The authorities which I have in mind are the ones to the effect that the legislative department may not prohibit the prescription and sale of intoxicating liquor as a medicine. See Sarrls v. Commonwealth, 83 Ky. 327; Commonwealth v. Fowler, 96 Ky. 166, 28 S. W. 786, 16 Ky. Law Rep. 360, 33 L. R. A. 839; McNulty v. Toof, 116 Ky. 202, 75 S. W. 258, 25 Ky. Law Rep. 430; Ex parte Cowert, 92 Ala. 94, 9 South. 225; Town of Selma v. Brewer, 9 Cal. App. 70, 98 Pac. 61; Freund, Police Power, §§ 222, 223; Tiedeman, State and Federal Control of Persons and Property, § 122. It is clear to me that if these authorities state the law it logically follows that the amount to be sold cannot be limited by legislation. If it be conceded that the physician may prescribe and the patient use a certain drug, it must be true that the physician must be allowed a free and untrammeled judgment to determine the quantity to be prescribed and used. If he may not exercise that judgment the patient is deprived of his services, for if in the opinion of the physician a given quantity of any drug is necessary to a healing, for him to be forced to prescribe less were as if he were forbidden to prescribe at all.

Notwithstanding all that I have said above, there are at least two decisions of the Supreme Court which appear to me to preclude the application of the principles to which I have referred. They are Abeel v. Clark, 84 Cal. 226, 24 Pac. 383, and French v. Davidson, 143 Cal. 658, 77 Pac. 663, and they establish the rule that compulsory vaccination laws are constitutional. There are certain differences between those cases and the one now before us, but it does not appear to me that the differences are such as to render the cases inapplicable here. It is upon those two cases alone that I base my present concurrence.

191 Cal. 53

BUELL v. BUELL. (S. F. 9736.)

(Supreme Court of California. April 21, 1923. Rehearing Denied May 21, 1923.)

1. Trusts 🔑86—Trust presumed to result in favor of one paying consideration for realty taken in another's name.

Ordinarily, when a transfer of real property is made to one person and the consideration paid by another, a trust is presumed under Civ. Code, § 853, to result in favor of the person by or for whom such payment is made.

2. Trusts 🔑89(4)—Trust held not to have resulted, though consideration paid by another.

Evidence of real estate transaction by real estate broker as confidential agent for his mother, from which a personal profit was realized by him *held* sufficient to establish that, though he paid the consideration passed under a certain contract of sale taken in his mother's name no trust resulted in his favor, the payment having been made pursuant to an agreement that the property should be hers in place of property previously conveyed to him without consideration.

3. Trusts 🔑103(2)—Real estate broker, as confidential agent for his mother, trading equity in contract of another for property taken in his name held trustee for her.

Where a real estate broker, acting as confidential agent for his mother has paid the consideration passed in a contract of sale and taken title in his mother's name in settlement of amounts due her, and thereafter traded her equity in the contract of sale for other property which he took in his own name, *held*, that he must be deemed to hold in trust for her.

In Bank.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by E. E. Buell against R. L. Buell, as administratrix of the estate of E. S. Buell, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Everts, Ewing & Wild and J. R. Fitch, all of Fresno, for appellant.

L. N. Barber and W. N. Gilliam, both of Fresno, for respondent.

KERRIGAN, J. This is an action brought by the plaintiff against the defendant to obtain a judgment impressing a trust on certain property in Fresno county. The court granted the relief prayed for, and the defendant appeals from the judgment.

The plaintiff is the mother of E. S. Buell, deceased, and the defendant is his surviving widow and the administratrix of his estate. The plaintiff had entered into a contract for the purchase of certain real estate referred to in the record as the Columbia Colony property, and her equity in this property, it appears, was given in exchange for a one-third interest in certain property in the town of Reedley, referred to as the Reedley garage, the deed to which upon the consummation of the exchange was taken in the name of the deceased. It appears that all of the consideration which had been paid upon the contract for the purchase of the Columbia Colony property was in the form of the conveyance by the deceased of property standing in his name valued at the sum of $2,800. It is therefore contended by his administratrix that he having furnished this consideration, the plaintiff must be deemed to have held the contract as trustee for him, and that when he traded said property for the Reedley garage he had the right to take title thereto in his own name, and that he was the owner thereof at the time of his death.

[1, 2] Passing the proposition as contended for by plaintiff that the doctrine of a resulting trust does not apply to an executory contract of sale (Green v. Drummond, 31 Md. 71, 1 Am. Rep. 14), we agree with the defendant that ordinarily, when a transfer of real property is made to one person and the consideration therefor is paid by another, a trust is presumed to result in favor of the person by or for whom such payment is made. Section 853, Civ. Code. But in the present case the evidence is ample to sustain the findings of the trial court that the property standing in the name of the deceased and which furnished the consideration for the contract of purchase of the Columbia Colony property belonged to the plaintiff, and that the same was conveyed to the vendors of the Columbia Colony property, with the understanding between the plaintiff and the deceased that it should be in settlement of the

account between the parties, and that the title to the Columbia Colony property should be taken by and vest in the plaintiff. Under these circumstances it cannot be said that the property in litigation was held in trust by the plaintiff for her son.

The findings, in part, are as follows: The contract for the Columbia Colony property was executed by the plaintiff December 20, 1918, by which the vendors thereof agreed to sell it to the plaintiff for the sum of $8,000, $2,800 of which was paid at the time of the execution of the contract, "and that all right, title, interest, and equity of the purchaser thereunder was, and at all times hereinafter mentioned, remained the property of plaintiff; that neither E. S. Buell, now deceased, nor his estate, had any right, title, or interest therein or thereto"; and the court further finds that the exchange for the Reedley garage property was negotiated by defendant's intestate at the request of plaintiff and as her agent, and that the title to this property was taken by him against her will and without her knowledge or consent. The court then finds that the first payment of $2,800 on the Columbia Colony property was made by defendant's intestate, but "was so paid for the use and benefit of the plaintiff and under and in pursuance of an agreement between the plaintiff and said E. S. Buell that the property so purchased should be her property." The court then makes a specific finding of the probative facts regarding the consideration for this payment, to the effect that plaintiff had conveyed certain real property to E. S. Buell, her son, without consideration, who thereupon promised that he would exchange it for other property to be conveyed to plaintiff at her request; that for more than three years immediately preceding the execution of the contract for the purchase of the Columbia Colony property he had been acting as plaintiff's confidential business agent and adviser, and in the course of his transactions in that capacity had acquired without plaintiff's knowledge certain other property which the plaintiff claimed should rightfully have been received by her; that the property conveyed by E. S. Buell to the vendors of the Columbia Colony property had been obtained by him through a series of exchanges for which the original consideration was property of the plaintiff, together with the sum of $300 belonging to said E. S. Buell; and that in said exchanges Buell had also received and retained without plaintiff's knowledge or consent the sum of $1,260.

The numerous transactions between the plaintiff and her son, all of which have an important bearing on the issues here and which tend to support the findings of the court are correctly stated in plaintiff's brief. They are substantially as follows: In the year 1916 plaintiff was the owner of certain real property in Fresno county, known as the Jensen ranch, and her son was engaged in business as a real estate broker in the city of Fresno. At this time he claimed that the plaintiff had verbally given him a half-interest in this ranch in return for services rendered to her, which she, however, denied. In that year she purchased property known as Le Grand ranch, giving as part payment therefor the Jensen ranch. She then entered into a contract, negotiated by her son, to sell Le Grand ranch for a certain cash payment, receipt of which was acknowledged by the contract, and $6,000 in subsequent installments, but consented to receive in lieu of the cash payment a lot in Maricopa and 40 acres of land in Texas. In this connection there was conveyed to the son without his mother's knowledge or consent some lots in Seattle, and what is termed the Robinson tract property, and he also had the deed to the Texas property made in his own name without her permission. This latter fact she discovered a short time after the transaction, but knew nothing about the Robinson tract property until much later. She demanded that he surrender the Texas property to her, in satisfaction of which demand he arranged an exchange in which the plaintiff received a ranch in Madera county, for which she conveyed certain property and her son conveyed what is known as the Belmont addition property which, together with the Duncan's addition property, he had acquired for the Texas land. About this time the son invested $300 in a local transportation line, from which, by a series of exchanges, he obtained a Hudson automobile. After borrowing $300 from the plaintiff to redeem this car from foreclosure—which amount was never repaid—he carried on a further series of land exchanges in which he used this car, together with the Duncan's addition and Robinson tract properties. In March, 1918, the plaintiff conveyed to her son lots referred to as Long Bros.' addition lots and a 10-acre ranch upon his oral undertaking to exchange them for her. He exchanged the last-mentioned land for property in Dinuba, and without her knowledge or consent mortgaged the Long Bros.' addition lots for $250, which he appropriated to his own use. He then exchanged these lots subject to the mortgage, together with property previously held by him for her, and acquired Fairmont addition and Acacia Park lots. He had already extracted from the series of exchanges $800 in cash and a $200 crop mortgage, which he cashed for his own benefit. He then mortgaged the Fairmont addition property for $210, which he also appropriated. The plaintiff in the meantime had been insisting that her son perform his agreement with regard to the property she had deeded to him. In November, 1918, he negotiated the purchase of the Columbia Colony property, a contract concerning which was executed by the plaintiff and the vendors, and the son executed in favor of the latter two deeds, one conveying the Dinuba property, and the other the Fairmont addition and the Acacia Park lots. It was at this time that he informed his mother of his acquisition of the Robinson tract property and the mortgage on the Long Bros.' addition and Fairmont addition lots, and promised to turn all of her property back to her in the proposed deal. Thereafter he negotiated the exchange of his mother's interest in this contract for the one-third interest in the Reedley garage property and, having previously secured his mother's consent to the exchange, brought to her an assignment transferring the contract to the owner of the garage property, which she executed and intrusted to her son for the purpose of making the exchange. In doing so he took the garage property in his own name, which she only discovered after his death, which occurred shortly thereafter.

[3] This brief summary of the involved and large number of exchanges of property shows that E. S. Buell had been plaintiff's confidential agent and that the property exchanged for the Columbia Colony property had been derived almost entirely from property of the plaintiff; that into the chain of transactions E. S. Buell had put only the sum of $300 of his own funds, and that he had abstracted in the course of the transactions, without the knowledge or consent of the plaintiff, sums amounting in all to $1,260, besides the real property which he conveyed as part of the purchase price of the Columbia Colony property. As before stated, the evidence clearly shows that the legal title to the property in controversy in this action was obtained by E. S. Buell by fraud and a breach of trust, and that the plaintiff is the party to whom it would have gone had the duty resting upon him been duly performed. It follows that the plaintiff is entitled to the relief demanded.

Judgment affirmed.

We concur: WILBUR, C. J.; WASTE, J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.; MYERS, J.

---

191 Cal. 33

CRABTREE v. HOUGHTON. (L. A. 7447.)

(Supreme Court of California. April 20, 1923.)

Costs 🔑190—No costs awarded plaintiff for map made at his sole instance.

Where a map, to be used as an exhibit, was not prepared at the request of, or under the direction of, the trial court nor by stipulation of the parties, but was made at the sole instance of plaintiff, a motion to strike an item of cost paid by plaintiff for making the map should have been granted.

In Bank.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by R. R. Crabtree against W. H. Houghton. From an order refusing to strike items from cost bill, defendant appeals. Reversed.

Charles J. Kelly, of Los Angeles, for appellant.

J. Vernon Givan, of Los Angeles, for respondent.

WILBUR, C. J. This is an appeal from an order of the trial court, refusing to strike from the cost bill of the plaintiff an item of $26.75, paid by the plaintiff for making a map introduced as plaintiff's Exhibit 7 upon the trial of the action.

It was stipulated by the parties that the map referred to in the item was prepared for use as an exhibit and was in fact so used, and that the sum paid therefor was fair and reasonable, and that the map was not prepared at the request of or under the directions of the trial court nor by stipulation of either of the parties, but was made at the sole instance of the plaintiff in said action. The court should have granted the defendant's motion to strike out this item upon the authority of Bathgate v. Irvine, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158.

The court is directed to modify the judgment by striking out the item of $26.75 costs, appellant to have his costs on appeal.

We concur: LENNON, J.; LAWLOR, J.; SEAWELL, J.; MYERS, J.; KERRIGAN, J.

---

191 Cal. 28

LLEWELLYN IRON WORKS v. INDUSTRIAL ACCIDENT COMMISSION et al. (L. A. 7183.)

(Supreme Court of California. April 18, 1923.)

1. Divorce 🔑169—Interlocutory judgment conclusive between parties only during period elapsing before final judgment.

An interlocutory divorce judgment is provisional and temporary only, and is conclusive between the parties only during the period elapsing before the final judgment, unless by some court proceeding or agreement between the parties it is in some manner modified.

2. Master and servant 🔑388—Child in custody of divorced mother held entitled to compensation as dependent on father.

The mere fact that an interlocutory divorce judgment awarded the custody of an infant child to the mother, and that the mother thereafter for some time supported the child, did not preclude the child from recovering compensation for death of the father as a dependent of the father, under Workmen's Compensation Act, § 14 (b), in view of failure of final decree to award custody to mother, and facts showing that at the time of his death the father was in fact supporting the child.

In Bank.

Certiorari to the Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by W. E. McDonald, a minor, by his guardian ad litem, Bertha K. Ludolph, for compensation for the death of his father, Joseph B. McDonald, opposed by the Llewellyn Iron Works, employer and self-insurer. Award for claimant, and employer brings certiorari. Affirmed.

Haas & Dunnigan and J. J. Wilson, both of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco (H. C. Kelsey, of San Francisco, of counsel), for respondents.

WASTE, J. Proceeding to annul an award made by the Industrial Accident Commission for death benefits to William E. McDonald, a minor, by reason of the death of his father, Joseph B. McDonald, an employee of petitioner; the award being made against the petitioner as a self-insurer. The commission found that the deceased was employed by the petitioner as a crane man in its manufacturing plant, that he sustained injury arising out of and occurring in the course of his employment from which he died, and that the said employee left surviving him, and wholly dependent, the respondent, William E. McDonald, a minor child, and the said minor child is entitled to a death benefit, together with the usual expenses.

The writ of review is sought upon the theory that the evidence introduced before the commission does not support the findings of dependency, and that in that respect there was a total lack of evidence, in that, at the time of the death of the employee, his minor child was, by interlocutory decree of divorce, awarded solely to the custody of his mother, and that, at the time of the death of said deceased employee, the minor child had been abandoned by the father and was being solely supported by his other parent. It is further claimed that there existed no agreement whatever subsequent to the divorce by which the deceased employee had agreed to support the minor child. It is also contended by petitioner that the status of the minor child at the time of the death of the employee was not such as to entitle him to the conclusive presumption of total dependency mentioned in section 14a of the Workmen's Compensation Act (St. 1917, p. 844), in force at the time of the death of the employee. That section, so far as pertinent, provides:

"(a) The following shall be conclusively presumed to be wholly dependent for support upon a deceased employee: * * * (2) A child or children under the age of eighteen years, or over said age, but physically or mentally incapacitated from earning, upon the parent with whom he or they are living at the time of the death of such parent or for whose maintenance such parent was legally liable at the time of death, there being no surviving dependent parent. (b) In all other cases, question of entire or partial dependency and questions as to who constitute dependents and the extent of their dependency shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employee."

It is not necessary to pass upon the contention last made by the petitioner. Assuming, but only for the purpose of stating the point, that the status of the minor may not have been such as to entitle him to the benefit of the presumption offered by the statute, a point we do not now decide, the fact of his dependency was clearly and satisfactorily determined in accordance with the facts existing at the time of the injury to the employee.

Petitioner would preclude our inquiry into these matters on the theory that the injured employee was relieved from the duty of supporting his child—a duty which it asserts was cast upon the mother of the claimant by an interlocutory decree of divorce obtained by her in an action against the employee. Passing for the moment the fact that no provision, either for the custody of the minor or for his support, was made in the final decree, we think the situation relied upon by petitioner, if it may be considered at all, only prima facie relieved the husband of the duty of supporting his child. Matter of McMullin, 164 Cal. 504, 507, 129 Pac. 773.

An examination of the facts in an industrial accident case, and an award made under somewhat similar circumstances, was upheld in Pacific Gold Dredging Co. v. Ind. Acc. Comm., 184 Cal. 462, 194 Pac. 1, 13 A. L. R. 725. The undisputed facts in that case disclosed that the mother of the minor had procured a decree of divorce from the injured employee, the custody of the minor son being awarded to her. She later placed the boy in an orphanage, and disappeared. Ten years later the boy went to live with his father, who voluntarily resumed his parental relations and obligations and took the boy to live with him, and assumed the burden of his education and support. The father was accidentally killed, and the Industrial Accident Commission awarded the boy the maximum amount for total dependency. On petition to this court for a writ of review the only points presented were upon the question of the dependency of the minor on his father. It was urged that dependency was not shown, either actual or presumptive. The court said (184 Cal. 466, 194 Pac. 3, 13 A. L. R. 725):

> "We find no authority for holding that, as between parent and child, the father is absolved from his legal duty to provide support to his minor child who has no other source of maintenance, because, on account of his own fault, he has been deprived of the custody of such child. Both a legal and moral obligation rests upon a father to support his minor children. And while, as between himself and third parties, that obligation may be shifted in proceedings of divorce or guardianship, and he may by misconduct forfeit his right to the custody of his child, it may be doubted if by such proceedings, to which he is not a party, a minor can be deprived of his natural right to turn to his father for maintenance, if the substituted source of supply fails. It has been held that such right to look to a father for maintenance cannot be taken from the infant by contract between the parents (Fernandez v. Aburrea, 42 Cal. App. 131 [183 Pac. 366]), and it certainly would be a reproach upon the law if a father, by his own misconduct making him an unfit custodian of the child, could absolve himself from legal responsibility for its support. He, at least, may voluntarily resume his legal responsibility. Conceding, in this case, that the minor was not a dependent upon his father during the period he remained in the custody of his mother, there was nothing in the legal status of the parties at the time Kenneth joined his father in California to prevent the latter from voluntarily resuming responsibility for his son's support."

[1, 2] The record in this proceeding discloses that the parents were divorced when the child was between three and four years of age. There was no personal service on the father, summons being served by publication. By the terms of the interlocutory decree the custody and control of the minor was awarded to the mother, the plaintiff in the action, without any provision being made for the support of either the mother or the child. The final decree is entirely silent as to all such matters; it merely adjudging a dissolution of the marriage between plaintiff and defendant. There is, therefore, nothing in the divorce proceedings which changes the legal status of dependency of the minor child in this proceeding. It is now firmly established that under divorce proceedings in this state an interlocutory judgment is, by the terms of the statute, provisional and temporary only. It is conclusive between the parties to the divorce action only during the period elapsing before the final judgment, unless by some court proceeding or agreement between the parties it be in some manner modified. London Guarantee & Acc. Co. v. Ind. Acc. Comm., 181 Cal. 460, 463–466, 184 Pac. 864.

Aside from these considerations, the unrefuted evidence in the record as to the decedent's attitude and conduct toward the minor applicant, at and immediately prior to his injury, demonstrates that he recognized and was, to the best of his ability under the circumstances, discharging his parental duties and obligations, and was supporting him. The evidence as clearly establishes that this arrangement was brought about through a voluntary agreement executed by the decedent, and consented to by the mother of the boy, shortly before the injury occurred. By the terms of that contract the decedent gave the mother the sum of $50, which one witness designated as "back support." He agreed also to pay her the sum of $20 on the next weekly pay day, and that every week he would make other payments "enough to support him well. He said he would support him the best way he could." The father thereupon took the boy with him, bought him clothing, and made arrangements with his own brother and the latter's wife, with whom he was living, for having the child in his company over weekends and at other times. The boy's eyes were crossed, and in anticipation of sending him to school the father engaged the services of a doctor for the performance of an operation necessary to correct the fault, at an agreed cost of $50. The mother was at that time supporting herself and the child by working in a store. It does not appear from the record what were her earnings at that time, or whether they were sufficient to adequately support the child and herself. It is very evident from the record, however, that she was very willing to accept the offer made by the father, and entered readily into the arrangement. From these facts, and from others appearing in the record, it at once appears that the commissioners were justified in holding that the father had voluntarily resumed his parental relations and obligations, had taken the boy to live with with him for a part of the time, and had assumed the burden of his maintenance, education and support. This being the fact, the relations of parent and child had been restored. The condition of dependency existed at the time of the father's death, as though it had never been disturbed. Pacific Gold Dredging Co. v. Ind. Acc. Comm., 184 Cal. 467, 194 Pac. 1, 13 A. L. R. 725. Although this arrangement was completed but a short time before the injury and death of the father occurred, nevertheless the resumption of the parental relation with the boy by him had become an accomplished fact, and existed at the time of the injury.

The award is affirmed.

We concur: WILBUR, C. J.; LAWLOR, J.; LENNON, J.; KERRIGAN, J.; SEAWELL, J.; MYERS, J.

191 Cal. 1

VARGAS v. MADEROS. (S. F. 9928.)

(Supreme Court of California. April 11, 1923.)

1. Easements 🔑17(1)—Facts held sufficient to show easement in right of way.

In an action to quiet title to land involving the right of defendant to use a strip of land as a means of ingress and egress to land owned by him, where, at the time of the purchase by defendant, a roadway was extending across premises subsequently purchased by plaintiff which had been used for more than 40 years in getting to and from his lot and was clearly marked at the time of plaintiff's purchase, *held*, that defendant's deed from a common grantor conveyed to him as appurtenant to his land the right of way.

2. Easements 🔑48(6)—Change of right of way by agreement transfers parties' rights to new location.

Where, at the time of purchase of a lot, it is subject to a private right of way to other property, which right of way is subsequently by agreement plowed up and transferred to a new location, the rights of the parties are also transferred to the new location.

In Bank.

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by Manuel Vargas against M. F. Maderos. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

A. S. Ormsby, W. S. Tinning, and R. L. Boyer, all of Martinez, for appellant.

J. E. Rodgers and A. F. Bray, both of Martinez, for respondent.

WILBUR, C. J. This action involved the rights of the respective parties in and to a strip of land which has been used by the respondent as a right of way for ingress and egress to the tract of land owned by him. The parties are both purchasers from Varney Estate Company. The latter company owned a large tract of land and subdivided it into farming tracts. The defendant purchased lot No. 3 as indicated upon the subdivision map of said land in 1914, and in 1916 the plaintiff purchased lot No. 5. At the time of the purchase by the defendant a roadway extending from the house upon the premises purchased by him had long been in use to and across the land subsequently purchased by the plaintiff. This roadway had been used for over 40 years as a means of getting to and from the residence upon lot 3 and was clearly marked upon the ground and was used by the defendant from and after the time of his purchase and at the time the plaintiff purchased lot 5 over which such roadway extended.

[1] Under these circumstances, it seems clear that when the owner of the entire tract sold to defendant lot No. 3 the deed conveyed to him as an appurtenant to his land this long-established right of way. The authorities are so numerous upon that question in this state that it seems unnecessary to do more than cite the provisions of the Civil Code upon that subject (Civ. Code, §§ 1084, 1104) and some of the more recent cases upon that subject (Nay v. Bernard, 40 Cal. App. 364, 180 Pac. 827; Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 129 Pac. 593; Cheda v. Bodkin, 173 Cal. 7, 158 Pac. 1025; see, also, cases cited in note 23 to Civ. Code, § 1084, Kerr's Cyc. Code of Cal.). The trial court was correct in its conclusion that the right of way exercised by the defendant and respondent for ingress and egress, to the public highway running through the large tract of land owned by the Varney Estate Company at the time of the subdivision and shown upon the map of said subdivision with reference to which both the parties hereto purchased their land, was a rightful use. In arriving at this conclusion, however, the trial court found that the strip of land in controversy so used was a public highway. It is conceded by the respondent that this conclusion was erroneous, and predicating its contention for a reversal partly upon that admission, the appellant claims that the only issue between the parties was over the question as to whether or not the strip in controversy was a public highway. We are not disposed to critically analyze the pleadings or the findings and judgment for the purpose of determining whether that position is substantially correct, for the reason that it is clear from the entire record that the substantial controversy litigated before the trial court was as to the right of the respective parties in and to the strip of land in controversy, and their respective rights were fully presented to the trial court. Under the circumstances of the case, the fact that the respondent predicated his right to use the strip of land for ingress and egress upon the proposition that it was a public highway included the lesser right which he successfully established, namely, a private right of way.

[2] We have thus far ignored the fact that the roadway used at the time the respective parties purchased their respective lots of land was plowed up by the plaintiff in such fashion that it could not subsequently be used as a right of way and the parties by mutual consent substituted therefor a newly located way, which was subsequently used by the defendant. In view of this acquiescence the rights of the parties were transferred to the new location. 14 Cyc. 1205; 19 C. J. 953. The conclusion of the trial court that the defendant had a right of way over the strip in question was fully justified

by the facts and circumstances proved in the case.

The judgment of the trial court is reversed, and the case is remanded, with instructions to the trial court to enter a new judgment upon the findings to the effect that the defendant and respondent is entitled to the use of the strip in question as a private right of way. Appellant to have his costs.

We concur: MYERS, J.; LENNON, J; WASTE, J.; LAWLOR, J.; KERRIGAN, J.; SEAWELL, J.

---

190 Cal. 769

Ex parte MINGO. (Cr. 2557.)

(Supreme Court of California. April 11, 1923.)

1. Intoxicating liquors 🔑11—County ordinance punishing same act as state law is in conflict therewith and void.

A county ordinance, enacted under authority of Const. art. 11, § 11, punishing exactly the same act denounced by the Wright Act, which by reference makes the Volstead Act the general law of the state, is in conflict therewith, and therefore void.

2. Criminal law 🔑252(3)—Judgment not void because complaint alleged violation of county ordinance instead of state law.

The mere fact that a complaint alleged a violation of a void county ordinance instead of the state law would not render the judgment of conviction void in so far as the facts alleged and proved showed a violation of the state law.

3. Intoxicating liquors 🔑11—State liquor law held not to grant additional power to county.

Wright Act, § 4, providing, "Nothing in this act shall be construed as limiting the power of any city or county * * * to prohibit the manufacture, sale, transportation or possession of intoxicating liquors for beverage purposes, * * *" *held* not to grant to counties any powers which they did not already possess under Const. art. 11, § 11, or Pol. Code, § 4041, subd. 31, so as to permit a prosecution by the county for the same act prosecuted by the state.

In Bank.

Application by Arthur Mingo for a writ of habeas corpus to be directed to the Sheriff of Kings County. Petitioner discharged.

Briggs & Sorensen, of Fresno, for petitioner.

William R. McKay, of Hanford, for respondent.

WILBUR, C. J. [1] Defendant was convicted of having intoxicating liquor in his possession and sentenced to pay a fine of $500 and to be imprisoned 90 days in jail. The Volstead Act (41 Stat. 305) and the Wright Act (St. 1921, p. 79) make the first offense punishable by fine only. An ordinance of Kings county, adopted January 5, 1922, prescribes as the maximum for such offense a fine of $500 and imprisonment for not more than 90 days. The complaint charged a violation of this ordinance. The question presented is whether the ordinance fixing a greater punishment than is prescribed by the state law for the offense of possessing intoxicating liquor is valid. The question is not a new one in this state. The county ordinance derives its authority from the power delegated to counties by article 11, § 11, of the Constitution, which provides that police power is thereby delegated to enact such regulations as are not in conflict with general law. A county ordinance punishing exactly the same act denounced by a state law is in conflict therewith, and therefore to that extent void. In re Sic, 73 Cal. 142, 14 Pac. 405; Ex parte Stephen, 114 Cal. 278, 46 Pac. 86; Ex parte Daniels, 183 Cal. 636, 192 Pac. 442, 21 A. L. R. 1172.

Before the adoption of the Wright Act by referendum at the last general election (November, 1922) such ordinances were valid and enforcible notwithstanding the concurrent power vested in Congress by the federal Constitution and the passage by Congress of the Volstead Act. In re Polizzotto (Cal. Sup.) 205 Pac. 676. But the enactment of the provisions of the Volstead Act by reference in the Wright Act, making it a general law of the state within the meaning of our state Constitution (article 11, § 11), thereby deprived the portions of the ordinance fixing a different penalty of all validity, because in conflict with such state statute. In re Sic, supra; Ex parte Stephen, supra.

[2] The mere fact that the complaint alleged a violation of the county ordinance instead of the state law would not render the judgment void in so far as the facts alleged and proved showed a violation of the state law (Ex parte Murphy [Cal. Sup.] 212 Pac. 30; Matter of Von Perhacs [Cal. Sup.] 212 Pac. 689; Ex parte Stephen, supra), but in the case at bar the sentence of imprisonment was not authorized by the state law.

[3] The respondent contends that section 4 of the Wright Act recognizes and establishes the validity of the county ordinance, and that therefore the rule hereinbefore stated does not apply. That section is as follows:

> "Nothing in this act shall be construed as limiting the power of any city or county, or city and county, to prohibit the manufacture, sale, transportation or possession of intoxicating liquors for beverage purposes; and all fines and forfeitures collected under any ordinance now or hereafter enacted in the exercise of such power shall be paid into the treasury of the city or county, or city and county, whose ordinance is violated." Stats. 1921, p. 79.

The authority to enact prohibitory ordinances is derived by the board of supervisors from the Constitution (article 11, § 11), and there is no attempt in the delegation of powers to county boards of supervisors in the Political Code to enlarge upon the powers granted by the Constitution. These powers will be found in section 4041, subd. 31, of the Political Code, which reads as follows:

> "To make and enforce, within the limits of their county, all such local police, sanitary and other regulations as are not in conflict with general laws."

Section 4 of the Wright Act does not purport to grant counties any power which they did not already possess, and we are therefore not confronted with the questions which would arise if there was such a specific grant. It is true that this construction of the law results in the conclusion that the punishment of a given offense in a given manner prevents the county from prescribing the same or a greater punishment for the same offense declared in the state law. This situation, however, does not result from the construction of any particular phraseology used in the Wright Act. It inheres in the nature of the situation. The constitutional and statutory power of the board of supervisors is limited to the enactment of such police regulations as are not inconsistent with the general law. When the state law and the county ordinance are in conflict, the situation is not changed by the legislative declaration that the act shall be construed as though there was no conflict.

In Ex parte Daniels, supra, we held that the Legislature could not create a conflict between a state law and local ordinance by the mere declaration in the statute that the local legislative bodies were prohibited from enacting any rules and regulations of traffic limiting the speed of automobiles, for the reason that the local bodies derived their authority from the Constitution, and the only way the Legislature could inhibit such legislation was by themselves occupying the same legislative field so completely that legislation on the subject by local legislative bodies would necessarily be inconsistent with the general rules laid down in the Motor Vehicle Act (St. 1915, p. 397, as amended by St. 1917, p. 382, and St. 1919, p. 191). It is true that there is a distinction between the situation dealt with in Ex parte Daniels, supra, and the situation now under consideration. There the Legislature attempted to prohibit local legislative bodies from exercising their powers derived from the Constitution; here the effort on the part of the Legislature is to allow legislation to stand which is authorized neither by the Constitution nor in any statutory grant of power. If we assume, as is contended, that it was the intention of the Legislature in adopting the Wright Act to allow all local ordinances upon the subject to stand unaffected by the new legislation, we are met by the fact that an ordinance of the city punishing exactly the same offense as is punishable under the state law and with a greater penalty is void (In re Sic, supra), because under the Constitution of the state the municipality cannot enact police regulations inconsistent with general law. This provision of the Constitution (article 11, § 11) has been held to be not only a delegation of power by the people of the state to the local body, but it has also been held to be a limitation upon the power of the local body and also upon the power of the state Legislature. In Re Sic, supra, it was said:

> "The last clause of this section must be held to be a limitation upon the power of municipalities, *whether that power is derived under this provision of the Constitution or from the charter.* If, as is held both by Bishop and Dillon to be the effect of authorities, a municipality can only pass ordinances punishing the same acts which are punishable under general laws, when expressly authorized to do so, and that no authority to pass such laws will be presumed from grants of power general in their character, it must be because that such ordinances may supersede the general law upon the subject. Here there is not only no such authority, but, if such ordinances are conflicting, there cannot be such authority. [Italics ours.]
>
> "It would seem that an ordinance must be conflicting with the general law which may operate to prevent a prosecution of the offense under the general law. The Constitution provides that no one shall be twice put in jeopardy for the same offense. If tried and convicted or acquitted under the ordinance, he could not be again tried for the same offense under the general law. The contrary doctrine has been held in some states, but this conclusion seems more in consonance with reason and justice. Some of these decisions apply to acts which are said to be of a dual nature, and offend at once against the general law and police regulations, which are not directed specifically at the offense denounced in the general law."

The conclusion arrived at in Re Sic, supra, precludes the delegation of any authority by the state Legislature to a county board of supervisors to enact police regulations which conflict with state legislation on that subject. There are other decisions in other states to the contrary (note 1 L. R. A. [N. S.] 382 et seq.), but this interpretation of our Constitution has been adhered to in this state.

Petitioner discharged.

We concur: MYERS, J.; LAWLOR, J.; LENNON, J.; WASTE, J.; KERRIGAN, J.; SEAWELL, J.

191 Cal. 9

SHEFFIELD v. PICKWICK STAGES, NORTHERN DIVISION, Inc.

(S. F. 9930.)

(Supreme Court of California. April 12, 1923.)

Venue 🔑52(1)—Plaintiff may make counter motion to retain case on motion for change, unless answer has not been filed when demand made.

When defendant applies for a change of venue because the action was not brought in the county where he resides, plaintiff may oppose the motion by showing the convenience of witnesses and the ends of justice would be promoted by refusing the change, and such facts should control the court in determining the question, the rule being subject to the exception that, unless answer has been filed when demand for change of venue is made, a counter motion to retain the case on the ground of convenience of witnesses will not lie, for until the issues are settled the court cannot determine what testimony will be material.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Homer H. Sheffield against Pickwick Stages, Northern Division, Inc. From an order denying a motion for change of venue, defendant appeals. Order affirmed.

B. P. Gibbs, of Los Angeles, and Theodore Hale, of San Francisco (Barry J. Colding, of San Francisco, of counsel), for appellant.

Ford & Johnson, of San Francisco, for respondent.

MYERS, J. This is an appeal from an order denying defendant's motion for a change of venue. The action was to recover damages for personal injuries sustained by plaintiff while being carried as a passenger in one of defendant's stages. The principal place of business of the defendant corporation was in Los Angeles county. The accident occurred in Santa Clara county, and the action was commenced in the superior court of the city and county of San Francisco. The defendant did not demur to the complaint, but filed its verified answer, and with it an affidavit of merits and a written demand that the action be transferred to Los Angeles county for trial. Its notice of motion for change of venue was upon the grounds that (1) the county designated in the complaint was not the proper county; (2) that the defendant was and is a resident of the county of Los Angeles; and (3) that the convenience of witnesses and the ends of justice would be best served by changing the place of trial to the latter county. Defendant made no showing, by affidavit or otherwise, in support of its third ground.

In response thereto, the plaintiff made a counter motion to retain the action in the city and county of San Francisco, on the ground that the convenience of witnesses and the ends of justice would be promoted by so doing. His affidavit in support thereof is admittedly sufficient, both as to form and substance. Upon the hearing of the two motions, the trial court made its order denying defendant's motion for change of place of trial, from which order this appeal is prosecuted.

Appellant's contention is that "retaining or changing the venue of this action upon the ground of convenience of witnesses can only be done when the action is instituted in the proper county in the first instance." This precise question has been decided adversely to appellant's contention as often as it has arisen in the courts of this state. In Jenkins v. California Stage Co., 22 Cal. 537, this court said:

> "When a defendant applies for a change of the place of trial, on the ground that the action was not brought in the county where he resides, the plaintiff has a right to oppose the motion by showing that the 'convenience of witnesses and the ends of justice would be promoted' by refusing the change, and such facts should govern and control the court in determining the question whether the application for the change should be granted or not."

See, also, Loehr v. Latham, 15 Cal. 418; Pierson v. McCahill, 22 Cal. 127; Hanchett v. Finch, 47 Cal. 192; Edwards v. S. P. R. R. Co., 48 Cal. 460; Hall v. Central Pac. R. R. Co., 49 Cal. 454; Reavis v. Cowell, 56 Cal. 588; Wong Fung Hing v. San Francisco, etc., 15 Cal. App. 537, 115 Pac. 331.

In Hall v. Central Pac. R. R. Co., supra, the court said:

> "In Edwards v. Southern Pacific Railroad Company, 48 Cal. 460, we held that under the former Practice Act, in a similar case, the place of trial ought not to be changed, if the convenience of witnesses required that the action be tried in the county where it was pending. The Code of Civil Procedure has made no change in the law, which requires a modification of the rule, and the rule has been so long established that we do not feel at liberty to depart from it."

Those words are equally appropriate to the present time and the instant case. We find no authority to the contrary, and none has been cited by the appellant.

The rule of the cited cases is subject to the exception that, unless answer has been filed at the time the demand for change of venue is made, a counter motion to retain the case on the ground of the convenience of witnesses will not lie. Cook v. Pendergast, 61 Cal. 72; McSherry v. Penn. C. G. M. Co., 97 Cal. 637, 32 Pac. 711; Pascoe v. Baker, 158 Cal. 232, 110 Pac. 815. This is for the obvious reason that, until the issues are settled, the court cannot determine what testimony will be material thereto. The case at bar was at issue when the motion was made, and therefore does not fall within this exception.

The order is affirmed.

We concur: WILBUR, C. J.; SEAWELL, J.; LENNON, J.; LAWLOR, J.; WASTE, J.

---

191 Cal. 18

In re BARNEY. (S. F. 10429.)

(Supreme Court of California. April 12, 1923.)

1. Appeal and error 🔑635(1), 1127—Failure to give notice to prepare typewritten record not ground for dismissal; in absence of sufficient record, motion for affirmance is proper.

The failure to give the notice to prepare the typewritten record for use on appeal is not a ground for a dismissal of the appeal; but if it appears from the record that, in the absence of a properly authenticated reporter's transcript, the record is insufficient on which a reversal of the decision could be predicated, it is proper to move for an affirmance of the judgment on that ground, and on such application the court will consider the question as to whether the record was properly prepared.

2. Appeal and error 🔑607(1)—Certification of transcript, notwithstanding delay in filing statutory notice, held an exercise of court's power to grant relief against delay in giving notice to clerk.

Where the delay of appellant in filing the notice with the clerk of the court for preparation of transcript prescribed by Code Civ. Proc. § 953a, was urged on the trial court as a reason for denying the certification of the transcript, and appellant at that time, without admitting that a default occurred, stated the reasons for such default, and the court, notwithstanding the delay, certified the transcript, *held* that, if the court had jurisdiction to relieve appellant under section 473, the certification of the transcript was an exercise of the court's power to grant relief under that section, notwithstanding the lack of formality in the request for such relief.

3. Appeal and error 🔑612(1)—Transcript not available for use on appeal, where trial court certified it six months after appellant defaulted.

A trial court, certifying a transcript, notwithstanding notice to the clerk for preparation of the transcript was not filed within the time required by Code Civ. Proc. § 953a, *held* not to have had jurisdiction to make such certification, under section 473, where it was made six months after appellant's default, and such transcript, in view of sections 473, 953a, was not available on appeal, though it was in fact prepared with reasonable diligence; the delay in its earlier presentation being due to the clerk's sending the transcript to the appellate court before proper authentication, and appellant's lack of knowledge that he was in default.

4. Appeal and error 🔑1127—Motion for affirmance and answer held to raise question as to power of trial court to relieve appellant from default in preparing transcript.

Where respondent predicated her motion for affirmance of judgment on failure of appellant to file notice of preparation of transcript within the time limited by Code Civ. Proc. § 953a, and as an only answer to such motion, appellant asserted the trial court had relieved him from his default, *held*, that appellant's ground for denial of respondent's motion brought the whole subject-matter before the Appellate Court, so that it could determine whether the trial court had jurisdiction to grant relief from appellant's default, as provided in section 473.

In Bank.

Appeal from Superior Court, Santa Clara County; F. P. Gosbey, Judge.

Petition by Benjamin B. Stanley for letters of guardianship of the person and estate of Lydia H. Barney. From an order denying the petition, petitioner appeals. Order affirmed.

Samuel T. Bush, of San Francisco, Fry & Jenkins, of San Jose, and Jesse Robinson, of Oakland (Clarence De Lancey, of San Francisco, of counsel), for appellant.

A. Kincaid, of Redwood City, and Rodgers & Smith, of Palo Alto, for respondent.

WILBUR, C. J. [1] The trial court having denied an application for letters of guardianship of the person and estate of Lydia H. Barney, a motion for a new trial of the matter was made in the trial court, and motions were made to vacate the order denying the letters of guardianship, and in various ways the trial court was pressed for a reconsideration of the decision. The trial court having adhered to its conclusion, an appeal was taken from the order denying the application for letters of guardianship and various other orders denying the application for reconsideration of such decision. The respondent moves to dismiss the appeal upon various grounds, some of which will be hereinafter stated, and also moves for an affirmance of the order of the trial court upon the ground that there is no sufficient record upon which the merits of the appeal can be considered. It is conceded that all the appeals, other than the one from the order denying the letters of guardianship, should be dismissed, and that a motion for a new trial in such proceedings was not authorized by law. It has been frequently held, and is now thoroughly established, that the failure to give the notice to prepare the typewritten record for use on appeal is not a ground for a dismissal of the appeal. If, however, it appears from the entire record that, in the absence of a properly authenticated reporter's transcript, there is no record upon which a reversal of the decision could be predicated, then the proper course is to move for an affirmance of the judgment on that ground, and upon such application the court will consider the question as to whether or not the record was properly prepared. It follows, from what has been said, that the motion to dismiss all the appeals, other than the one from the order denying the application for letters of guardianship, should be granted, and that the motion to dismiss the latter appeal should be denied.

The motion to affirm the order denying the application for letters of guardianship and the motion for the dismissal of the appeal from such order is based upon affidavits filed by the respondent, and in connection with these affidavits the appellant has filed a typewritten transcript of the proceedings at the time of the final settlement of the reporter's transcript and its certification by the judge on September 16, 1922. From the affidavits thus presented, and from the transcript on appeal and the reporter's transcript filed on the motion, it appears that the notice to the clerk for the preparation of the transcript required by section 953a of the Code of Civil Procedure was filed April 15, 1922, although the appellant had notice of the entry of the decree denying letters of guardianship at least as early as February 25, 1922. The time for the filing of such notice was not extended.

The clerk of the superior court immediately upon the completion of the reporter's transcript handed it to the judge for certification, and it was certified and forwarded to the clerk of this court; but, inasmuch as the parties had not been notified of its presentation to the trial judge, the appellant requested the return of the transcript for certification. It was presented to the trial judge on the 23d day of June, 1922, but the matter of the approval of the transcript was continued until September 1, 1922, when it was again continued until the 16th day of September, 1922, at which time it was certified by the judge. This was more than six months after the default of the appellant for failure to file his notice for the preparation of the record within time. It is contended by the respondent that the application for relief under section 473 of the Code of Civil Procedure was too late if made at the hearing September 16, 1922, and that the court had then lost jurisdiction to grant the application for relief under section 473 of the Code of Civil Procedure.

It has been the custom of this court to consider applications for dismissal and for affirmance for lack of a record upon affidavits filed in this court and upon the transcript on file. Inasmuch as it appears that the notice for the preparation of the transcript was filed too late, and no claim is made that the time for its filing had been extended, the only question is whether or not the court had and exercised the power to excuse the delay. No formal application for relief was made by the appellant at the time of the certification of the transcript on September 16, 1922; but the respondent objected to the settlement of the statement on the ground that the notice had not been filed in time. The appellant suggested that the delay was due to the inadvertent proceedings for a new trial, which were not authorized by law, and the court announced that, notwithstanding the delay, it would settle the bill of exceptions.

[2] In view of the fact that the delay of the appellant in filing the notice prescribed by section 953a, Code of Civil Procedure, was urged upon the trial court as a reason for denying the certification of the transcript, and in view of the fact that the appellant at that time, without admitting that a default had occurred, stated the reasons for such default and the court thereupon, notwithstanding the delay, certified the transcript, we think that, if the court had jurisdiction to relieve the appellant under section 473, Code of Civil Procedure, the certification of the transcript under these circumstances was an exercise of that power, notwithstanding the lack of formality in the request for such relief.

[3] The more serious question, however, is whether or not the court had jurisdiction after the expiration of six months from the time of appellant's default. We feel constrained by the provisions of section 473, Code of Civil Procedure, to say that the court was without jurisdiction. If we had any discretion in the matter, we would be disposed to exercise that discretion in favor of the appellant, for the reason that the transcript has been, in fact, prepared with reasonable diligence, and the delay in its proper presentation grew out of the fact that the clerk of the superior court sent the transcript to this court before its proper authentication. At the hearing in June upon the certification of the transcript, the attention of the appellant was not called to the fact that he was in default, and apparently the appellant was of the opinion, until the 16th of September, 1922, that he was not in default. In view of the limitations fixed by sections 473 and 953a, Code of Civil Procedure, it must be held that the transcript offered for use on appeal has not been prepared in accordance with the law and, therefore, is not available upon appeal. There is nothing in the clerk's transcript, if it be treated as a judgment roll, which would show error.

[4] The appellant resists the motion for an affirmance upon the ground that the motion for an affirmance is not predicated upon the ground that the trial court exceeded its jurisdiction in settling or certifying to the reporter's transcript, but upon the ground that the notice for the transcript was filed too late.

This point is not available to the appellant for the reason that the respondent predicates her motion upon the failure of the appellant to file the notice in time and the only answer to that obvious insufficiency is the one sought to be made here, namely, that the trial court has relieved the appellant for this default. That point having been suggested by the appellant as a ground for the denial of the respondent's motion, the whole subject-matter is before us and the order must be affirmed.

The order denying the application for letters of guardianship is affirmed. All other appeals are dismissed.

We concur: LENNON, J.; WASTE, J.; KERRIGAN, J.; SEAWELL, J.; MYERS, J.; LAWLOR, J.

---

190 Cal. 752

LLANO INV. CO. v. MINTON. (L. A. 7274.)

(Supreme Court of California. April 10, 1923.)

1. Pleading 🔑150—Allegations of answer to cross-complaint setting up new matter deemed denied.

In action for money had and received where defendant filed a cross-complaint setting up a cause of action for salary under a contract with plaintiff, and plaintiff's answer thereto set up as new matter that defendant was employed by it under the contract with its predecessors of which contract plaintiff was the assignee, the allegation of the answer is deemed to have been denied and a new issue presented with respect to the nature of defendant's contract of employment.

2. Trial 🔑396(3) — Finding held consistent with issues presented by answer to cross-complaint.

In action for money had and received where defendant set up a cause of action for salary owing him by plaintiff, and plaintiff answered the cross-complaint setting up that the contract was with its predecessors and assigned to plaintiff, findings which took into consideration all charges and debits under the old and the new contracts were consistent with issues presented by plaintiff's answer to the cross-complaint.

3. Judgment 🔑256(6)—Finding of amount due when action commenced held to support judgment.

In action for money had and received in which defendant counterclaimed for salary due under a contract with plaintiff, and plaintiff answered setting up that the contract was with its predecessors and assigned to it, and all the facts on which indebtedness to plaintiff rested occurred before the action was commenced, nothing being alleged to have occurred after that date which would change the situation, a finding that a balance was due and unpaid at commencement of action was equivalent to a finding that it was due and unpaid at the time judgment was rendered and was sufficient to support the judgment.

In Bank.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge pro tem.

Action by the Llano Investment Company against E. C. Minton. Judgment for defendant, and plaintiff appeals. Affirmed.

Packard & Fisher and John C. Packard, all of Los Angeles, for appellant.

Albert Sidney Brown, of Los Angeles, for respondent.

LAWLOR, J. Plaintiff commenced this action to recover the sum of $550.30 from defendant as money had and received, alleging that defendant was employed by plaintiff to superintend a ranch which plaintiff controlled and was authorized to sell certain goods belonging to plaintiff; that he sold the goods and received the sum of $1,400.30 therefor; that he had turned over to plaintiff but $850 of that amount and was therefore indebted to plaintiff in the sum prayed. Defendant denied all the allegations of the complaint and filed a cross-complaint, in which it was alleged that he was employed by plaintiff as superintendent of its ranch from December 10, 1917, to May 12, 1920; that for his services plaintiff promised to pay him at the rate of $50 per month from December 10, 1917, to October 31, 1918, of $100 per month from November 1, 1918, to February 29, 1920, and of $150 per month from March 1, 1920, to May 12, 1920; that the total salary promised was $2,493.33; that there is owing him for salary from November 21, 1919, to May 12, 1920, the sum of $693.33; that defendant used his automobile in connection with plaintiff's business at plaintiff's request, for which plaintiff agreed to pay a reasonable sum; that $276, or $15 per month for 18⅖ months, is a reasonable amount for such use, wherefore defendant prayed judgment for the sums of $693.33 and $276.

Answering the cross-complaint, plaintiff denied that defendant was employed by it from December 10, 1917, to May 12, 1920, and alleged that he entered a contract of employment with the Llano Del Rio Company of Nevada, which contract was assigned to plaintiff, with defendant's consent; that defendant was employed by plaintiff under the contract from February 17, 1919, to April 7, 1920, and not for any other period; denied that it promised to pay defendant for his services the sum of $2,493.33, or any other sum in excess of $675, the amount provided by the contract, which, it was alleged, has been paid to him, and denied all the allegations with respect to the use of the automobile.

Upon the trial the court made and filed

findings of fact and conclusions of law, and pursuant thereto entered judgment that defendant recover from plaintiff the sum of $505.26 and his costs. From that judgment plaintiff takes this appeal upon the judgment roll alone.

[1] The first contention of appellant is that the judgment is based upon a cause of action not within the allegations of the pleadings and therefore not sustained by them. In support of this position are cited Chetwood v. California National Bank, 113 Cal. 414, 45 Pac. 704; Wilson v. White, 84 Cal. 239, 241, 24 Pac. 114; Benedict v. Bray, 2 Cal. 251, 56 Am. Dec. 332; Eidinger v. Sigwart, 13 Cal. App. 667, 674, 110 Pac. 521; and McCormick, etc., Co. v. Nofziger Bros. L. Co., 10 Cal. App. 241 101 Pac. 688—to the effect that a plaintiff must recover upon the cause of action set out in his complaint and not upon a different case made out by the findings or proof.

The court found that there was a balance due, owing, and unpaid to respondent by appellant upon the salary of the defendant "under his employment by the plaintiff and its predecessors referred to, after all charges and debits, which the plaintiff and its predecessors had against the defendant, had been made against him," the sum of $505.26. It is claimed this finding is based upon a cause of action which respondent might have against appellant for salary under an employment by appellant and its predecessors, whereas respondent in his cross-complaint alleged only that he was employed by the appellant, saying nothing about its predecessors, and that there was a sum due him from appellant from November 21, 1919, to May 12, 1920. Appellant insists now that it could not be called upon to prove all charges and debits which appellant or its predecessors had against respondent; that the finding cannot be construed as a finding of a balance due and unpaid under an employment by appellant alone; and that no basis exists upon which to infer that the balance due under the three employments was the same balance as might be due under only one of them.

In its answer to the cross-complaint appellant set up as new matter that respondent was employed by it under the contract with its predecessor, of which contract appellant was the assignee. This allegation is deemed to have been denied by respondent (Colton Land & Water Co. v. Raynor, 57 Cal. 588, 589), and a new issue was presented with respect to the nature of respondent's contract of employment (Rogers v. Riverside L., etc., Co., 132 Cal. 9, 11, 64 Pac. 95). As instructions upon issues so presented are proper (Rankin v. Sisters of Mercy, 82 Cal. 88, 95, 22 Pac. 1134), similarly findings upon them are not outside the pleadings.

In the case at bar the court found, against respondent's allegation, that he had not been employed from 1917 to 1920 by appellant, but, as alleged in the answer to the cross-complaint, that his employment was under the contract set forth—first with appellant's predecessor and subsequently with appellant, following the assignment of the contract. It was further found that appellant assumed all the obligations and liabilities under the contract. Under such circumstances, the fact that there had been several employers instead of one is immaterial, inasmuch as appellant occupied the same position as its predecessors. Also, all the rights and obligations which had arisen under the contract at any time would have to be considered to determine the balance due at the time of its termination. There is no contention that the finding in question is not based on proper evidence, and it must be assumed the parties presented to the court all their respective claims under the contract. It may be remarked that as respondent alleged he had been fully paid up to November 21, 1919, at which time he was admittedly working for appellant, the charges and debits prior to that time could only have run in favor of appellant and, according to the finding, charges and debits were made in favor of appellant only.

[2] The court further found that the contract between respondent and appellant, to which appellant became a party by assignment, was superseded on November 1, 1918, by a new agreement, under which respondent was to receive $100 per month, commencing November 1, 1918. Thereupon, considering the charges and debits in favor of appellant under the old contract and those under the new one, the court found that there was due and owing to respondent the sum of $505.26. This finding is entirely consistent with the issues presented by appellant in its answer to the cross-complaint.

Appellant's second point is that the judgment is not sustained by the findings. The court found there "was a balance on May 12, 1920, due, owing and unpaid to the defendant by the plaintiff," the sum of $505.26. This finding, it is claimed, does not show appellant had not paid the money due on that day or that there now exists or has existed subsequent to May 12, 1920, any obligation on appellant's part to pay respondent. It is pointed out that in its answer to the cross-complaint filed June 4, 1920, appellant denied it owed respondent anything. Majors v. Cowell, 51 Cal. 478, 483, is cited to the point that—

> "Under our present Code of Civil Procedure, as we have repeatedly held, the findings must support the judgment, and no facts in issue will be presumed to have been proved except those which are found."

We are also referred to Jacuzzi v. Jacuzzi, 38 Cal. App. 533, 176 Pac. 872. That was an action to recover money for work and labor performed by the plaintiff at the request of the defendant. The court found the work had been performed two years before and that a stated sum was the reasonable value thereof, making no finding that it was unpaid. It was held the issue of payment was raised by the pleadings and that the finding referred to was insufficient to support the judgment.

[3] However, we are of the opinion the finding that the amount appellant owed to respondent was unpaid on May 12, 1920, the day the action was commenced, is sufficient to support the judgment in the case at bar and distinguishes it from Jacuzzi v. Jacuzzi, supra. All the facts upon which the indebtedness of appellant rested occurred before May 12, 1920. Whether or not there was a sum owing and unpaid was a conclusion to be drawn from the facts as they existed at that time, regardless of when appellant denied he was indebted. In the pleadings filed after the commencement of the action there there were no events alleged to have occurred after the date which would have changed the situation. Therefore, in the absence of a subsequent satisfaction or mitigation, such as payment, a finding that a balance was due, owing, and unpaid on May 12, 1920, would be equivalent to a finding that it was due, owing, and unpaid at the time judgment was rendered. There was no allegation that the amount had been subsequently paid, and in order to hold that it was paid after May 12, 1920, it would be necessary to assume that the issue of payment after that time had been raised, that evidence had been offered to that effect, and that the court had failed to make a finding thereon. Such an assumption will not be indulged, in view of the rule laid down in Himmelman v. Henry, 84 Cal. 104, 106, 23 Pac. 1098, 1099, that—

> "The findings must be sufficient to support the judgment, and must contain nothing inconsistent with it, but a failure to find upon some issue, a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal, unless it is shown by statement or bill of exceptions that evidence was submitted in relation to such issue."

The judgment is affirmed.

We concur: WILBUR, C. J.; KERRIGAN, J.; SEAWELL, J.; MYERS, J.; WASTE, J.; LENNON, J.

190 Cal. 774

Ex parte KENNERLY. (Cr. 2556.)

(Supreme Court of California. April 11, 1923.)

Criminal law 🔑258(3)—Justice's court can imprison for nonpayment of fine for offense not punishable by imprisonment.

In view of Pol. Code, §§ 4481–4483, relating to construction of inconsistent provisions in different titles, chapters, and articles, Pen. Code, § 1205, which is contained in a title dealing with proceedings in the superior court and which provides that the imprisonment for nonpayment of a fine shall not exceed the maximum period for which imprisonment might be imposed as a punishment for the offense, does not apply to convictions in justices' courts, which are governed by Pen. Code, § 1446, authorizing imprisonment for nonpayment of a fine not to exceed one day for each dollar of the fine, so that one who was fined in the justice court for the first offense of unlawfully selling intoxicating liquor, which is not punishable by imprisonment, may be imprisoned for nonpayment of the fine.

In Bank.

Application by J. H. Kennerly for a writ of habeas corpus prayed to be directed to the sheriff of Fresno county to secure the release of petitioner from custody after conviction of possessing intoxicating liquor. Petitioner remanded.

Gearhart, Carling & Cummings, of Fresno, for petitioner.

WILBUR, C. J. The petitioner was convicted of having intoxicating liquor in his possession. It was his first offense. The penalty therefor under the Wright Act was a fine of not exceeding $500. He was fined $500 and in addition it was directed that he be imprisoned in the county jail of the county of Fresno until the fine be satisfied, in the proportion of one day's imprisonment for every dollar of the fine.

The petitioner's application is based upon the proposition that inasmuch as the state law provides no term of imprisonment for the first offense of having liquor in possession, section 1205 of the Penal Code expressly prohibits any imposition of imprisonment for nonpayment of a fine "beyond the term for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted." It is therefore contended that the portion of the judgment sentencing the defendant to imprisonment for nonpayment of fine is void.

The question thus raised is not free from difficulty. There is a great diversity of decision in the various opinions rendered by this court from time to time, due, no doubt, to the hasty consideration of applications for relief from imprisonment and the prompt determination of the cases thus considered.

It is clear that section 1205 of the Penal Code relates to proceedings in the superior court. Beginning with title 3 of part 2 of the Penal Code, the Code deals primarily with proceedings in the superior court after indictment or upon information; for instance, title 3 is, "Proceedings in Criminal Actions Prosecuted by Indictment, to the Commitment, Inclusive." Title 4, "Proceedings After Commitment and Before Indictment." Title

5, "The Indictment." Title 6, "Pleadings and Proceedings After Indictment and Before the Commencement of the Trial." Title 7, "Proceedings After the Commencement of the Trial and Before Judgment." Title 8, "Judgment and Execution." While title 11, in which section 1446 of the Penal Code is found, is entitled "Proceedings in Justices' and Police Courts and Appeals to the Superior Courts," and chapter 1, containing sections 1425 to 1461, inclusive, is headed "Proceedings in Justices' and Police Courts."

The Political Code gives us the rule of construction which will apply in case of conflict between different sections of the Code. Political Code, § 4481, provides that—

> "If the provisions of any title conflict with or contravene the provisions of another title, the provisions of each title must prevail as to all matters and questions arising out of the subject-matter of such title."

Section 4482 provides:

> "If the provisions of any chapter conflict with or contravene the provisions of another chapter of the same title, the provisions of each chapter must prevail as to all matters and questions arising out of the subject-matter of such chapter."

Section 4483 provides:

> "If the provisions of any article conflict with or contravene the provisions of another article of the same chapter, the provisions of each article must prevail as to all matters and questions arising out of the subject-matter of such article."

Under these provisions of the Code, established for its own interpretation, it would seem clear that if there is a conflict between section 1205 of the Penal Code, relating to proceedings in the superior court, and section 1446, relating to proceedings in the justices' or police courts, that each should prevail in its own proper domain; that the provision in section 1205 that the term of imprisonment for the nonpayment of fine cannot exceed the term of imprisonment provided by the law for the particular offense in question is in conflict with the provisions of section 1446, which authorizes an imprisonment at the rate of $1 per day for the nonpayment of fine, is well illustrated by the case at bar, in which, under the terms of section 1446, the petitioner may be imprisoned 500 days, whereas under the provisions of section 1205 he cannot be imprisoned at all.

Without considering any of the previous decisions of the court, and treating the matter as a new one for the construction of the Code sections bearing upon the subject, it would seem clear that the case is controlled by section 1446, dealing with proceedings in a justice's court.

It may be well at this juncture to call attention to some of the confusion resulting from previous decisions and then to attempt to reach a conclusion as to the proper disposition of the case at bar. In Ex parte Kelly, 28 Cal. 414, it was held that imprisonment for the nonpayment of a $5,000 fine might extend to 2,500 days, although the term of imprisonment for the same offense was a much less time. The court reached its conclusion upon the ground that the imprisonment for nonpayment of fine was merely a method of enforcing the payment of the fine. In that connection it was said:

> "The mere fact that by its operation the defendant may be imprisoned in the county jail, by way of enforcing payment or satisfaction of his fine, for a longer period than he could be lawfully imprisoned in the state prison by way of punishment, is entitled to no weight. The latter imprisonment is the punishment or a part of it; but the former is no part of the punishment per se, but is merely one of the modes by which the law enforces the satisfaction of the fine which is in itself the punishment or a part of it. The punishment fixed by the statute is imprisonment in the state prison, or fine, or both; all beyond is mere mode and manner of enforcement. The first is to be satisfied by serving out the prescribed term in the state prison, and in that way only; but the latter may be satisfied in either of three ways, by voluntary payment of the amount of the fine, or by its collection under execution as in the case of a judgment in a civil action (Crim. Prac. § 461); or by imprisonment in the county jail not exceeding one day for every two dollars of the fine. The alleged incongruity is apparent only when the mere mode and manner of enforcing the punishment is confounded with the punishment itself and regarded as a part of it, but it wholly disappears when the obvious distinction between the two is kept in view. * * *"

This was but an elaboration of the same conclusion expressed in People v. Markham, 7 Cal. 208, 209, where it was said:

> "The act of 1855 must be construed with reference to the section above quoted, and as there is no conflict between them, both must stand. But it is said, this will be virtually convicting a man under one law, and punishing him by the provisions of another. The answer to this is, that the imprisonment is not a punishment, but a means of enforcing a payment of the fine, and, even if it should be regarded as a punishment, it would make no difference, as the provisions of this law must be regulated by those of the general act on the same subject, inasmuch as there is no contradiction. * * *"

Both of these decisions were based upon section 460 of the Criminal Practice Act of 1851 (Stats. 1851, p. 263), as follows:

> "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which shall not exceed ten days for every hundred dollars of the fine, or in that proportion."

This section of the Practice Act was amended in 1857 (Stats. 1857, p. 164) to read as follows:

> "A judgment that the defendant pay a fine, may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which shall not exceed one day for every two dollars of the fine, or in that proportion."

It was under this latter amendment that the decision of Ex parte Kelly, supra, was rendered, sustaining a commitment which for nonpayment of fine might extend to 2,500 days, although the term of imprisonment fixed for the offense of which the petitioner was convicted was two years' imprisonment.

Section 1446 of the Penal Code originally appeared in the Criminal Practice Act as section 626, contained in part 5 of that act, "Of Proceedings in Justices', Recorders', and Mayors' Courts." The section then read as follows:

> "A judgment that the defendant pay a fine, may also direct that he be imprisoned until the fine be paid or satisfied."

In 1857 (Stats. 1857, c. 126, p. 151) the Legislature passed a statute concerning persons under sentence of imprisonment wherein it authorized boards of supervisors of each county to cause persons in the county jail under sentence of imprisonment to labor upon public or private work. This statute contained the following provision:

> "Sec. 2. When a person shall be imprisoned for nonpayment of a fine, or until a fine be paid, the imprisonment may extend to, but shall not exceed one day for every two dollars of the fine, and the costs that may be due from the person imprisoned, in the prosecution in which the fine was adjudged."

Section 1446 of the Penal Code as originally enacted read as follows:

> "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, in the proportion of one day's imprisonment for every two dollars of the fine."

This was amended in 1873–74 (Stats. 1873–74, p. 455) to read, "be satisfied, in the proportion of one day's imprisonment for every dollar of the fine." This section has not since been amended unless by implication.

Section 1205 of the Penal Code was also amended in 1873–74 (Stats. 1873–74, p. 455) so that the imprisonment could not exceed one day for each dollar of the fine. These two sections remained the same until 1891 (Stats. 1891, p. 52), when section 1205 was amended in its present form, fixing the imprisonment at one day for each $2 of the fine and providing that the term of imprisonment could not exceed the term "for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted."

In the decisions rendered on habeas corpus the court has frequently used sections 1446 and 1205 interchangeably and without reference to the fact that one applied to the superior court and the other to the justices' or recorders' courts.

For instance, in Ex parte Ellis, 54 Cal. 204, the petitioner had been committed by a justice of the peace for nonpayment of fine. In passing upon the case the court said that the judgment conformed to the provisions of section 1205 of the Penal Code. Inasmuch as it also conformed to section 1446 of the Penal Code, relating to justices' courts, the erroneous reference is immaterial, for between 1873–74 and 1891 the two sections were practically identical, both having been amended by the same act of the Legislature (Amendments to the Pen. Code, 1873–74, p. 455).

The cases of Ex parte Ellis, 54 Cal. 204, Ex parte Chin Yan, 60 Cal. 78, and Ex parte Baldwin, 60 Cal. 432, all dealt with imprisonment for nonpayment of fine under judgments rendered by justices of the peace or police court judges. Notwithstanding that fact in Ex parte Baldwin, supra, the court distinguished that case from Ex parte Ellis, supra, and Ex parte Chin Yan, supra, upon the ground that the former were judgments rendered under section 1205 of the Penal Code. The question involved there is of no importance here, but these decisions illustrate the confusion resulting from the failure to apply these two sections to the judgments of the courts to which they were respectively applicable.

In the case of Ex parte Miller, 82 Cal. 454, 22 Pac. 1113, the petitioner was convicted of a misdemeanor for the violation of an ordinance which only authorized the imposition of a fine. It was therefore claimed that the judgment imprisoning the petitioner for the nonpayment of fine was not valid. That matter was disposed of as follows:

> "But the offense for which the petitioner was convicted was a misdemeanor, and the Code provides for such imprisonment as a means of enforcing the fine."

The principle enunciated in Ex parte Kelly, supra, that the imprisonment for nonpayment of fine is merely a method of enforcing the payment of the fine, is thus again declared.

In Ex parte Arras, 78 Cal. 304, 20 Pac. 683, it was held that a judgment for imprisonment in the state prison for the nonpayment of a fine was void, the court intimating that the imprisonment should be in the county jail. In Ex parte Wadleigh, 82 Cal. 518, 23 Pac. 190, this view was confirmed. Justice McFarland, however, in a concurring opinion, expressed a doubt as to whether or not the term of imprisonment for nonpayment of a fine could exceed the term of imprisonment provided for the particular offense. Justice Paterson, who concurred in this view, wrote an opinion in the matter of In re Mulholland, 97 Cal. 527, 32 Pac. 568, in which he held that notwithstanding the amendment of section 1205 of the Penal Code in 1891 changing the rate of imprisonment to $2 per day instead of $1 per day, that section 1446 of the Penal Code still controlled in justices' and police courts and that the imprisonment in such courts under section 1446 of the Penal Code could be at the rate of $1 for each day, and a judgment imposing an imprisonment at the rate of $1 per day for nonpayment of a fine of $50 was sustained by him. It is important to notice that although this decision is recorded by the reporter as an application to the Supreme Court for relief upon habeas corpus, that the opinion is that of Justice Paterson alone, as is made evident by an inspection of the original opinion now on file at Sacramento. It is therefore only entitled to the weight of his individual opinion.

In Ex parte Casey, 85 Cal. 36, 24 Pac. 599, we have also the opinion of a single justice on habeas corpus. Mr. Justice Fox expressed the opinion that the term of imprisonment for nonpayment of a fine under section 1446 of the Penal Code might exceed the time fixed as the term of imprisonment for the offense, basing his decision in part upon Ex parte Kelly, supra, and distinguishing the cases of Ex parte Wadleigh, supra, and Ex parte Rosenheim, 83 Cal. 388, 23 Pac. 372, and Ex parte Arras, supra.

The case of Ex parte Erdmann, 88 Cal. 579, 26 Pac. 372, is confidently relied upon by the petitioner as decisive of the question involved on his application for relief. This was an opinion by the court in bank. The petitioner had been sentenced to pay a fine of $500 and in default of payment to be imprisoned in the county jail at the rate of one day for each dollar until the fine be satisfied. The maximum term of imprisonment for the offense was not exceeding three months. The prisoner contended that he could not be imprisoned for more than three months for the nonpayment of fine, and having been so imprisoned he sought relief. The court there stated:

> "The question has been presented to us heretofore, when there was some difference of opinion in regard to it. As the Legislature, at its recent session, amended said section 1205 so as to expressly provide that imprisonment to enforce a fine must 'not extend, in any case, beyond the term for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted,' we think that former doubts on the subject should, in justice, be resolved in favor of the petitioner."

This conclusion is reached by the erroneous assumption that the prisoner was sentenced under section 1205 of the Penal Code by a police court. This decision amounts simply to this assertion by the court:

> "We have heretofore been in doubt as to whether or not the term of imprisonment for nonpayment of fine can exceed the term of imprisonment fixed by the law for the given offense. The Legislature having expressly provided by section 1205 of the Penal Code that such a term cannot exceed the term of imprisonment provided by the offense, we will accept the opinion of the Legislature although it was not expressed until after the sentence, and we will discharge the prisoner."

The court apparently overlooked the fact that section 1205 did not apply to a police court, and that the sentence there under consideration was one by such court. The court did not pass upon the question as to whether or not the amendment of section 1205, general in its terms, applied to both superior and justices' courts, because the sentence involved in that case was imposed before the amendment became effective, and, of course, that question was not involved. There was no citation of the case of Ex parte Kelly, supra, in which it had been affirmatively established that the term of imprisonment for nonpayment of fine might exceed that for the offense by many years. The question presented to us is whether or not we shall follow this case as an authority, for, admittedly, it holds that a judgment for nonpayment of a fine rendered by a justice's court cannot exceed the term of imprisonment for the offense.

Notwithstanding the fact that Ex parte Erdmann, supra, decided April 2, 1891, assumed that section 1205 of the Penal Code applied to a police court sentence, in Ex parte Soto, 88 Cal. 624, 26 Pac. 530, decided the same month, the decision was devoted entirely to a consideration of the question of whether or not a conviction in a recorder's court, followed by a sentence to imprisonment in the city jail in the proportion of one day's imprisonment for each $2 of the unpaid portion of the fine, was a valid judgment. The recorder, in imposing the sentence, had apparently followed the provisions of section 1205, which had been approved by the Governor March 10, 1891, but had not yet gone into effect. Three of the justices were of the opinion that under section 1446 of the Penal Code the judgment of the justice's court might provide for a greater allowance to the prisoner for each day of imprisonment than $1 per day. Three were of the opinion that the section did not authorize such a judgment, but two of them, Justices De Haven and Harrison, were of the opinion that the question could not be raised on habeas corpus. Later, however, the opinion expressed by Mr. Justice Beatty in Ex parte Soto, supra, was concurred in by four justices of the Supreme Court, including Justice Sharpstein, who did not participate in Ex parte Soto, supra, and thus became the opinion of the Supreme Court. Ex parte Noble, 96 Cal.

362, 31 Pac. 224. This decision is only of importance in the case at bar because it is expressly based upon the proposition that section 1446 was still applicable to justices' courts, for section 1205 expressly provided for the rate of imprisonment of one day for each $2, and this section as thus amended was in force at the time of the imposition of the sentence considered in Ex parte Noble, supra, and unless section 1446 was still in force in justices' courts, the mere reference to section 1205 would have been sufficient authority for affirming the imprisonment at the rate of $2 per day.

As we have already pointed out, the case of Ex parte Erdmann, supra, was not based upon the limitation expressed in section 1205 of the Penal Code nor upon any distinction between sections 1205 and 1446 of the Penal Code, but upon the proposition that the extent of the imprisonment for nonpayment of fine could not exceed the term of imprisonment provided for the offense. This case, however, is not the latest expression of this court upon that subject. In Ex parte Karlson, 160 Cal. 378, 117 Pac. 447, Ann. Cas. 1912D, 1334, the court had under consideration a sentence for contempt. The petitioner had been fined in the sum of $200 and it was provided:

> "Upon his failure to pay such fine he be committed to the county jail until such fine is paid at the rate of one day's imprisonment for each two dollars of said fine."

The court held that this imprisonment for the nonpayment of the fine was valid notwithstanding the fact that the power to imprison for contempt was limited to five days. Code Civ. Proc. § 1218. The court held that the power to imprison for nonpayment of fine existed at common law; that section 1205 of the Penal Code did not apply to nor limit the powers of the superior court to punish for contempt and remanded the prisoner notwithstanding the fact that the term of five days had already been served by him. This case must be taken as a repudiation of the doctrine that there is any inherent restriction upon the power to imprison for nonpayment of fine, merely because the Legislature has fixed a term of imprisonment as a punishment for the offense which may be less than the term of imprisonment for the nonpayment of a fine. It was suggested by Justice Angellotti in his dissenting opinion that the result reached by the court might justify permanent imprisonment where the party was unable to pay the fine. The answer of a majority of this court to this proposition was that excessive fines and imprisonment were prohibited by the Constitution, and consequently, if the imprisonment was thus excessive, there would be relief under the constitutional provision limiting the power of courts to impose excessive imprisonment. In this connection it should be noted that in a recent case (In re Garner, 179 Cal. 409, 177 Pac. 162) the provisions of section 1218 of the Code of Civil Procedure limiting the power to punish for contempt by imprisonment for five days was sustained as a constitutional limitation upon the inherent power of the court to punish for contempt. The cases of Ex parte Karlson, supra, and Ex parte Crittenden, 62 Cal. 534, were based upon the fundamental proposition laid down in Ex parte Kelly, supra, that imprisonment for nonpayment of fine is not a punishment in addition to the fine, but a mere method of enforcing the collection of the fine. In the case of Ex parte Karlson, supra, the following is quoted from Ex parte Crittenden, supra:

> "The payment of the fine is the punishment. The awarding or infliction of the fine is no punishment. The commitment is an incident of the fine. It is not, in any manner, the 'imprisonment' allowed by the statute. The payment of the fine, and a commitment for not paying it, cannot coexist. The commitment is not a separate punishment or imprisonment added to the payment of a fine. It is in this view that it has always been held that where a statute authorizes or prescribes the infliction of a fine as a punishment, either for a contempt of court or for a defined offense, it is lawful for the court inflicting the fine to direct that the party stand committed until the fine is paid, although there be no specific affirmative grant of power in the statute to make such direction."

In so far, then, as the case of Ex parte Erdmann, supra, decided in 1891, lays down principles in conflict with the case of Ex parte Kelly, decided in 1865, and People v. Markham, supra, decided in 1857, it was in effect overruled by Ex parte Karlson, supra, decided in 1911. We are therefore free to consider the question here involved upon its merits and in consonance with the decisions sustaining the power to punish by imprisonment for nonpayment of a fine as an incident to the collection of the fine.

If the conviction was in the superior court, the limitation in section 1205 of the Penal Code would clearly apply and require the discharge of the petitioner; but the conviction in this case was in the justice's court, and section 1446 of the Penal Code applies unless the amendment to section 1205 in 1891 was a limitation upon justices' courts as well as upon superior courts. We may say that the latter point is not advanced by the petitioner and it is clear that it is not tenable for the reasons heretofore given.

We conclude, then, that under the provisions of section 1446 of the Penal Code a justice's court may, upon imposing a fine for the offense of having intoxicating liquor in possession, direct the imprisonment of the defendant in accordance with the provisions of section 1446; that is to say, at the rate of $1 per day until the fine be satisfied.

Petitioner remanded.

We concur: MYERS, J.; LAWLOR, J.; LENNON, J.; WASTE, J.; KERRIGAN, J.; SEAWELL, J.

---

190 Cal. 794

LAMBORN v. LAMBORN. (S. F. 10138.)

(Supreme Court of California. April 11, 1923.)

Divorce ⚷222—Former wife entitled to attorney's fees and expenses on husband's application for modification of decree for alimony.

Where a former husband, after rendition of a divorce decree, has applied for a modification of that decree as relates to the alimony, the court may, under Civ. Code, §§ 137, 139, award the former wife whatever costs, attorney's fees, or expenses are necessary for the prosecution of an appeal rendered necessary by the former husband's application.

In Bank.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by Frances H. Lamborn against Ervin H. Lamborn for divorce. Judgment for plaintiff. Motion of defendant for a modification as to the amount of alimony. Judgment modified. From an order awarding counsel fees and costs on an appeal by plaintiff, defendant appeals. Affirmed.

Hayes, Oliphant & Dukette, of Oakland, for appellant.

Dixon L. Phillips, of Oakland, for respondent.

WILBUR, C. J. The parties to this proceeding were divorced, and by the final decree of divorce an award of permanent alimony of $45 per month was made to the plaintiff. After the time for appeal from the final decree, both parties moved the court for a modification of the amount of alimony awarded to the plaintiff. The trial court decreased the amount of alimony to $35 per month. The plaintiff took an appeal from the order and moved the court for an allowance for attorney's fees and costs on the appeal thus taken. The defendant appealed from the order awarding counsel fees and costs on the plaintiff's appeal. We will hereafter refer to the parties as the former husband and former wife.

The former husband contends that the trial court had no jurisdiction to make an award for counsel fees and costs on the appeal of the former wife, from the order modifying the allowance of alimony made to her in the final decree of divorce. Section 139 of the Civil Code provides that the award made to the wife for her support during her life in the final decree of divorce may be modified from time to time. Section 137 of the Civil Code provides that, during the pendency of the divorce action, the court may, in its discretion require the husband to pay as alimony any money necessary for the prosecution of the action and for support and maintenance. It also provides:

> "The final judgment in such action may be enforced by the court by such order or orders as in its discretion it may from time to time deem necessary, and such order or orders may be varied, altered, or revoked at the discretion of the court."

It matters not whether we consider the allowance of costs and attorney's fees to the wife to enable her to appeal from the order modifying the decree as an additional allowance to her for her support as authorized by section 139, Civil Code, made after the final decree of divorce, or whether we consider that the divorce action is pending within the meaning of section 137, Civil Code, so long as the court retains power to modify the terms of the decree, or whether we regard it as an order deemed necessary for the enforcement of the final decree within the meaning of the provisions for such enforcement contained in section 137, Civil Code, above quoted. It is clear that the court has jurisdiction to award the former wife whatever costs and expenses are necessary for the prosecution of an appeal rendered necessary by the application of the husband for the modification of the decree.

It is true that an ordinary action is deemed to be pending only until the appeal from the judgment is determined or until the time for an appeal has passed (section 1049, Code Civ. Proc.), but this general provision of the statute with reference to ordinary judgments is modified in the case of divorce actions by the provisions of the Code, authorizing the modification of an award for alimony at any time after the final decree is entered. If there is any doubt about this proposition, it is clear that, where it is necessary for the wife to maintain a proceeding against her husband in order to secure proper maintenance that the costs of such a proceeding may be necessary for her support and justify an allowance to her for her support in the amount of her expenses so necessarily incurred. Whether we regard the allowance to the wife as money necessary for her support, the allowance of which is authorized by section 139, Civil Code, or as money paid to her as counsel fees and costs during the pendency of the divorce action, it is clear that the court is authorized to make such an allowance to the former wife.

It is contended that this allowance should not have been made until after the appeal had actually been taken. We think it unnecessary to discuss this point, inasmuch as the appeal was in fact taken and is now pending in this court for determination.

Judgment affirmed.

We concur: MYERS, J.; WASTE, J.; LENNON, J; LAWLOR, J.; KERRIGAN, J.; SEAWELL, J.

---

190 Cal. 757

PRICHARD et al. v. KIMBALL et al.

(L. A. 7083.)

(Supreme Court of California. April 11, 1923.)

1. Pleading 🔑359—Verified answer may not be stricken as sham, if material issue is presented.

Where an answer is verified, and no claim was made by affidavit or otherwise it was false, it may not be considered sham before trial if it presents a material issue.

2. Pleading 🔑8(6, 11)—Denial that lease and option was nullity or constituted a cloud on title held conclusions.

In an action to have declared void a lease containing an option and to cancel it of record, and to have cloud on title to leased premises, caused by the lease removed, an answer denying that the lease and option, or either of them, had become a nullity, or that they were a cloud on plaintiff's title, were conclusions of law, raising no issue.

3. Pleading 🔑358—Denial that defendant threatened to use outstanding instruments of title to vex plaintiff held immaterial, and to present no issue.

In an action to cancel a lease and option, an answer asserting that the defendant had not threatened to use the outstanding documents vexatiously against plaintiff was insufficient to present material issue on motion to strike, as Civ. Code, § 3412, provides that a written instrument as to which there is a "reasonable apprehension" that it may cause serious injury to a person against whom it is void may be canceled.

4. Pleading 🔑358—Allegation that attorney's fee was not reasonable held not to present an issue as against motion to strike.

In an action by lessor to have canceled a lease and option, providing that, if lessee's act caused lessor to bring action for enforcement, lessor shall be entitled to reasonable attorney's fees, a denial in defendants' answer that $1,000 was a reasonable attorney's fee presented an immaterial issue as against a motion to strike; the attorney's fees provided in the lease not being the cause of action, but an incident to it.

5. Landlord and tenant 🔑92(1)—Option in lease held nonassignable.

Where a lease containing provision against assignment gave lessee an option to purchase, conditioned on performance of the terms of lease running only during the term of the lease, and that, in case of exercise of the option, purchase price should be paid in installments, and no deed given until 60 per cent. of the purchase price was paid, the option formed a part of the lease, and was subject to the provision against assignment.

6. Appeal and error 🔑193(9)—Contention that lessor's complaint to cancel lease was insufficient for failure to give lessees notice of nonperformance held proper on appeal, though not made below.

In lessor's action to cancel lease, defendant's contention, that inasmuch as the lease required lessor to give lessee notice in event of breach, and provided for the giving of a deed by lessee, who had erected a building, in case he did not exercise his option to purchase, the complaint was insufficient for lack of allegation of notice to lessee, was a contention which might be raised at any time during the proceedings under Code Civ. Proc. § 434, though no demurrer was filed, and no such contention made below.

7. Cancellation of instruments 🔑22—Notice of breach by lessor held futile and not necessary as condition of lessor's suit to cancel lease.

Though a lease giving lessee option to purchase on faithful performance provided that lessor should give lessee notice of breach, and that, in case lessee did not exercise the option, he should execute a deed to lessor, allegation by lessor that such notice was given was not essential to his right to maintain suit to cancel the lease, because lessee was setting up some claim of right under the lease and option which the lessee's answer set forth, and asked decree that he be permitted to exercise the option, making it apparent that notice would have been futile.

8. Cancellation of instruments 🔑62—Provision for attorney's fees to lessor enforcing lease or quieting title held not to apply in suit to cancel lease.

A provision in a lease giving reasonable attorney's fees to lessor in case suit should be brought to enforce it, or for quieting title to or obtaining possession of the premises, did not apply where the lessor took possession of the premises and brought suit to declare void and cancel the lease and option contained therein on the ground that lessee was setting up some claim of right under such lease and option, though the complaint asked that the cloud on lessor's title caused by the lease be removed, as such suit was not to enforce the lease or obtain possession, nor was it an action to quiet title; there being a clear distinction between the old remedy to cancel instruments preserved by Civ. Code, § 3412, and the newer statutory remedy, under Code Civ. Proc. § 738, to determine adverse claims or quiet title.

In Banc.

Appeal from Superior Court, Los Angeles County; Charles R. Burnell, Judge.

Bill by Elmer M. Prichard and others against Carolyn Kimball and another, administrators of the estate of Wade H. Kimball, deceased. Judgment for plaintiffs, and defendants appeal. Modified and affirmed.

D. A. Stuart, of Los Angeles, for appellants.

Geo. A. Prichard, Leslie E. Clawson, and M. M. Meyers, all of Los Angeles, for respondents.

LAWLOR, J. This action was brought by the plaintiffs to have declared void a lease, to secure its cancellation of record and delivery up to them, to have the cloud upon their title to the leased premises caused by the lease removed, and to recover attorneys' fees and costs.

Plaintiffs, on June 30, 1917, were the owners of certain described real property in Los Angeles county, and on that date leased it to Wade H. Kimball, since deceased, and A. J. O. Korbel, one of the defendants herein. The lease by its terms was to expire December 31, 1920. Some time before November 18, 1918, defendant Korbel assigned his interest in it to Wade H. Kimball. On the latter date a supplementary lease was entered into between plaintiffs Elmer M. Prichard and Hallie Prichard, who are husband and wife, as lessors, and Wade H. Kimball and defendant Carolyn Kimball, as lessees, in which were incorporated all the provisions of the first lease. Wade H. Kimball is now deceased, and defendants Carolyn Kimball, his wife, and A. C. Thorpe are the administrators of his estate.

By the terms of the lease the lessees agreed to erect a frame cottage upon the property, which was to become a part of the realty; to cultivate the land in a proper manner; to commit or suffer no waste or damage to be done to the premises; to pay the lessors $50 per month rental; to pay all regular state, county, and city taxes levied, and to have the house they should construct insured. It was further understood and agreed that the lessees might make other improvements upon the premises, such as the installation of pipe lines and pumping facilities, at their own expense; that time should be of the essence of the contract; that, in event of a failure of the lessees to perform any of their obligations under the contract, the lessors should give them notice of the breach, whereupon the lessees should have 30 days to perform the things required by the notice; that the parties of the second part should not assign the lease without the written consent of the lessors, except from one to another, such an assignment not to release either of the lessees to carry out the terms of the lease, and that the lessees would give peaceable possession of the said premises at the expiration of the lease.

In consideration of the promises and agreements on the part of the lessees, the lessors agreed, in the event that the lessees carried out the terms of the agreement, that the lessees should be granted an option during the life of the agreement to purchase the property on or before December 31, 1920, for $13,500, $3,000 to be paid at the time of the exercise of the option, and the balance in installments. It was further agreed that, if the lessees exercised the option, they should give notice thereof in writing to the lessors, and at the same time make the cash payment provided, and that if the lessees failed to comply with the provisions of the lease and the lessees elected to terminate the lease, the option should also terminate without further notice or act by the lessors. Further provisions were included, relating to the giving of a deed by the lessors and the payment of an existing mortgage in case the lessees exercised the option. Finally, it was agreed that, should the lessees fail to exercise the right to purchase, they should execute to the lessors a deed sufficient to convey title to the lessors, free and clear of any act or thing done, made or suffered by the lessees, and that, should suit be brought "to enforce any of the terms or conditions of this lease, or for the purpose of quieting title to or obtaining possession of the said premises, or any portion thereof, from the said parties of the second part, * * * there shall be allowed to the parties of the first part * * * a reasonable attorney's fee to be included as a part of any judgment in favor of the parties of the first part."

By the terms of the supplementary lease the lessors agreed to mortgage the premises for $1,400 to install a pumping plant. The lessees agreed to purchase and install an electric motor, which should become a part of the realty, to pay interest on the mortgage, and to pay the sum of $1,400 in addition to the $3,000 first payment in case they should exercise their option of purchase, and at that time the mortgage to install the pumping plant should be unpaid.

It was alleged in the complaint that the lease and option expired on December 31, 1920; that no extension thereof was granted; that no notice of their election to exercise the option has been given by the lessees, and that no payment whatever has been made on account of the option to purchase the premises; that by reason of their expiration the lease and option have become a nullity; that it does not appear from the records of Los Angeles county, or upon the face of the lease and option, whether or not the lessees have exercised their option to purchase the premises, have given notice of their intention to do so, or have paid any sum for the purchase, as provided in the option; that the defendants are setting up some claim, the exact nature of which is unknown to the plaintiffs, to the effect that the defendants still have some rights under the lease and option; that the instruments throw a cloud over the plaintiffs' title, and that there is a reasonable apprehension, and plaintiffs do apprehend, that if the instruments are left outstanding serious injury may be caused to the plaintiffs; that it was necessary for plaintiffs to employ counsel in behalf of the matters for which it was provided in the lease reasonable counsel fees should be allowed, and that such reasonable fees for the services in the case at bar are $1,000.

Defendant A. J. O. Korbel interposed a demurrer to the complaint, which was overruled. Defendants Carolyn Kimball and A. C. Thorpe, as administrators of the estate of Wade H. Kimball, deceased, and Carolyn Kimball in her own behalf, filed an answer. In it they denied that, by reason of their expiration and termination, the lease and option, or either of them, became a nullity; that they threaten to use the lease and option vexatiously against the plaintiffs, or that these documents throw a cloud over plaintiffs' title; and denied that $1,000 was a reasonable attorney's fee. Further answering the complaint, it was alleged that the plaintiffs had failed to carry out and perform their part of the lease and option; that, after defendants were let into possession, they made improvements amounting to $1,500, which increased the value of the land more than $10,000, and paid sums totaling $1,450 to plaintiffs and $65.92 taxes; that, in order to satisfy creditors of the estate of Wade H. Kimball, deceased, it was deemed necessary to sell the option rights of the estate in the premises; that on or about August 3, 1920, the plaintiffs wrongfully and forcibly entered upon the premises, and took and retained possession of them; that, although defendants procured persons who were willing to buy the premises subject to the option rights for $22,500, provided, upon inspection, they should be found to be as represented, and although the premises were as represented the plaintiffs prevented the buyers from inspecting the premises, and stated that the estate of Wade H. Kimball, deceased, no longer had any interest in the premises; that by reason of these facts defendants had been damaged to the extent of $7,500, and plaintiffs are entitled to no relief until they offer to do equity.

In a part of the answer designated as a counterclaim similar facts were alleged, and it was further stated that plaintiffs gave defendants no notice, as provided in the lease, wherein it was claimed there was any breach or failure upon the part of the lessees to perform their obligations under the contract. Defendants prayed that the option be declared to be in full force and effect for such time as the court might deem it necessary for them to sell the option rights, and asked that, if this could not be done, they recover $7,500 and costs from plaintiffs.

A demurrer to this answer was filed, but before decision thereon the entire answer was stricken from the files upon the grounds that it was sham and irrelevant, irrelevant and redundant. Leave was granted to further answer within 10 days, but none was filed. Thereupon "this cause, taken as confessed by the said defendants served with process, coming on to be heard before the court, the court, having hearing evidence presented herein finds that all of the allegations of plaintiffs' complaint are true, and that plaintiffs are entitled to judgment against the said defendants." The lease, supplementary lease, and option were declared to be terminated, null and void, and canceled of record; the defendants were declared to have no rights under the option; any cloud on plaintiffs' title growing out of the leases and option was declared removed; and it was further ordered that the plaintiffs recover from defendants the sum of $600 attorney's fees and $15.20 costs, "all to be paid in due course of administration of the estate of the said Wade H. Kimball, deceased." From that judgment the defendants, except A. J. O. Korbel, take this appeal.

[1] Appellants' first assignment of error is that the trial court erred in striking out their answer. It is insisted that, as the answer was verified, and no claim was made by affidavit or otherwise that it was false, and as nothing appears in the record to question its truth or its form, it could not be stricken out as sham. Before it can be said the answer was properly stricken out on that ground, it must appear that no defense was set up by it, for it was held in Greenbaum v. Turrill, 57 Cal. 285, 291, that a verified answer, setting up a defense, either affirmatively or by a denial of the allegations of the complaint, may not be considered sham before a trial of the issues. Therefore it is necessary only to determine whether or not a material issue was presented by the answer, for, if none was, the answer was properly stricken out as irrelevant. Felch v. Beaudry, 40 Cal. 439; Hemme v. Hays, 55 Cal. 337; Montgomery v. Merrill, 62 Cal. 385; Loveland v. Garner, 74 Cal. 298, 15 Pac. 844.

[2, 3] In the case at bar the answer denied that the lease and option, or either of them, had become a nullity, that they threw a cloud on respondents' title or that appellants threatened to use the documents vexatiously against respondents. The first two of these denials were conclusions of law, which raised no issue, and need not be considered. Frost v. Harford, 40 Cal. 165. The third denial is immaterial, for section 3412 of the Civil Code provides only that—

> "A written instrument, in respect to which there is a *reasonable apprehension* that if left outstanding *it may cause serious injury* to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." (Italics ours.)

The material allegation of the complaint in this respect was that if left outstanding there was reasonable apprehension that the lease and option would cause serious injury to respondents, in that appellants were setting up some claim under the instrument. Whether the appellants were using the document vexatiously or not was immaterial. If they were claiming rights under it, and their claim was groundless, respondents had the right to a decree that as to them the instrument was void, whether appellants' claim was bona fide or for purpose of vexation. If their claim was valid, it would make no difference whether it was vexatious to the repondents or not. There was no denial of any other facts stated in the complaint.

[4] The denial that $1,000 was a reasonable attorney's fee was also immaterial, the attorney's fee provided in the lease not being the cause of action, but an incident to it. Huber v. Shedoudy, 180 Cal. 311, 314, 181 Pac. 63.

[5] The second part of the answer and the counterclaim rest upon the proposition that appellants might have sold their option rights but for the unlawful act of the respondents in taking possession of the premises before the expiration of the lease. It is claimed in this connection that, although it was provided in the lease that the lessees should not assign it without the written consent of the lessors, the lease and option were severable, and the option could be assigned without the lessors' consent. We do not so read the lease, which, with the option, formed one document. The first part of the lease recited the obligations of the lessees, including the agreement that they would not assign it. Then followed the provisions relating to the option, the granting of which was conditioned on the faithful carrying out of the terms of the lease by the lessees, and which was to run only during the term of the lease.

With reference to the option, it was provided that, should the conditions of the lease be performed and the option exercised by the lessees, the purchase price should be paid in installments, and no deed should be given by the lessors until 60 per cent. of the purchase price was paid. The option thus formed a part of the lease, and was dependent on it. In view of the provisions for installment payments in case the option was exercised, and that no deed should be given until 60 per cent. of the purchase price had been paid, it cannot be said the lessors intended, as to the option, to deal with any one whom the lessees might select. The option must be held to be part of the lease, and governed by the clause that no assignment should be made except with the written consent of the lessors.

It was not alleged that the lessors agreed to the transfer of the option rights to any of the purchasers which the appellants alleged they had procured. In the absence of such assent, they could not sell the right to purchase the property. Therefore their claim for damages, based solely on the fact that the lessors had prevented them from selling the property at a profit, is without merit, and presents no issue. It follows there was no error in the court's striking out the answer and counterclaim on the ground they were irrelevant.

[6] Appellants further contend that, inasmuch as the lease provided for a notice to be given by the lessors in the event of a breach of the lease by the lessees, and for the giving of a deed by the lessees in case they did not exercise their option of purchase, the lessees were entitled to a notice and demand for the deed before the lessors became entitled to bring this action. There is no allegation in the complaint that any such notice was given or demand made, and it is insisted by appellants that because of this fact it affirmatively appears respondents are entitled to no relief in this suit, and that the complaint fails to state a cause of action. Although it appears from the record that no such contention was made by appellants in the trial court, no demurrer having been filed, this point is one which may be raised at any time during the proceedings. Code Civ. Proc. § 434; Ryan v. Holliday, 110 Cal. 335, 42 Pac. 891; Flood v. Templeton, 148 Cal. 374, 83 Pac. 148.

[7] The case here differs from one brought before the making of a demand to recover money or enforce the performance of an obligation, in that here the execution of the deed, for which it is claimed the demand should have been made, is not the thing sought in the action. The contention is that, had respondents pursued another remedy, appellants would not have been subjected to the annoyance and expense of a suit. However that may be, it is settled that a demand is unnecessary where it appears it would be unavailing. Cox v. Delmas, 99 Cal. 104, 120, 33 Pac. 836; California Cured Fruit Ass'n v. Stelling, 141 Cal. 713, 719, 75 Pac. 320. In this case it is alleged in the complaint that appellants were setting up some claim of right under the lease and option. Such a fact would be entirely incompatible with a willingness to give a quitclaim deed to the premises. In addition, these appellants in their answer set forth their claim, and asked a decree that they be allowed to exercise the option. Under such circumstances a demand for a deed would obviously have been fruitless.

[8] There remains but to consider the action of the court in allowing counsel fees. Under the lease reasonable attorney's fees were to be allowed in case suit should be brought to enforce any of the terms of the lease or for "quieting title to, or obtaining possession of, the said premises." This action is not brought to enforce any term of the lease or to obtain possession of the premises. Nor, in our opinion, is it an action to quiet title. Although one result of an action to cancel an instrument may be to remove a cloud from title, there is a well-recognized difference between such an action and one to quiet title. Thus, in Castro v. Barry, 79 Cal. 443, 21 Pac. 946, it was pointed out that

suits to have an instrument canceled or adjudged to be void were quite common in the old chancery practice, and were preserved in section 3412 of the Civil Code, while suits to determine adverse claims, or to quiet title, were unknown to the old chancery practice, but were provided for by statute and carried into section 738 of the Code of Civil Procedure. See, also, Code Civ. Proc. § 749a. The court there said:

> "The distinction between the two kinds of action is clear. They are different not merely in form (for we have no forms of action in the common-law sense), but in purpose. In the former case the proceeding is aimed at a particular instrument, or piece of evidence, which is dangerous to the plaintiff's rights, and which may be ordered to be destroyed in whosesoever hands it may happen to be. While in the latter, the proceeding is for the purpose of stopping the mouth of a person who has asserted or is asserting a claim to the plaintiff's property, whether such claim be founded upon evidence or utterly baseless. It is not aimed at a particular piece of evidence, but at the pretensions of an individual."

See, also, Angus v. Craven, 132 Cal. 691, 697, 64 Pac. 1091.

The leases were evidently drawn with care, and it cannot be said the rights of the lessors were not fully safeguarded. Attorney's fees were provided for only in the cases enumerated, and actions to quiet title were expressly included. In view of the marked difference between such actions and the one at bar it must be held this is not an action in which respondents are entitled to recover attorney's fees from appellants.

Appellants object to the provision of the judgment that plaintiffs recover attorney's fees and costs from all of them, but "all to be paid in due course of administration of the estate of the said Wade H. Kimball, deceased." However, in our opinion, this clause could only have reference to such portion of the total amounts as were collected from the estate, and was not a direction that the whole judgment be collected from it.

The judgment as to the appellants herein is modified by striking therefrom the portion providing for a recovery of attorney's fees, and as so modified is affirmed; each party to pay his own costs on appeal.

We concur: WILBUR, C. J.; MYERS, J.; WASTE, J.; LENNON, J.; SEAWELL, J.; KERRIGAN, J.

---

190 Cal. 767

PRICHARD et al. v. KIMBALL et al.
(L. A. 7089.)

(Supreme Court of California. April 11, 1923.)

Cancellation of instruments 🔑35(3) — **Assigning lessor held proper party defendant to suit by lessor to cancel lease.**

Where a lease provided that assignment should not release assignor from carrying out the lease, and one of the lessees assigned his interest, and a supplementary lease between the other lessee and lessor provided that none of the lessees under the first should be released by the second lease, the assigning lessee was a proper party defendant to the lessor's action to cancel the lease and an option contained therein, and to remove the same as a cloud on title.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles R. Burnell, Judge.

Action by Elmer M. Prichard and others against Carolyn Kimball and another, administrators of the estate of Wade H. Kimball, deceased, and A. J. O. Korbel. Judgment for plaintiffs, and defendant Korbel appeals. Modified and affirmed.

John R. Layng, of Los Angeles, for appellant.

Geo. A. Prichard, Leslie E. Clawson, and M. M. Meyers, all of Los Angeles, for respondents.

LAWLOR, J. The facts in this case are the same as in Prichard v. Kimball (L. A. No. 7083) 214 Pac. 863, this day filed. This appeal is taken separately by defendant A. J. O. Korbel from the judgment entered against all the defendants and rendered as to him upon his failure to answer after the overruling of his general demurrer to the complaint.

Appellant contends the complaint fails to state a cause of action, in that there is no allegation that respondents demanded of him or that he failed or refused to give a quitclaim deed upon the expiration of the lease, which it is insisted was necessary before the respondents could institute this action; that, from the fact that the second lease, which materially altered the terms of the first, was not signed by appellant, but by Wade H. Kimball, deceased, and defendant Carolyn Kimball only, it follows that appellant has assigned his interest in the lease or had been released by operation of law arising from the act of signing the second lease.

Considering these arguments, it must be borne in mind that this action is not one to recover damages for a breach of the contract, or to enforce any of its provisions, but to cancel the outstanding contract, which, it is admitted by the demurrer, has terminated and expired, but from the face of which it cannot be ascertained whether or not the defendants still have any rights thereunder.

With reference to the first point, it is sufficient to refer to the holding in Prichard v. Kimball, supra, wherein was considered the appeal of appellant's codefendants, that, in view of the allegations of the complaint to the effect that the defendants were claiming rights under the lease and option, a demand for a deed would have availed respondents nothing, and was not necessary.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Considering the second point, in our opinion it is immaterial whether or not appellant has assigned his rights under the principal lease. It was provided in that instrument that such an assignment should not release the assigning lessee from carrying out the terms of the lease, and in the supplementary lease that none of the lessees under the first lease should be deemed to be released from any terms or conditions thereunder by the supplementary lease. Appellant, although not a party to the supplementary lease, was in any event still bound by the terms of the first lease, and, as far as could be determined therefrom, remained a party to it. He was therefore properly made a party to this action to cancel it and a cause of action stated as to him in that regard.

In view of our conclusion in Prichard v. Kimball, supra, that this is not an action to quiet title or to enforce a term of the lease, the complaint did not state a cause of action entitling respondents to recover attorneys' fees, and it follows that that portion of the judgment allowing such fees is erroneous.

The judgment as to this appellant is modified by striking therefrom the portion providing for a recovery of attorneys' fees, and as modified is affirmed, each party to pay his own costs on appeal.

We concur: WILBUR, C. J.; MYERS, J.; WASTE, J.; LENNON, J.; SEAWELL, J.; KERRIGAN, J.

---

190 Cal. 786

PASADENA UNIVERSITY v. LOS ANGELES COUNTY. (L. A. 7003.)

(Supreme Court of California. April 11, 1923.)

1. Taxation 🔑204(1)—Constitutional amendment not limited or extended by statute subsequently enacted.

Pol. Code, § 3613, subd. 2, enacted subsequent to the adoption of Const. art. 13, § 1a, providing for exemptions, can in no way limit or extend the terms thereof.

2. Taxation 🔑242(1)—Constitutional exemption of collegiate institutions held applicable only to institutions whose whole work is of "collegiate grade."

Const. art. 13, § 1a, providing, "any educational institution of collegiate grade * * * shall hold exempt from taxation its buildings and equipment, * * * used exclusively for the purposes of education," *held* to exempt from taxation only an institution of collegiate grade as a whole, and not one wherein part of the students enrolled were doing work of less than a collegiate grade.

3. Statutes 🔑194—General words, followed by enumeration of particular classes, limited thereby.

It is a rule of construction of statutes that, where general words follow the enumeration of particular classes, the general words will be construed as applicable only to the persons or things of the same general nature or class as those enumerated; the words being construed in their natural and ordinary sense.

4. Statutes 🔑235—Courts should liberally construe statutes for maintaining educational institutions.

It is the policy of the law to favor by reasonable legislation the maintenance of educational institutions, and it is the duty of the courts, in construing such statutes, to indulge in reasonable liberality to effect the purpose of the legislation.

5. Taxation 🔑438—Correction of assessment roll by removing notation of exemption held proper.

Where it appeared that the notation, "Exemption allowed," had been erroneously indorsed on the assessment roll opposite the listing of a particular educational institution's property, *held*, under Pol. Code, § 3881, as amended by St. 1917, p. 968, that the auditor should have extended the tax, notwithstanding the erroneous notation of exemption, and a failure to do so was subject to correction, with the written consent of the district attorney.

In Bank.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by the Pasadena University, a corporation, against the County of Los Angeles. Judgment for defendant, and plaintiff appeals. Affirmed.

Nathan Newby, of Los Angeles, for appellant.

A. J. Hill, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondent.

SEAWELL, J. This cause is before us after decision by the District Court of Appeal of the Second District, Division 1. The appeal is from an order denying appellant relief from a property tax assessed against its property for the year 1919.

Appellant, an institution of learning, chartered or incorporated by virtue of the laws of this state, claims that it is an educational institution of collegiate grade, and, being such, lays claim to those certain exemptions allowed by the provisions of article 13, § 1a, of the Constitution of this state. It is also the claim of appellant that the county assessor of Los Angeles county, having entered on the assessment roll opposite the listing of appellant's property a notation, "Exemption allowed," had no authority thereafter to cancel said notation or entry and insert in lieu thereof "No exemption." This right involves an interpretation of section 3881 et seq., Political Code, which will hereafter receive attention.

The mandate of the Constitution is that all property of the state, except as otherwise in the Constitution provided, and not exempt under the laws of the United States shall be taxed in proportion to its value, to be ascertained by law. Article 13, § 1a, under which exemption is claimed, provides:

> "Any educational institution of collegiate grade, within the state of California, not conducted for profit, shall hold exempt from taxation its buildings and equipment, its grounds within which its buildings are located, not exceeding one hundred acres in area, its securities and income used exclusively for the purposes of education."

[1] The decision of this case rests solely upon an interpretation of the language of the Constitution. Section 3613, subdivision 2, Political Code, was passed subsequent to the adoption of the constitutional amendment above set out, and it can in no way limit or extend the exemption therein granted. Neither is there involved in this case a claim of exemption of an institution covering part of a collegiate course, nor claim of exemption for that part of the property of an educational institution exclusively devoted to an entire or partial collegiate course, where such institution also conducts other grades on other property.

Within the period of time to which our attention is directed, to wit, the first Monday in March, 1919, and for several months thereafter, the total number of enrolled students in attendance at appellant University was 304, of which number but 37 had, before admission thereto, completed a four-year high school course or its equivalent. One hundred and seventeen pupils were enrolled in the academic department; the only requirements for admission thereto being the completion of the eighth grade course. Eighty-nine were in attendance upon the grammar grade department. Of the remaining 61 students, two-thirds of them were taking work which required for admission not less than four years of high school work or its equivalent. Thus it will be seen that but a small fractional part of the student body was engaged in work of a collegiate grade. But it is not necessary to resort solely to the laws of ratio or relations to determine the legal status of appellant.

[2] The language of the Constitution seems clear and unambiguous as to meaning and intent, and it is not at all necessary to read into it any other word or words to persuade us, even against our inclination, that appellant is not an educational institution of collegiate grade, and is therefore without the exemption provisions of the Constitution. Unquestionably it was the intention of the electorate, as expressed in the language of the Constitution, to exempt only educational institutions of collegiate grade. If it was not so, the words "of collegiate grade" would have been omitted, and the property of all educational institutions, both graded and mixed, if used exclusively for educational purposes, and not for profit, would have come within the exemption. Had it been the intention to grant the exemption claimed, undoubtedly appropriate and definite terms would have been selected to express the real purpose. It would not have been difficult to have said, by the selection of words and the arrangement of sentences, that the property of all educational institutions in which a collegiate grade is maintained or conducted shall be exempt from taxation.

As we read the language of the Constitution, exemption is granted to an institution of collegiate grade as a whole and not otherwise. Appellant University is made up or composed of a number of grades or groups of students ranking in classification below the grade defined as a collegiate grade. By far the largest number of enrolled students are not within the collegiate grade classification. Appellant is not, therefore, and cannot be, characterized as an institution exclusively of any particular grade, but one of many grades.

We are not required to speak in defense of the policy of the law granting exemptions to an institution of collegiate grade exclusively and withholding its favors from institutions such as appellant. The fact, however, that free elemental, rudimentary, and grammar schools are quite universal throughout the state, and the number of institutions of a collegiate grade offering training in technical knowledge and advanced branches of education are limited in number, and can be maintained only at a high cost to the educational bodies supporting them, may have been deemed a sufficient justification for the state to encourage by way of tax exemptions the establishment of such private institutions not conducted for profit and devoted exclusively to educational work of collegiate grade. The educational benefits accruing to the state by reason of the existence of such institutions may have been regarded as outbalancing any loss suffered by the tax-exemption. Many good reasons may be advanced to justify the exemption. The language we are called upon to construe is not only statutory, but also constitutional, and we are not at liberty to wrest from its place a single phrase in order to give a meaning to a section of the Constitution not warranted by the language employed. In such case we are bound to respect the maxim, "Ita lex scripta est."

[3] The subject of the section under discussion is "Educational Institutions of Collegiate Grade." These words are the antecedent of "used exclusively for the purposes of education," and under all rules or canons of construction qualify and limit the purposes for which the buildings, equipment, and grounds may be used. It is the rule of construction that, where general words follow the enumeration of particular classes of per

sons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. 36 Cyc. 1119; 25 R. C. L. 996, 997; 2 Lewis' Sutherland, Stat. Constr. 803, 804. Words used in a statute are to be read in a natural and ordinary sense. Black on Interpretation of Laws (2d Ed.) pp. 142, 143.

> "Where words and sentences, and parts of sentences, having no very definite signification in their ordinary use, are employed and clearly intended to have a particular and definite meaning and application, and this appears from their particular use, connection, and application in the statute, that meaning and application must be accepted as proper and controlling. * * * The rule of 'noscitur a sociis' is frequently applied in the construction of revenue laws." 25 R. C. L. 995, 996.

[4] The maxim, "Expressio unius est exclusio alterius," bears with full force upon the provisions of the language under consideration. The construction we have been forced to place upon the language is not narrow, but is as broad as the language itself will permit and a failure to go further is due to a dearth of words. It is true that it is the policy of the law to favor by reasonable legislation the maintenance of institutions designed to promote education generally. It is the duty of courts, in construing statutes enacted for their benefit, to indulge in reasonable liberality, to the end that the evident purposes of such legislation may become effective. It is equally true, on the other hand, that grants of exemption from taxation cannot be allowed, unless the intention to do so is expressed in direct terms, or is fairly inferable from the language of the instrument by which the right is claimed.

In concluding the discussion of this branch of the case, we may add to what has already been said that we are further fortified in our conclusion by the argument made in favor of the adoption of the constitutional amendment, as prepared by its sponsers and distributed to the qualified electors, as required by law, for their enlightenment and consideration prior to the general election at which it was submitted and adopted, to wit, November 3, 1914. We quote the following from the argument of the proponent:

> "Sixth. The amendment as drawn is carefully safeguarded against possible abuse by the following limitations: * * *
>
> "(a) It exempts only institutions of collegiate grade. * * *
>
> "(c) The exempt property is limited to buildings, equipment, and grounds, with securities and income 'used exclusively for the purposes of education.' Real estate held for investment or revenue will be taxed just as at present, only the educational 'plant' actually in use being exempt from taxation. * * *"

[5] The final question raised in this case is as to the scope of the authority of the assessor to correct an assessment at any time after the assessment has been made and prior to the sale of the property assessed for delinquent taxes under the provisions of section 3881, Political Code as amended by St. 1917, p. 968. Said section provides that:

> "Defects in description or defects in form or clerical omissions of the assessor, or clerical errors of the assessor, in any assessment book, when it can be ascertained from the assessment book, or from the assessor's maps or block books, or other papers in the assessor's office, what was intended, or what should have been assessed, may, with the written consent of the district attorney, be supplied or corrected by the assessor at any time after the assessment" and prior to the sale of said property.

Counsel have devoted themselves to a consideration of the meaning of the clause "or other papers in the assessor's office." We hardly think a decision of the question whether or not the cards and papers resorted to by respondent are sufficient to authorize the assessor to change the assessment in the manner attempted, to be necessary for a decision of the instant case. The situation, as we understand it, was as follows:

The head or manager of the Pasadena University failed to file a request for exemption from taxation, as required by law, until he had been notified by the assessor that, unless he did so, the University property would be assessed and required to pay its taxes. A few days before the first Monday in July, 1919, the assessor received from the head of the University an affidavit and claim for exemption. On July 7, 1919, before the rolls had passed from his custody, upon further consideration of said affidavit and claim, in connection with other information received, the assessor concluded that appellant was not entitled to exemption, and on that day directed one of his deputies to cancel said exemption entry. This the deputy neglected to do. On the same day the assessor indorsed the words "No exemption" across the face of appellant's affidavit and claim for exemption, which was then on file in his office. On a card kept by the assessor, enumerating the list of colleges exempt from taxation, appeared a notation opposite appellant's name, "Not allowed." This card was kept in the files of the office. On July 8, 1919, the assessor informed appellant by writing that its application for exemption had been disallowed.

On October 1, 1919, formal application was made by the assessor, with approval of the district attorney, to the board of supervisors for permission to change the assessment roll by placing the property of the Pasadena University thereon for taxation and for an order canceling such exemption entry. Appellant filed its objections to the proposed change on October 31, 1919. On December 9th the board ordered the correction to be made and the assessment was accordingly changed to include the omission and taxes were assessed against appellant to the amount of $1,660, which sum was subsequently paid under protest. In an effort to establish a right to make the change or supply the omission, papers admittedly not official records in a strict sense were resorted to and parol evidence was also admitted.

We think it unnecessary to enter into an extended discussion as to the admissibility of parol evidence received in the case or as to whether or not the documents and letters admitted in evidence were of the character sanctioned by section 3881, Political Code, and therefore entitled to consideration. We are of the opinion that, inasmuch as the property of the University was listed and described and the valuation thereof entered on the assessment roll, and the rate of the tax levy had been established by the board of supervisors, the carrying forward of the amount of tax was but a mere mathematical calculation, and the amount of taxes assessed against said University was easily determinable by the application of the simple rule of mathematical computation, and this was a permissible correction under section 3881, supra.

We are of the opinion that the auditor should have extended the tax notwithstanding such erroneous notation of exemption, and the omission to do so was subject to correction by the provisions of said section 3881, and which omission was supplied with the written consent of the district attorney.

Appellant's claim of exemption from taxation was heard within the time provided by law upon notice to appellant, who was present at the hearing and fully contested the same. It was determined as a matter of law that said University could not be brought within the grant of the Constitution. We find no reversible error in the proceedings.

The judgment is affirmed.

We concur: WILBUR, C. J.; KERRIGAN, J.; LAWLOR, J.; LENNON, J.; WASTE, J.; MYERS, J.

---

190 Cal. 690

BAYLEY v. GARRISON, County Auditor.
(S. F. 10512.)

(Supreme Court of California. March 24, 1923.)

1. Officers ⟹100(2)—Increase of salaries of deputies not violative of constitutional inhibition against increasing salaries of "officers"; "term of office."

The inhibition of Const. art. 11, § 9, providing that salary of a public officer shall not be increased during his term of office, applies only to officers who have a fixed and definite term, and does not preclude the increase of salary of a deputy holding office at the pleasure of his principal; such deputy having no term of office within the meaning of the constitutional provision.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Officer; Term of Office.]

2. Officers ⟹100(1)—Increase of salaries of deputies not violative of constitutional inhibition against increasing salaries of officers.

Increasing the salaries of deputies is not an increase of the salary of the officer by reason of the fact that the added advantage of more competent service or help inures to the benefit of the officer.

3. Statutes ⟹102(2) — Statutes increasing compensation of deputies payable from county treasury not in violation of constitutional requirement of uniformity of county government.

The uniformity of county government, as required by Const. art. 11, § 4, is not destroyed by a statutory construction which permits the increase of salaries of deputies, notwithstanding the constitutional inhibition of article 11, § 9, against increasing the salaries of officers, because some deputies are paid by the county, while others must be paid by the officer, from his salary; the fact that there is an inherent difference in the payment of compensation not, of itself, resulting in lack of uniformity in county government.

4. Constitutional law ⟹48—Statutory construction invalidating whole scheme of county governments for want of uniformity to be avoided.

A statutory construction which would result in overturning all county governments in the state by holding that the entire scheme of payment of county officers is violative of Const. art. 11, § 9, requiring uniformity in county governments, should not be indulged in if by any reasonable course it can be avoided.

5. Courts ⟹90(3)—Doctrine of stare decisis applied.

Where the dual system of fixing salaries of deputies of county officers, in some counties deputies being paid from the county treasury and in others from the salary allowed to the officer, has been for many years recognized by the Legislature, and held by the courts as not violative of Const. art. 11, § 4, requiring uniformity of county governments, the doctrine of stare decisis precludes the court from now holding otherwise.

6. Constitutional law ⟹48—Doubts resolved in favor of constitutionality of statute.

Where there is a reasonable doubt as to whether or not a legislative enactment violates a constitutional inhibition, the doubt must be resolved in favor of the validity of the statute.

In Bank.

Application by A. C. Bayley for writ of mandate against E. F. Garrison, as Auditor of Alameda County, requiring him to audit petitioner's demand for salary. Writ granted.

Fitzgerald, Abbott & Beardsley, of Oakland, for petitioner.

Ezra W. Decoto and Frank Mitchell, Jr., both of Oakland, for respondent.

WILBUR, C. J. This is an original proceeding in mandamus brought by a deputy in the office of the county clerk of Alameda county, whose petition existed before the county clerk took office on January 6, 1919, but whose compensation was increased by the Legislature of 1921, during the term of the office of the county clerk. The point involved, as stated in the petitioner's points and authorities, is as follows:

> "His petition involves the question as to the right to increase the pay of existing deputies, during the term of the principal, in cases where the principal at the commencement of his term was given a fixed salary and allowed deputies, also with fixed salaries, and all paid out of the county treasury."

That question was determined in favor of the petitioner's contention in the case of Harrold v. Barnum, 8 Cal. App. 21, 96 Pac. 104. In addition to the authorities cited in that opinion in support of the view there expressed the following cases may be cited: Board of Com'rs of Muskogee County v. Hart, 29 Okl. 693, 119 Pac. 132, 37 L. R. A. (N. S.) 388; State ex rel. v. Oklahoma City, 38 Okl. 349, 134 Pac. 58; State ex rel. Rumbold v. Gordon, 238 Mo. 168, 142 S. W. 315, Ann. Cas. 1913A, 312; Bowers v. City of Albuquerque, 27 N. M. 291, 200 Pac. 421; Stone v. State, 18 Ala. App. 228, 89 South. 824; Quernheim v. Asselmeier, 296 Ill. 494, 129 N. E. 828; People v. Stong, 67 Colo. 599, 189 Pac. 27; Hibbard v. Suffolk County, 163 Mass. 34, 39 N. E. 285.

The general rule is thus stated in 37 L. R. A. (N. S.) 389 as follows:

> "The general rule, however, seems to be that this constitutional prohibition against changing the salary of a public officer during his term of office applies only to officers who have a fixed and definite term, and does not apply to appointive officers, who hold only at the pleasure of the appointing power."

[1] It is clear then that so far as the increase of salary to the deputy is concerned it is not violative of article 11, § 9, of the Constitution, which prohibits the increase of the salary of an officer during his term of office for the reason that such deputy has no term of office within the meaning of the constitutional provision. Does the increase of the salary to a deputy increase the salary of the officer appointing the deputy? In considering this question it should be observed at the outset that the Penal Code (section 74a) makes it a felony for the officer to directly or indirectly receive or accept any part of the compensation of his deputy. That section provides as follows:

> "Every officer of this state, or of any county, city and county, city, or township therein, who accepts, keeps, retains, or diverts for his own use or the use of any other person any part of the salary or fees allowed by law to his deputy, clerk, or other subordinate officer, is guilty of a felony."

[2] It is clear then that whatever advantage the officer may derive from the fact that his deputy has an increased salary is not a direct benefit, but arises, if at all, from the securing of more valuable or competent help than could be obtained for the lesser amount. Is this advantage an increase of his compensation within the meaning of the Constitution? So far as we know this point has never been decided adversely to the constitutionality of an increase of compensation to the deputy because of whatever incidental advantage might result to the principal. The point does not seem to have been considered sufficiently important to have been even suggested in any of the cases. Perhaps the outstanding reason for this is that it is by no means clear that the additional compensation to the deputy is an advantage to the principal, and because the fixing of a salary to the deputy is altogether taken out of the hands of the principal, and there is no means of ascertaining whether he could do better or worse for himself financially by the selection and payment of the deputy out of his own salary. Perhaps the antithesis of the proposition under consideration will be helpful in reaching a conclusion. The Constitutions of many of the states prohibit the increase or the decrease of the salary of a public officer, as ours does, in the case of certain state officers. Const. art. 5, § 19. It has been held that the decrease of the salary of a deputy is permissible notwithstanding this constitutional provision. Somers v. State, 5 S. D. 321, 58 N. W. 804; Id., 5 S. D. 585, 59 N. W. 962. It seems clear that the Legislature could decrease the compensation of a deputy, at least to a reasonable extent, without in any wise affecting the compensation of the principal. If the same deputy continued to work for the reduced compensation it is evident that the salary of the principal would not thereby be reduced. If the volume of the work of the county officer was so reduced that the number of deputies supplied to him was wholly unnecessary it would seem clear that to take away the salary provisions for such unnecessary deputies would not constitute a reduction of his salary. For instance, if the Legislature should provide that the registration of voters should occur every four years, instead of every two years, and should make a corresponding reduction in the office force of the county clerk or registrar of voters, this would hardly be considered a reduc-

tion of their salary, for they would receive for their compensation the same amount they had theretofore received.

We conclude that the provision for the deputy is neither an increase of the salary of the officer nor of the deputy during his term of office within the meaning of article 11, § 9, of our Constitution, prohibiting an increase of salary.

[3-5] It is suggested that this construction of our Constitution brings this opinion in conflict with that just rendered in the case of Wines v. Garrison, 214 Pac. 56, a companion case, for the claimed reason that the conclusion reached is inconsistent not only with the authorities supporting the case of Wines v. Garrison, supra, but also the theory on which the County Government Act is held to be general and uniform within the meaning of article 11, § 4, of the Constitution. The question then is this: Does this construction of the act of the Legislature increasing the salary of the deputy render the Political Code dealing with the subject of county government unconstitutional? This suggestion requires a reconsideration of some of the fundamental principles involved in the question. It was definitely determined in the case of Tulare County v. May, 118 Cal. 303, 50 Pac. 427, that the system by which in some counties officers were paid in a lump sum and in other counties were paid a certain stipend, and were allowed a certain number of deputies, to be paid directly from the county treasury, did not destroy the uniformity of county government within the meaning of article 11, § 4, of the Constitution. In other words, it was there decided that the Legislature could provide both schemes for the compensation of county officers and their deputies. That conclusion has ever since been adhered to. A contrary conclusion would result in destroying all the county governments in the state by holding that the entire scheme for the payment of all county officers and deputies is unconstitutional and void. Such a result should not be arrived at if by any reasonable course it can be avoided. The doctrine of stare decisis furnishes the complete escape from this dilemma. It has been determined that the dual system of fixing salaries does not violate article 11, § 4. This conclusion was not only arrived at after full argument and careful consideration, but, in order that the conclusion might be reached, three previous decisions of this court were overruled. We ought not now to say after a lapse of 25 years, and after a continuous and consistent course of legislative and judicial action, that dissimilarities between the two systems, perhaps now for the first time fully appreciated, require us to reverse the decision in Tulare County v. May, supra, and to reconsider the authority of that conclusion.

In this connection it is suggested that the lump sum theory of compensation as discussed in Tulare County v. May, supra, and the corresponding system by which certain deputies were paid directly from the county treasury, were harmonized in the case of Tulare County v. May, supra, by holding, in effect, that in either case the entire amount to be paid by the county was fixed by the statute, and, in effect, in both cases payments were made to all officers and deputies from the county treasury. Consequently it is now suggested that, to hold that the lump sum payable from the county treasury can be increased in one class of counties, and not in another class of counties, is inconsistent with the decision in Tulare County v. May, supra, and those subsequent decisions following that case, including our own decision of the companion case, Wines v. Garrison, supra. It is true that the conclusion that the salaries of deputies can be increased in one class of counties by payments from the county treasury, and that, in order to increase the salaries of deputies in other counties, the increase must come from the officer who receives a lump sum from the county, does demonstrate that there is a difference between the two methods of fixing compensation; but the fundamental question is not whether there is a difference between the two systems, for that there is a difference is perfectly clear to us as it was to the authors of the opinion in Tulare County v. May, supra, but the question is whether the difference, whatever it may be, arises to such proportions as to destroy the uniformity in county government required by the Constitution. It was held otherwise in Tulare County v. May, supra. It was there recognized that there were some differences between the two systems; for instance, it was argued that the systems were not uniform, for the reason that in one case the county officer could determine whether or not he would employ a deputy, and thus determine whether or not the county would be compelled to pay the amount of that deputy's salary, while in the other class of counties the salary was fixed and certain. It was recognized that in one class of counties the saving resulting from not employing a deputy would inure to the benefit of the county officer, and in the other class of counties it would inure to the benefit of the county itself. Notwithstanding this discrepancy between the two plans, it was held that the system was, nevertheless, uniform. So here we clearly recognize that the increase of compensation to the deputy in one case must be paid by the county officer, if necessary, and in the other class must be paid by the county; but this does not create a greater irregularity than that involved in the proposition just stated.

[6] Moreover, we are not permitted to examine these questions in the light of cold logic, and determine by a system of syllogistic reasoning that a scheme may or may not be right or logical; but we are required merely to ascertain whether or not there is a reasonable doubt as to whether the Constitution has been violated by the legislative enactment. If there is such a doubt, that doubt must be resolved in favor of the validity of the statute. To overturn the statute in question would require us not only to entertain a greater doubt than a reasonable one as to the validity of the legislative action, but would also require us to reach that degree of certainty which alone justifies the overturning of previous decisions of this court. Both these considerations would constrain us to sustain the constitutionality of the act so far as its uniformity is concerned, even though we might entertain some doubt upon that question. It should be noted, also, that the doubt expressed is not as to the conclusion reached in Tulare County v. May, supra, that the act is uniform, but as to the validity of the reasoning by which that conclusion was reached, namely, that the two systems were equal—that is, that the lump sum salary and the salary of the officer, plus the deputy's salary, were equivalent—and, even though we may impeach this reasoning to some extent, it does not require us to set aside the conclusion that the County Government Act as enacted was uniform. As already pointed out, there may be differences and still be uniformity.

We conclude, therefore: That the increase of compensation to a deputy who holds office at the pleasure of his principal is not a violation of article 11, § 9, of the Constitution as to him; second, that the increase of the salary of the deputy is not an increase of the salary of the principal within the meaning of article 11, § 9; third, under the previous decisions of this court the system by which some officers in some counties are paid a lump sum and others allowed a salary, and also deputies and clerks payable from the county treasury is a uniform system, and our present conclusion does not require reconsideration of those cases holding the two systems of payment not to infringe upon the constitutional inhibition against the lack of uniformity in the county government, notwithstanding the fact that the conclusion reached indicates a dissimilarity between the two systems of paying the deputies.

The petition for writ of peremptory mandate will be granted.

We concur: SEAWELL, J.; KERRIGAN, J.; LENNON, J.; MYERS, J.; WASTE, J.; LAWLOR, J.

---

191 Cal. 4

STORM et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 10323.)

(Supreme Court of California. April 12, 1923.)

Master and servant 🔑373—Injury by dynamite caps exploded by employee smoking held not compensable as "arising out of employment."

Where apprentice painter, while sandpapering the walls of an unoccupied dwelling which his employer was renovating under contract, lost his eyesight by explosion of dynamite caps which in some unknown manner had been placed on a window sill of the room, and which were caused to explode by coming in contact with a spark from a match with which the painter lit a cigar, *held*, that the injury did not arise out of, nor was it proximately caused by, the employment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

In Bank.

Proceedings under the Workmen's Compensation Act by R. D. Lindsay, applicant, opposed by Floyd G. Storm, employer, and the New Amsterdam Casualty Company, insurance carrier. Award by the Industrial Accident Commission, and the employer and insurance carrier apply for certiorari. Award annulled.

Barry J. Colding, Theodore Hale, and Redman & Alexander, all of San Francisco, for petitioners.

A. E. Graupner, of San Francisco, for respondents.

MYERS, J. Writ of review to review an award of the Industrial Accident Commission. The essential facts found by the Commission are as follows:

> "(1) R. D. Lindsay, applicant, while employed as apprentice painter on February 13, 1922, at San Francisco, Cal., by defendant Floyd G. Storm, sustained injury occurring in the course of and arising out of his employment, as follows: While at work sandpapering the walls of an unoccupied dwelling which the employer was renovating under contract, the applicant sustained minor wounds and lost the sight of both his eyes by reason of the explosion of dynamite caps which in some unknown manner had been placed on a window sill in the room where he was at work and which were caused to explode by coming in contact with a spark from a match with which just previously the applicant had lit a cigar to smoke while he would be working."

It was also established without conflict in the evidence that Lindsay had been working in the premises where the injury occurred several days prior thereto; that his duties were to wash the walls and sandpaper the woodwork, preparatory to retinting and re-painting; that he was the only person working there on the day of the accident; that the dynamite caps which caused the injury were not on the premises at the time he was put to work there, nor were they there on the morning of the day he was injured; that they were placed there or dropped there while he was out at lunch on that day by some person unknown; that they were not brought there by his employer or any fellow employee, and that nothing of that sort was ever used by the employer in connection with his business; that the employer was not involved in any labor dispute or controversy which would afford a motive for placing the caps there; that there was not upon the premises at the time any paint, varnish, distillate, or any explosive or inflammable substance connected with the employer's business which could have contributed to the injury.

An injury, in order to be compensable under the terms of the Compensation Act (St. 1917, p. 831), must have been sustained by the employee "arising out of and in the course of the employment," and must have been "proximately caused by the employment." It is conceded that the injury herein was sustained in the course of the employment, but it is urged in behalf of petitioners that the facts found by the Commission, considered in the light of the other undisputed facts, do not justify the conclusion that the injury arose out of the employment or that it was proximately caused thereby.

They emphasize the thought that the purpose of the Compensation Act is to place upon industry the burden of only those losses which arise out of industry, as a natural and proximate result thereof, and that it was not intended to cover those losses which, while having some connection with industry, are in no sense a product or result thereof. They insist that the injury suffered by the employee herein can in no sense be fairly said to "arise out of a risk in some way peculiar to the business in which he was engaged." Honnold on Workmen's Compensation, p. 418.

We are convinced the petitioners' position is well sustained. As was said in Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164, and reaffirmed in Federal Mutual Liability Ins. Co. v. Industrial Acc. Comm., 187 Cal. 284, 201 Pac. 920:

> "The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employee's work or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasonably incident to the employment."
>
> "But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause." Kimbol v. Industrial Acc. Comm., 173 Cal. 351, 160 Pac. 150, L. R. A. 1917B, 595, Ann. Cas. 1917E, 312.

The instant case is clearly distinguishable from Whiting-Mead Co. v. Industrial Acc. Comm., 178 Cal. 505, 173 Pac. 1105, 5 A. L. R. 1518, except as to the point wherein it is there held that the act of smoking while at work, when not forbidden by the employer, does not constitute a departure from the employment. That is conceded by the petitioners herein. In that case the employee injured his hand while at work, and as a proximate result of his work. In order to enable him to continue working an agent of the employer bandaged the hand and saturated the bandage with turpentine. While at work thereafter the employee struck a match, which ignited the turpentine and seriously burned the injured hand. It is thus apparent that the presence of the inflammable substance in that case was a condition created by the act of the employer, and that it was one of the conditions under which the employee was required to work. Both of these elements are absent from the instant case.

The Kimbol Case, supra, presents more points of similarity to the case at bar. There the employee was injured by the collapse of a floor above the room in which he was required to work. The collapse was not due to a structural defect in the building, but to an unauthorized use which another tenant had made of the room above by storing heavy materials therein. There, as here, the risk which resulted in the injury was one created, not by the employer, but by a stranger to the employment, and it was there held to be "a risk to which the employer's business specially exposed the employee." That conclusion was predicated, at least in part, upon the fact that "the danger was a constant one, inherent in the place itself under the conditions there existing," and that it "was peculiar to the particular place in which the employee was required to work." No such conditions obtained here. The danger incident to the presence of the dynamite caps was not a constant one, but came into existence but an hour or two before the accident happened. The premises in which the employee was required to work were wholly free from any such danger, and so remained until just before the accident. That danger was not, in any sense, inherent in the place itself; on the contrary, so far as the evidence discloses, it was a purely fortuitous circumstance that those caps chanced to be left there at that place rather than in some other vacant building.

To render an injury compensable there must be discernible some relationship of cause and effect between the employment and the injury. "It is not sufficient for a workman to say, 'I should not have been injured unless I had been where I was and doing the work which I was employed to do.'" Cooper v. N. E. Ry. Co., 9 Butterworth's W. C. C. 129. It must be shown, in addition, that the injury was a natural or probable result of the employment, or of the conditions thereof. Such would seem to be the meaning of the requirement that it must have been "proximately caused by the employment." This case would have been no different, on principle, if the employee had been injured by a stray bullet coming from the scene of an attempted hold-up, several blocks away. Under those circumstances it would scarcely be claimed that the injury was proximately caused by the employment.

The distinction between the case of Gen. Acc., F. & L. A. Co. v. Ind. Acc. Comm., 186 Cal. 653, 200 Pac. 419, and cases such as the instant one was pointed out by this court in Fed. M. L. Ins. Co. v. Ind. Acc. Comm., 187 Cal. 285, 201 Pac. 920. The case of Benson v. Bush, 104 Kan. 198, 178 Pac. 747, 10 A. L. R. 1165, is not in point. In that case the employee was injured as the direct consequence of performing an act which his employment required him to perform. He performed that act in a negligent manner, but, contributory negligence being no defense, he was entitled to recover. In the case of Rish v. Iowa P. C. Co., 186 Iowa, 443, 170 N. W. 532, the presence upon the premises of the dynamite caps which caused the injury was due to the fact that the employer was using those caps in the conduct of its business, and the court affirmed the award because of its conclusion that this circumstance showed "the causal connection between the employment and the injury complained of." In Haller v. City of Lansing, 195 Mich. 753, 162 N. W. 335, L. R. A. 1917E, 324, the employee was injured by the explosion of gasoline which was brought to and kept upon the premises by the employer for use in his work. So, here, if the employee had been injured by an explosion of varnish or distillate which was upon the premises for use in connection with the employer's business, the causal connection between the employment and the injury would have been apparent. In Laurino v. Donovan, 183 App. Div. 168, 170 N. Y. Supp. 340, and 186 App. Div. 387, 173 N. Y. Supp. 619, the right to recover was predicated upon the circumstance that the injury was caused by the negligence of a fellow employee, acting in the course of his employment, while they were both working upon the employer's premises. The court there held that negligence of a fellow workman, in the course of the employment, which is neither a willful nor a sportive act, is a risk incidental to the employment.

It would serve no useful purpose to discuss in detail the remaining cases cited by the Commission in support of its award. Suffice it to say that there were present in each of those cases facts showing a causal connection between the employment, or the conditions thereof, and the injury complained of. That essential element is wholly absent in the present case, and the award is therefore annulled.

We concur: WILBUR, C. J.; KERRIGAN, J.; WASTE, J.; LENNON, J.; SEAWELL, J.; LAWLOR, J.

---

191 Cal. 22

LAPIQUE v. WALSH. (L. A. 7500.)

(Supreme Court of California. April 17, 1923. Rehearing Denied May 17, 1923.)

1. New trial 🔑163(2)—Granting of new trial vacates judgment rendered after trial and in pursuance thereof.

The granting of a new trial vacates the judgment which has been rendered after the trial and in pursuance thereof.

2. Costs 🔑260(4), 263—Appeal held frivolous, justifying imposition of $1,000 penalty as damages to respondent.

Appeal from order setting aside a so-called deficiency judgment, based upon the alleged invalidity of a second judgment of the Supreme Court vacating its previous judgment upon untenable grounds, *held* frivolous, and taken for delay, justifying the imposition of a penalty of $1,000 damages to be paid respondent.

In Bank.

Appeal from Superior Court, Los Angeles County; Dana R. Weller and Leslie R. Hewitt, Judges.

Action by John Lapique against Frank E. Walsh, administrator of the estate of Laurent Etchepare, deceased. From an order refusing to set aside order vacating purported deficiency judgment, plaintiff appeals. Affirmed.

John Lapique, of Orange, in pro. per.

Alfred Wright, Alexander Macdonald, Bauer, Wright & Macdonald, and Harry L. Dunnigan, all of Los Angeles, for respondent.

WILBUR, C. J. A motion was made by the respondent to dismiss the appeal in this action on the ground that the appellant's opening brief had not been filed in time. The appellant made a counter motion to submit the case upon his opening brief on the ground that the respondent had not filed a reply in time. The former motion was denied, and the latter granted, for the reason that we felt that the whole case had been decided by this court in its order denying a rehearing from a decision of the District Court of Appeal. Lapique v. Plummer, 50 Cal. App. 88, 195 Pac. 293; Lapique v. Walsh, 50 Cal. App. 82, 195 Pac. 296. The opinion of the District Court of Appeal will be found in 51 Cal. App. 191, 196 Pac. 512. It was held by the District Court of Appeal and affirmed by this court in the denial of a rehearing that the judgment affirmed by this court in De Leonis v. Walsh, 140 Cal. 175, 73 Pac. 813, was vacated and set aside by the order of the Supreme Court in De Leonis v. Walsh, 145 Cal. 199, 78 Pac. 637, reversing an order denying a new trial. In the course of the opinion of the District Court of Appeal it said:

> "We see no reason for holding that the same result [that is, the vacation of the judgment] did not follow upon a new trial being granted by the Supreme Court. Consequently, appellant's claim, under his purported assignment, gives him neither right, nor color of right, to revive a judgment which is legally dead."

In our decision denying a transfer to this court we said:

> "This general order necessarily had the effect of vacating and rendering for naught the judgment of June 3, 1901; and this notwithstanding the prior affirmance of the judgment. See Brison v. Brison, 90 Cal. 323, 327, 27 Pac. 186; Houser & Haines Mfg. Co. v. Hargrove, 129 Cal. 90, 61 Pac. 660; People v. Bank of San Luis Obispo, 159 Cal. 82, Ann. Cas. 1912B, 1148, 112 Pac. 866."

It is thus made to appear that the judgment upon which plaintiff founds his whole claim was vacated by the judgment of this court given October 29, 1904, and could not thenceforth be effective for any purpose. The appellant in his brief asks us to overrule the opinion expressed in our denial of the rehearing, claiming that it is obiter dicta.

[1] These opinions merely express what has been frequently determined, namely, that the granting of a new trial vacates the judgment which has been rendered after the trial and in pursuance thereof.

[2] In view of the fact that the appeal in this case is utterly frivolous and without the slightest foundation, some additional facts will be stated in order to further disclose that fact. Plaintiff's predecessor brought this action to redeem from a deed theretofore given by plaintiff therein to the defendant as security for an indebtedness owing from the plaintiff therein to the defendant, claiming that such indebtedness had been entirely paid. The court determined that the deed was in fact given as a mortgage, but that the plaintiff owed the defendant $2,444.09. De Leonis v. Walsh, 140 Cal. 175, 73 Pac. 813. This judgment was affirmed in the case just cited. An appeal was also taken by the plaintiff from the order denying a new trial, and in De Leonis v. Walsh, 145 Cal. 199, 78 Pac. 637, that order was reversed. The case was thereupon presented to the trial court for retrial, and upon such trial it was stipulated that the entire amount of the indebtedness owing from the plaintiff to the defendant had been paid, and in addition, the plaintiff had overpaid the defendant $4,834. It was accordingly adjudged that the deed given as security be canceled, and that the plaintiff have judgment for $4,834. The plaintiff's predecessor thus secured upon the retrial the property involved in the action and a judgment against the defendant. The title thus established in her was no doubt disposed of by her before her death, which occurred in 1908. Thereafter, on January 13, 1912, more than seven years after the judgment of 1905 was entered and had become final, an order was made by a judge of the superior court reciting that the cause was still pending, and substituting Juan J. Menendez, the son and executor of the last will and testament of Maria Espiritu Chijulla De Leonis as plaintiff. On January 15, 1912, an agreement was signed by Juan J. Menendez, as executor of his mother's estates, as follows:

> "In consideration of the sum of two thousand ($2,000.00) dollars I hereby agree to sell and transfer and convey all of my rights, title, and interest, that I now may have in the above-entitled decree and judgment filed on the 14th day of October, 1901, in the above-entitled action, Docketed October 16, 1901; entered October 16, 1901, Book 99, p. 149, by D. C. Burson, Jr., deputy clerk, to John Lapique, of Los Angeles county. Dated January 15, 1912. Juan J. Menendez, Executor of the Estate of Maria Espiritu Chijulla de Leonis, Deceased."

On March 12, 1912, Juan J. Menendez, purporting to act as son, legatee, devisee, and distributee of the undescribed residue of the estate of Mrs. Leonis, signed an agreement assigning "all my right, title, and interest, that I now may have in the above-entitled action, and judgment docketed and entered October 16, 1901, Book of Judgments No. 99, p. 149, to John Lapique."

On March 13, 1912, Juan J. Menendez was substituted as plaintiff, and on March 14, 1912, John Lapique filed an affidavit:

> "That he is the owner of the foregoing cause of action now pending in this Court, and that the assignment and transfer of judgment from Juan J. Menendez to your affiant is on file herein, transferring to your affiant all the estate, right, title and interest in the above-entitled action, and for that reason your affiant desires to be substituted as the plaintiff in the above-entitled action in place and in stead of Juan J. Menendez. John Lapique."

And upon that date the same judge of the superior court who had made the previous orders of substitution entered an order substituting John Lapique as plaintiff. Thereupon John Lapique began a series of proceedings in the superior, appellate, and Supreme Courts, in which neither party to the record had any interest in the land purporting to be the subject-matter of the action.

John Lapique based all his claims upon the contention that the original judgment entered in 1901, and affirmed in 140 Cal. 175, 73 Pac. 813, was not affected by the subsequent reversal of the order denying a new trial (145 Cal. 199, 78 Pac. 637), and that the trial in pursuance of such reversal was wholly void, although based upon a stipulation of the parties. Thus, after his alleged predecessor had secured the land and the fruit of the judgment rendered upon the new trial, and had thus obtained more than she secured by the original judgment, the substituted plaintiff claims the right to redeem the land as ordered by the original judgment, although the defendant no longer had the land.

On March 25, 1919, the clerk of the superior court entered what purported to be a deficiency judgment. This document covers 15 pages of the clerk's transcript on appeal, and is signed "Harry J. Leland, Court Commissioner," and was "Directed to be entered in the Judgment Book and Deficiency Judgment docketed 4/1/19." This "deficiency" amounted to $255,779.20, and was apparently rendered against the defendant Frank E. Walsh personally, as well as in his representative capacity, upon the theory that he was liable for the rents, issues, and profits of the lands involved in the action. This deficiency also included the amount awarded the plaintiff by the judgment of 1905, upon the new trial ($4,834), with interest thereon, amounting to $4,568.15. However, the clerk charges John Lapique with the amount of $2,444.09, fixed by the judgment of 1901 (see 140 Cal. 178), with interest from July 27, 1899, amounting in all to $5,845.89. Thus, on the face of the "deficiency judgment" the clerk gave to the plaintiff the fruits of both judgments, although John Lapique's entire claim was based upon the invalidity of the second judgment.

The court on June 13, 1919, set aside this so-called deficiency judgment by an order reciting that such purported judgment was void, and was entered by the clerk after an application for a similar judgment had been made to the court January 18, 1919, and had been denied. This is one of the orders appealed from. John Lapique on December 15, 1919, moved to set aside the order vacating the "deficiency judgment" upon various grounds, based upon the claim that the attorneys for the plaintiff and defendant in 1905 had no power to stipulate to the judgment then entered, and that the same was entered in contempt of the order of the Supreme Court affirming the original judgment (140 Cal. 175, 183, 73 Pac. 813), and upon the ground that the judge who entered the order vacating the "deficiency judgment" was disqualified, and numerous other grounds. This application was denied, and the appellant has appealed from this order. It is clear that there is absolutely no basis for the appeals. The entry by the clerk of the purported "deficiency judgment" was absolutely without authority.

This appeal is clearly frivolous, and evidently taken for delay. It is a case in which a penalty should be imposed for a frivolous appeal.

Order affirmed, with $1,000 damages to the defendant for frivolous appeal, to be entered as costs in the trial court.

We concur: MYERS, J.; WASTE, J.; KERRIGAN, J.; SEAWELL, J.; LENNON, J.; LAWLOR, J.

61 Cal. App. 291

PEOPLE v. KLOPFER. (Cr. 927; Cr. 2565.)

(District Court of Appeal, Second District, Division 1, California. March 7, 1923. Hearing Denied by Supreme Court May 5, 1923.)

1. Criminal law 🔑369(4)—Evidence of larceny of check held relevant to show opportunity to commit forgery.

In a prosecution for forgery, evidence showing a larceny by defendant of a check, written by the one whose name he was charged with subsequently forging to the checks in controversy, from the fireplace, where it had been thrown because it was blurred, and the cashing of that check with a forged indorsement, was relevant as directly connecting defendant with the forgery of the checks as charged, by showing his familiarity with the checks and check book and with the signature, which was forged.

2. Criminal law 🔑369(2)—Evidence of other offense is competent, if relevant to material issue.

The general rule that evidence of another and distinct offense is not admissible does not require the exclusion of evidence which tends to prove a fact material to the commission of the offense charged merely because it also shows another offense and may prejudice accused with the jury.

3. Criminal law 🔑1170½(6)—Question and answer subsequently stricken held not prejudicial.

The question as to who lived with accused, and an answer "a lady known as his wife," were not prejudicial to accused, where the answer, which was not entirely responsive to the question, was stricken out by order of the court.

4. Witnesses 🔑286(4)—Redirect examination as to suspicion of another offense held proper.

Where defendant had brought out on cross-examination of a witness for the prosecution the fact that the witness had lost a sum of money and that considerable feeling existed between the witness and defendant, it was not error to permit the witness, on redirect examination, to state that he suspected accused of taking that money.

5. Criminal law 🔑1170(3)—Exclusion of letter subsequently held admissible is not reversible error.

It was not reversible error for the court to exclude from evidence a letter when first offered by defendant's counsel, where he subsequently ruled that the letter was admissible, though defendant's counsel then neglected to offer the letter in evidence, since the inadvertence of counsel cannot be charged to the judge.

6. Criminal law 🔑427(3)—Acts and declarations of conspirator can be admitted before proof of conspiracy, if facts are intimately connected.

Aside from the general rule that the order of proof is within the discretion of the trial judge, it is not error to receive evidence of the acts and declarations of a conspirator before the corpus delicti or the conspiracy is proved, if the facts from which the conspiracy is to be inferred are intimately blended with the other facts going to make up the crime which is charged.

7. Criminal law 🔑511(4)—Evidence held sufficient to corroborate testimony of accomplice as to forgery.

Evidence that a written check subsequently cashed by defendant, and blank checks subsequently used in a forgery, were taken from a residence after one of defendant's visits, that defendant was hard-pressed for funds, with other facts and circumstances, *held* sufficient to corroborate the testimony of an accomplice that defendant forged the two checks.

8. Criminal law 🔑511(2)—Evidence corroborating accomplice need not be of strong nature.

To meet the requirements of Pen. Code, § 1111, evidence to corroborate an accomplice need not be of a very strong nature, but is sufficient if it tends in and of itself to connect the accused with the commission of the offense, though it must do more than raise a mere suspicion.

9. Criminal law 🔑829(10) — Requested instruction on corroboration of testimony held covered.

A requested instruction that corroborative evidence was additional evidence of a different character to the same point was sufficiently covered by a given instruction that the testimony was corroborated, when it was shown to correspond with the representation of some other witnesses, or to comport with some facts otherwise known or established by evidence.

10. Criminal law 🔑1173(2)—Omission from instruction as to corroboration of accomplice held not prejudicial.

The omission from an instruction on corroboration of an accomplice of the provision of Pen. Code, § 1111, that the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof, was not prejudicial to accused, where the jury was plainly told what was a sufficient corroboration, and there was ample corroborating evidence tending to connect accused with the commission of the offense.

11. Criminal law 🔑822(12) — Instruction defining corroboration of witness held not reversible error.

An objection that a charge that testimony was corroborated when shown to correspond with that of some other witnesses, or to comport with some facts otherwise known or established by evidence, was erroneous because the jury may have understood that it applied to the testimony of an accomplice, since it immediately followed an instruction relating to an accomplice, does not require reversal, where the jury elsewhere was appropriately instructed concerning both the testimony of the accomplice and the necessary corroboration of such testimony, since the instructions must be considered as a whole, and failure to arrange them in logical order is not ground for reversal.

12. Criminal law 🔑656(2)—Direction to defendant to write name faster held not misconduct.

In a prosecution for forgery, where defendant as a witness undertook to write the name forged to the check in controversy, a direction by the court to him to write the name again and write it faster was not misconduct on his part, since it was the duty of the judge to prevent any attempt by the witness to disguise his handwriting.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

William Klopfer was convicted of forgery, and he appeals from the judgment of conviction and from the order denying his motion for new trial. Affirmed.

George D. Higgins, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

HOUSER, J. Defendant was found guilty on each of two counts of an information charging him with having committed the crime of forgery. He appeals from an order denying his motion for a new trial and also from the judgment.

[1] Appellant's first specification of error is that the trial court erred in admitting evidence, over the objection of defendant, of the commission by defendant of a separate and distinct offense not charged in the information nor directly connected with the charges therein, to wit, the crime of larceny of a $50 check from the fireplace or grate in the home of Frank O. Helmig, on the 9th day of December, 1921. The two forgeries of which defendant was found guilty were respectively shown to have been committed on the 20th and 21st days of December, 1921. Frank O. Helmig was the complaining witness in the case on trial, and it was alleged in the information that it was the name of Frank O. Helmig which was forged to the two checks. The particular evidence admitted by the court, and to which counsel objected, is to the effect that, on December 9th, Mr. Helmig executed and indorsed with his own signature a check for the sum of $50, payable to "cash"; that because it was somewhat blurred he doubled it up and threw it into the fireplace; that defendant was a frequent visitor at Mr. Helmig's home and had access

to the desk in which Mr. Helmig kept his check book; that such check book was an ordinary business man's check book, with each check numbered in a series and Mr. Helmig's name printed thereon; that defendant was without funds and pressed for money; that on or about the 12th day of January the check which Mr. Helmig had thrown into the fireplace was returned to him by his bank, cashed. The testimony further showed that this particular check, after having been indorsed by Vernon T. Ashcraft, had been presented by defendant to one Jacobson as payment for a suit of clothes. Such evidence directly connected defendant with the crime of forgery of the two checks as charged in the information by at least showing his familiarity with the checks and the check book and the signature of Mr. Helmig and his opportunity to copy and to forge his signature. It also showed system, or motive, or guilty knowledge on the part of defendant.

[2] That such testimony may have tended to show that larceny was also committed by defendant is no cause for complaint upon the part of defendant, for, while it is a general rule of evidence that, on the trial of a person accused of crime, evidence of another and distinct offense is not admissible, it is also the rule that, where the evidence tending to prove such independent offense also tends to prove a fact material to the commission of the offense charged, such evidence is admissible, and the fact that such evidence may appear to prejudice the defendant with the jury is no ground for its exclusion. It is said, in the case of People v. Sanders, 114 Cal. 230, 46 Pac. 157:

> "If the evidence of another crime is necessary or pertinent to the proof of the one charged, the law will not thwart justice by excluding that evidence, simply because it involves the commission of another crime."

And the same principle of law is announced in the following cases: People v. Argentos, 156 Cal. 725, 106 Pac. 65; People v. Cook, 148 Cal. 341, 83 Pac. 43; People v. Ebanks, 117 Cal. 663, 49 Pac. 1049, 40 L. R. A. 269; People v. Walters, 98 Cal. 141, 32 Pac. 864; People v. McPherson, 6 Cal. App. 270, 91 Pac. 1098; People v. Rowland, 12 Cal. App. 19, 106 Pac. 428; People v. Mack, 14 Cal. App. 16, 110 Pac. 967; People v. Tomalty, 14 Cal. App. 234, 111 Pac. 513; People v. Kizer, 22 Cal. App. 15, 133 Pac. 516, 521, 134 Pac. 346. That the particular evidence to which objection is made was also admissible for the purpose of showing system, or motive, or guilty knowledge, is too well settled to require the citation of authorities.

[3] If for no other reason than that the answer was not entirely responsive to the question and because it was stricken out by order of the court, defendant was not injured by the following question and answer: "Q. Who else lived there with Mr. Klopfer? A. A lady known to me as his wife."

[4] Concerning the specification of error that the trial court erred in overruling the objection of defendant to a question propounded to the witness Ashcraft, with reference to the alleged theft by the defendant of the sum of $210 from said witness Ashcraft, which question and answer were as follows: "Q. Did you suspect Mr. Klopfer of taking the money at that time? A. Yes, sir;" it is sufficient to say that, in view of the fact that the question to which objection was made arose on redirect examination regarding a matter brought out on cross-examination—that is to say, the loss by the witness of the sum of $210, and that considerable feeling existed between the witness and defendant for the reason that the witness had accused defendant of taking it—the question was not improper, as it tended to throw some light on the possible bias or prejudice of the witness as to defendant.

[5] Counsel for appellant specifies as error the refusal by the court to admit a certain letter in evidence, but it appears that the court later decided that the letter was competent—at a time, so counsel says, "when the letter was not under consideration and in the hurry and stress of the trial counsel for defendant inadvertently overlooked the opportunity to again offer it in evidence." Counsel, having had the opportunity to put the letter in evidence, is in no position to predicate error upon the fact that the court first refused to admit it. Any inadvertence on his part cannot be properly charged to the judge of the trial court.

[6] Appellant next complains that the court erred in overruling the objection of defendant to the testimony of the witness Ashcraft, in advance of the corpus delicti being proven, of conversations concerning an alleged conspiracy before the conspiracy was shown. The corpus delicti was proved by this particular witness; and aside from the general rule that the order of proof is within the discretion of the trial judge, when the facts from which the conspiracy is to be inferred are so intimately blended with the other facts going to make up the crime which is charged, it is not error to first receive evidence of the acts and declarations of a conspirator. People v. Fehrenbach, 102 Cal. 397, 36 Pac. 678; People v. Daniels, 105 Cal. 262, 38 Pac. 720; People v. Van Horn, 119 Cal. 330, 51 Pac. 538; People v. Compton, 123 Cal. 408, 56 Pac. 44; People v. Donnolly, 143 Cal. 398, 77 Pac. 177.

[7] Appellant has urged that the court erred in denying defendant's motion for a new trial, upon the grounds that the evidence was insufficient to justify the verdict, that the verdict is contrary to the evidence, and that the verdict is contrary to law, the point being that there is no evidence which corroborated the testimony of the accomplice; but in this regard it should be remembered that the evidence, in addition to that adduced by the

accomplice, showed many other things—access, opportunity, corroboration of the means employed in and the object of cashing the $50 check; the defendant's financial condition; the disappearance of the $50 check from the fireplace of Mr. Helmig and its reappearance, together with the other forged checks, among Helmig's cashed checks; the motive: the use by defendant of Ashcraft, the accomplice, in the first instance, and later the use by defendant of Jacobson, an outsider, to further the scheme; the physical condition of the $50 check itself, with reference to its being crumpled, etc., as exhibited to the jury; the disappearance of all these checks at about the same time, that is, during defendant's visit or visits at the home of Helmig; that these checks were all similar in blank form, supporting the inference that defendant, having been shown to have had one of them, may have had all of them in his possession; together with the additional fact that exemplars of defendant's handwriting were admitted in evidence for the purpose of comparing them with the signatures and the indorsements on the forged checks. Considering all of these facts, which were corroborative of the testimony of the accomplice, the evidence was certainly sufficient to justify the verdict, which was neither contrary to the evidence nor contrary to the law.

[8] In order to meet the requirements of Penal Code, § 1111, regarding the corroboration of an accomplice, it is not necessary that the evidence received be of a very strong nature. Although more is required by way of corroboration than to raise a mere suspicion (People v. Thompson, 50 Cal. 480), if the evidence, however slight, tends in and of itself to connect the accused with the commission of the offense, it is sufficient (People v. McLean, 84 Cal. 482, 24 Pac. 32; People v. Barker, 114 Cal. 620, 46 Pac. 601; People v. Robbins, 171 Cal. 479, 154 Pac. 317; People v. Garwood, 11 Cal. App. 665, 106 Pac. 113; People v. Martin, 19 Cal. App. 295, 125 Pac. 919; People v. Flood, 41 Cal. App. 377, 182 Pac. 766).

[9] The next four specifications of error relate either to the refusal of the court to give, or to the giving by the court of, certain instructions. The first one to which attention is directed is that the court erred in refusing to give the following instruction requested by the defendant:

> "You are instructed that corroborative evidence is additional evidence of a different character, to the same point."

The principle of law contained in the refused instruction was sufficiently covered by another instruction given by the court as follows:

> "The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness, or to comport with some facts otherwise known or established by evidence."

Hence the defendant has no cause to complain in that connection.

[10] Another matter of which appellant complains is that the court erred in instructing the jury as follows:

> "A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence tending to connect the defendant with the commission of the offense. Such corroborative evidence need not tend to establish the precise facts testified to by the accomplice. It is sufficient if such corroborative evidence, standing alone, tends to connect the defendant with the commission of the crime charged."

Exception is taken to that instruction because there is omitted therefrom the following words, as found in section 1111 of the Penal Code: "And the corroboration is not sufficient, if it merely shows the commission of the offense or the circumstances thereof." An instruction containing, among other things, the exact words as herein quoted was also refused by the court. The jury was plainly told what was a sufficient corroboration; also that the offered evidence need not tend to establish the precise facts testified to by the accomplice. If the evidence offered in corroboration of the testimony given by the accomplice merely showed that an offense was committed or the circumstances thereof, but did not tend to connect defendant therewith, it is plain that such "corroboration" would not be sufficient. But an examination of the corroborative evidence, as herein outlined, will show that so many of the different pieces of evidence submitted to the jury for its consideration in connection with the corroboration of the testimony of the accomplice were entirely independent of, and so thoroughly separated from, any testimony given by the accomplice—all of which tended to connect defendant with the commission of the offense—that neither the omission of the phrase to which reference has been made from the instruction as given, nor the refusal by the court to include the same in instructions offered by defendant, can be said to have worked any substantial injury to him.

[11] The third complaint with reference to the instructions is that the court erred in charging the jury as follows:

> "The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness, or to comport with some facts otherwise known or established by evidence."

Counsel argues that the instruction was not proper because the jury may have understood that it applied to the testimony of an accomplice. But elsewhere the jury was appropriately instructed concerning both the testimony of an accomplice and the necessary corroboration of such testimony; besides the attacked instruction did aptly apply to the testimony given by other witnesses in the case; and, even assuming that the instruction in question immediately followed an instruction affecting an accomplice, such fact does not furnish ground for criticism for the reason, if for no other, that the instructions are not to be taken singly, but must be considered as a whole. It would be going a long way to hold that the failure of a judge to arrange a set of multitudinous instructions in logical order would be good ground for the reversal of the case.

The last specification of error regarding instructions is to the effect that the court erred in refusing to give each of the instructions requested by the defendant, and particularly the instruction with reference to the presumption of innocence. No argument is presented by appellant; neither is there any citation of authority. It suffices to say that an examination of the record herein discloses the fact that the jury was fully instructed on all issues in the case, and that the jury was especially instructed with reference to the presumption of innocence of defendant.

[12] Appellant also urges misconduct of the court as a reason why a new trial should be granted. He specifies that during the cross-examination of defendant as a witness, when, for the purpose of using the handwriting of defendant as an exemplar, he was requested to write the name of Frank O. Helmig, the court said to defendant: "Now write it again and write it faster." Such act on the part of the court did not constitute misconduct; and, while it does not appear that the court suspected the defendant of anything wrong in connection with his handwriting, it may safely be presumed that such was the case, and, if there was any doubt in the mind of the judge as to any attempt on the part of the witness to disguise his handwriting, it was the duty of the court to see that his natural and genuine handwriting was submitted to the jury.

Misconduct by the deputy district attorney is also suggested in that he brought out irrelevant matters concerning the defendant's living with a woman not his wife, and, in his closing argument, accusing defendant of stealing the $50 check from the fireplace or grate of Frank O. Helmig; but both those matters have heretofore been the subject of attention herein and it at least satisfactorily appears that, so far as the deputy district attorney was concerned, there was nothing which deserved criticism.

No prejudicial error appearing, it is ordered that the order denying the motion for a new trial and the judgment herein be, and the same are, affirmed.

We concur: CONREY, P. J.; JAMES, J.

Opinion of the Supreme Court in Bank Denying Hearing.

PER CURIAM. In denying the application for a hearing in this case, we withhold approval of that portion of the opinion to the effect that evidence of the theft of the $50 check was admissible to show system or motive, or guilty knowledge on the part of the defendant.

The application for a hearing in this court, after decision in the District Court of Appeal of the Second Appellate District, Division 1, is denied.

WILBUR, C. J., and LAWLOR, LENNON, WASTE, SEAWELL, and MYERS, JJ., and RICHARDS, Justice pro tem., concur.

191 Cal. 92

YOUMASHEF et al. v. WEISGERBER.
(S. F. 9931.)

(Supreme Court of California. April 27, 1923.)

Sales ⚷479(7)—Complaint in action by vendor after default in conditional sales contract held not to state cause of action.

Complaint in action by vendors after default of purchaser under conditional sale, seeking only a foreclosure of the purchaser's equity and an order compelling a reconveyance, *held* not to state a cause of action, as it did not pray for recovery of the balance due, and there was no need for a reconveyance, since, according to the allegations, plaintiff had retained and still had title, nor was a cause of action stated to recover possession; there being no allegation that defendants were in possession or of a demand by plaintiff.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by A. P. Youmashef and A. G. Youmashef against Fred Weisgerber. Judgment for defendant, and plaintiffs appeal. Affirmed.

Henry B. Lister, of San Francisco, for appellants.

Edward J. Linforth, of San Francisco, for respondent.

WILBUR, C. J. The plaintiffs entered into a contract with the defendant on the 20th day of January, 1920, wherein the plaintiffs agreed to sell and the defendant agreed to buy the furnishings and fixtures contained in the Arcadia Apartments, 522 Hyde street, San Francisco, and also the lease of said premises. Defendant paid $7,500, and the balance of the purchase price, amounting to $1,250, with 6 per cent. interest on the deferred payments, was to be paid in monthly installments of $150 each for 5 months, and at the end of the sixth month the balance of principal and interest was to become due. It was agreed that, if any installment of principal or interest was unpaid for 30 days after it was due, then the whole amount of principal and interest remaining unpaid should forthwith become due and payable at the election of the holder of this agreement. The defendant agreed to pay the rent of the apartments and pay all bills incurred in conducting the apartment house business. The plaintiffs agreed to deposit the bill of sale subject to a chattel mortgage on the furnishings and fixtures to secure the payment of rents "on the following terms and conditions, to wit: If the party of the second part [defendant] shall pay all money due and to become due as herein provided, and faithfully comply with each and all of the covenants herein contained, then in that event said bill of sale above referred to is to be delivered by the said Italian-American Bank to the party of the second part, [the defendant], or his agents, on demand." It was further agreed by the defendant, in case of a default in the payment of any installment for 30 days, "then in that event all moneys paid hereunder shall be forfeited to the party of the first part as liquidated damages, for nonfulfillment of this agreement, and as for rent for the use of said premises, and does hereby agree to peacefully surrender possession of the premises herein described, and the furnishings described in the inventory hereunto annexed, to the holder of this agreement." It was agreed that title should remain in the plaintiffs.

The plaintiffs brought this suit, claiming that the defendant had defaulted in the payment due April 20, 1920, to the extent of $50, and alleged that said default had continued for more than 30 days. The defendant answered and filed a cross-complaint alleging damages for fraud. The trial court found that all of the allegations of the complaint were true, and that none of the allegations of the answer or cross-complaint was true and rendered judgment that the plaintiffs should take nothing by their action. From this judgment the plaintiffs appeal on the judgment roll alone.

The plaintiffs insist that the action is one for the foreclosure of an equitable mortgage. The only thing that bears this out is the prayer of the complaint for a judgment foreclosing all of defendant's equity in the property described in the agreement and for an order compelling the defendant to reconvey the property immediately to the plaintiffs. The agreement was a conditional sale with the title remaining in the vendors and apparently with the possession surrendered to the vendee. The vendors upon default had a right to sue for the balance of the purchase price or to recover the possession of the personal property. Silverstin v. Kohler & Chase, 181 Cal. 51, 183 Pac. 451, 9 A. L. R. 1177. The plaintiffs did neither. They did not pray for the balance due under the contract, which, at the time of the filing of the amended complaint, was the full balance of the purchase price, nor did they ask for the possession of the property.

It is clear that the plaintiffs were not entitled to a judgment herein for the balance due them, for they did not pray for the recovery of such balance. They were satisfied to retain the amount already paid them and sought to secure the title to the property which they had sold to the defendant, but, according to their own allegations, they already had such title and consequently did

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

not need the interposition of the court to secure that title in themselves. The complaint did not state a cause of action to recover the possession of the property, because it contained no allegation that the defendant was in the possession thereof, or that the plaintiffs had demanded the possession of the property, nor did the plaintiffs pray for judgment awarding them the possession of the property.

The complaint failed to state a cause of action, and in consequence the judgment of the trial court that the plaintiffs take nothing by the action was not erroneous.

In the presentation of this matter in the briefs both parties have stated facts not shown by the record. The appellants excuse themselves for not bringing up a transcript of the evidence on the ground that the transcript would cost more than the amount involved in the action. They also claim that the defendant sold the property, and that by an agreement between the parties the sum of $1,000 from such purchase price was deposited with the clerk to pay the balance of $850 due the plaintiffs in the event it should be determined that the defendant's claims for damages were not sustained. The respondent claims that the plaintiffs refused to accept a judgment for the balance due or to accept payment of the $850. This the appellants deny. None of these matters is properly before us for our consideration.

The appellants have failed to show that the judgment of the trial court was erroneous and the judgment must be affirmed.

Judgment affirmed.

We concur: MYERS, J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.; KERRIGAN, J.; WASTE, J.

---

191 Cal. 80

WILMON v. AROS et al.

SMITH v. SAME.

(L. A. 7292.)

(Supreme Court of California. April 25, 1923.)

1. Appeal and error 🔑524—Maps and copies of the surveyor's notes, not incorporated in bill of exceptions or authenticated, form no part of record on appeal.

In an action to quiet title to land and establish a location of certain range lines, boundaries, and corners, where maps and a copy of the field notes and surveys of the property have been introduced below, but have not been properly incorporated in the bill of exceptions or authenticated in the manner provided by law, they cannot form any part on the record of appeal.

2. Appeal and error 🔑907(4)—Where record does not purport to contain all evidence produced, evidence cannot be held insufficient to sustain finding on appeal.

Where the bill of exceptions does not set out all of the evidence, the appellate court must affirm, upon the presumption that the court below decided correctly upon all of the evidence reported.

3. Boundaries 🔑4—Duty of court to establish lines and corners in best accord with natural objects and where least inconsistent with government surveys, notes, and plats.

In an action to quiet title and determine the location of range lines, boundaries, and corners, it is the duty of the court to ascertain, as near as might be, where the monuments were set by the government surveyors, and from records of the official survey and the evidence as to present conditions and positions of natural objects to locate lines and corners and lines in controversy, where they will best accord with the natural objects described in the field notes as being about the monuments found to exist and in a manner least inconsistent of the government surveys, notes, and plats.

In Bank.

Appeals from Superior Court, San Bernardino County; Rex B. Goodcell, Judge.

Actions by J. C. Wilmon against Teofilo E. Aros and others and Frederick Smith against Teofilo E. Aros and others, to quiet title. Judgments for plaintiffs, and defendants appeal. Judgments affirmed in each case.

Thomas T. Porteous, of Riverside, for appellants.

Swing & Wilson, of San Bernardino, for respondents.

WASTE, J. Two causes are affected by this appeal. The respective plaintiffs and respondents each brought an action against the same defendants to quiet title to what appear to be adjoining pieces of land. Each, for a second cause of action, alleged his ownership of the respective parcels of land, that certain boundary line fences existed, and that the defendants wrongfully entered, taking possession and ousting plaintiffs, and destroyed certain portions of the fence, to the damage of the plaintiff, in each case alleged to be in the sum of $500. By appropriate denials the defendants tendered issues on all of these matters. The actions were actually brought for the purpose of having the north and east boundaries of the plaintiff Wilmon's land, the south boundary of one portion and the east boundary of another portion of plaintiff Smith's land, concerning all of which there is a dispute, between the two plaintiffs on the one side, and the defendants on the other, fixed and determined by means of monuments and marks located on the ground. These boundaries can only be determined by fixing and locating the original corners and lines which are applicable to the lands of both plaintiffs, and the testimony as to the surveys made to fix those corners and lines applies to both tracts of land. It was therefore stipulated in the court below that the two actions be tried together and the testimony applied to both cases. On submission, separate findings and judgments were made. The plaintiffs prevailed, and the defendants have appealed.

[1, 2] The only point made by the appellants is that the evidence is insufficient to justify the finding of the trial court as to the location of certain range lines, boundaries, and corners, and that certain other original monuments set by the United States government surveyor are not now in place and cannot now be identified. For two reasons the judgment must be affirmed. There were introduced and admitted in evidence in the court below certain exhibits. These include a map of the lands in controversy, made by the county surveyor of San Bernardino county prior to the trial, a copy of government plat filed by the Surveyor General from field notes in his office, copy of the field notes and surveys of the property certified to by the Surveyor General of the United States, and a map of the township in which the property lies. These exhibits were not properly incorporated in the bill of exceptions and were not authenticated in the manner provided by law. They, therefore, form no part of the record on appeal. Moore v. Semple, 11 Cal. 360. The bill of exceptions does not set out all the evidence, and we are uninformed upon what record the court acted. The judgment must therefore be affirmed upon the presumption that the court below decided correctly upon all the evidence before it. Gates v. Buckingham, 4 Cal. 286; Miller v. Dailey, 136 Cal. 212, 220, 68 Pac. 1029. Assuming the exhibits to have been properly authenticated as part of the record on appeal, we should still be of the opinion that the findings are sufficiently supported by the evidence. The testimony of 13 witnesses, found in nearly 1,000 folios, was almost entirely directed to the location of the descriptive lines and corners of the property and physical objects thereon. Four competent civil engineers and surveyors of many years' experience gave precise and technical descriptions of surveys of the lands made by them. The witnesses did not all agree in many particulars concerning the lines and corners of the property. The surveyors did not locate certain monuments in the same place. All trace of some of the monuments has disappeared, and the exact places where they were erected cannot now be positively identified.

[3] The rule governing the duty of the trial court in such cases is so well expressed by this court in the two decisions in Weaver v. Howatt, 161 Cal. 77, 118 Pac. 519, and 171 Cal. 302, 152 Pac. 925, that it is only necessary to refer to those cases, which present facts in many instances parallel to the case at bar. It was the duty of the trial court to ascertain, as near as might be, where the monuments were set by the government surveyors, and from records of the official survey and the evidence as to the present conditions and positions of natural objects to locate the lines and corners of the sections and the boundary lines of the property in controversy at points where they will best accord with the natural objects described in the field notes as being about the monuments found to exist on the ground, and in a manner least inconsistent with the government surveys, notes, and plats.

With all the evidence in the case before it the trial court was satisfied as to the proper location of the lines in dispute, and its conclusions are reflected in the findings.

It is ordered that the judgments appealed from be, and each is, affirmed.

We concur: WILBUR, C. J.; MYERS, J.; KERRIGAN, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.

191 Cal. 69

GARFIELD v. FORD et al. (S. F. 10036.)

(Supreme Court of California. April 23, 1923.)

Guaranty 🔑30—Agent held not entitled to recover on guaranty contract executed in his name which did not disclose agent sold goods for principal only.

Where plaintiff sold goods to defendant F. in name of plaintiff's principal, defendants C. and S. executing a guaranty contract running to plaintiff, in consideration of plaintiff's sale of goods to defendant F., and the principal assigned to plaintiff all rights in the goods sold to F., *held*, under Civ. Code, § 2809, plaintiff could not recover on contract of guaranty because it did not disclose the fact he was selling only as agent and that the property sold belonged to the principal; the guarantors being entitled to know with whom they were contracting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by Chester A. Garfield, doing business under the name of Garfield & Co., formerly Garfield, Myers & Co., against Oscar Ford and others. Judgment against named defendant only, and plaintiff appeals. Affirmed.

Dozier & Dozier, of San Francisco, for appellant.

Sloss, Ackerman & Bradley, of San Francisco, for respondents.

WASTE, J. The plaintiff brought this action to recover the purchase price of a quantity of machinery alleged to have been sold by him to defendant Ford, it being alleged that defendants Castleman and Smith were guarantors of the amount due. The sole defense was that plaintiff did not sell the property. Judgment was entered that the plaintiff recover the value of the machinery from the defendant Ford, but take nothing against defendants Castleman and Smith. Plaintiff appeals from that portion of the judgment which denies him relief against the guarantors.

The facts are clearly established, and appellant admits that "it cannot be contended that there is no conflict of evidence." The case is presented by the findings, which are comparatively simple and involve but one question. Appellant entered into an agreement with the defendant Ford, in the name of his principal, the Ransome Concrete Machinery Company of New Jersey, to sell and deliver to Ford certain concrete mixing machinery and appurtenances, for the sum of $1,627.50, payable in installments; title not to pass until full payment was made, but delivery to be made at once. The day before this contract was made, but obviously in contemplation of its being entered into, the respondents Castleman and Smith executed the guaranty contract sued on. That instrument recites that, whereas appellant has agreed to sell to Oscar Ford certain machinery and equipment, in consideration of the premises and of the sale and delivery of such machinery and equipment by appellant to Ford, Castleman and Smith agree to and do guarantee the payment of the full purchase price thereof. The machinery was delivered, pursuant to the contract, but Ford did not pay for it, and this action was brought.

The evidence establishes, and the trial court in effect found, that the machinery agreed to be sold by appellant to Ford was the property of the Ransome Concrete Machinery Company of New Jersey, and that the plaintiff was merely the agent for that concern. While the trial court found that appellant retained an interest in the machinery and in the purchase price, the extent of that interest is not disclosed, and we may assume it was merely to the extent of appellant's commission on making the sale.

Although the fact was not pleaded, it appears that prior to the commencement of the action the Ransome Concrete Machinery Company sold and assigned to the plaintiff whatever right, title, and interest it might have in the machinery and equipment, and all claims and demands against the respondents. Defendant Ford has not appealed from the judgment entered against him. The theory of the defendants Castleman and Smith in the court below, and now, is that appellant cannot recover on the contract of guaranty because it does not disclose the fact that he was selling only as agent and that the property sold belonged to his principal. This contention must be upheld.

This is not a case of construing a doubtful or inartificially drawn instrument, in which recourse may be had to the facts and circumstances accompanying the transaction, in order to arrive at the intention of the parties, as was the situation in First Nat. Bank v. Bowers, 141 Cal. 253, 74 Pac. 856, cited by appellant; but one in which it is asserted that no liability was incurred by the guarantors to a party other than the one to whom the guaranty was plainly executed. The obligation of guarantors must be neither larger in amount nor in other respects more burdensome than that of the principal. Civ. Code, § 2809. They cannot be held liable upon any contract that is not within the terms of their guaranty. Glassell v. Coleman, 94 Cal. 260, 266, 29 Pac. 508; Graham v. F. & M. Bank, 116 Cal. 463, 466, 48 Pac. 384; Jack v. Sinsheimer, 125 Cal. 563, 568, 58 Pac. 130. "The strictness with which parties assuming to act upon the faith of a guaranty have been held to its precise terms is illustrated in Barns v. Barrow, 61 N. Y. 39; s. c., 19 Am. Rep. 247, where it was decided that a guaranty running to a member of a firm for goods to be sold by him, did not inure to the benefit of the firm of which he was a member, although they delivered the goods described in the guaranty." Evansville Nat. Bank v. Kaufmann, 93 N. Y. 273, 287 (45 Am. Rep. 204). A new party could no more be imported into the contract and imposed upon the guarantors without their consent than a change could be made in like manner in the other pre-existing stipulations. The respondents might have been willing to contract with appellant, but not with the Ransome Concrete Machinery Company of New Jersey. They had the right to know, and to decide for themselves. Without their assent—and it is not claimed that any knowledge or acquiescence existed—a thing was wanting which was indispensable to the continuity of the contract. National Bank v. Hall, 101 U. S. 43, 51, 25 L. Ed. 822.

The judgment is affirmed.

We concur: WILBER, C. J.; LENNON, J.; LAWLOR, J.; MYERS, J.; SEAWELL, J.; KERRIGAN, J.

191 Cal. 72

WOODSEND v. CHATOM et al. (Sac. 3375.)

(Supreme Court of California. April 23, 1923.)

1. Landlord and tenant 🔑323, 326(3), 330(1)—Partnership 🔑20—Agreement held to create relation of landlord and tenant, with common tenancy in crops.

A written agreement between a landowner and another, labeled a "lease," wherein the first party agreed "to lease," which provided for a definite term of three years' tenancy, with the privilege of two additional years, *held* to create the relation of landlord and tenant, rather than a cropping agreement or partnership, notwithstanding it provided, "The ranch shall run on a 50 per cent. basis to each party," and resulted in a tenancy in common in the crops grown under the contract, so that one who purchased the entire crop from the tenant, who had no permission to sell the whole, was liable to the landlord for conversion.

2. Estoppel 🔑75—Landlord held not estopped to recover share of crop unlawfully sold by tenant.

In an action for conversion by the owner of land, who by reason of the lease agreement was a tenant in common of the crop grown by the tenant, to recover his proportionate share from a purchaser of the whole crop, sold without authority by the tenant, where such tenant's occupancy was shown to be brief, and the lease under which he held was recorded for five months before the sale, and where plaintiff had never clothed his tenant with any authority to dispose of the crop, *held*, that the principle of estoppel could not apply, so as to defeat his right of recovery.

3. Sales 🔑234(3) — Purchaser of personal property acquires only title or estate of vendor.

A purchaser of personal property acquires only the title or estate of his vendor.

In Bank.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by L. E. Woodsend against A. G. Chatom and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Power & McFadzean, of Visalia, for appellants.

Farnsworth, McClure & Burke, of Visalia, for respondent.

SEAWELL, J. This is an action in conversion. Judgment went for plaintiff, and defendants have appealed.

Respondent, as party of the first part, and H. B. Wyllie, as party of the second part, entered into a contract, agreement, or lease, the nature of which is a matter of dispute, whereby the party of the first part agreed to lease to the party of the second part 240 acres of land owned by the former and situate in Tulare county. The instrument provided for a term of 3 years with a renewal privilege of 2 years. By said instrument the party of the first part agreed to furnish certain seed for the first year's tenancy. Thereafter seed was to be furnished from the premises, or if not so furnished the expense of supplying the same was to be borne equally by the parties to the contract. It was the obligation of the party of the first part to furnish horses, plows, tools, and other equipment, in good and reasonable condition. A long list of personal property to be furnished by the said party of the first part is enumerated. The party of the first part agreed to pay one-half of the cost necessary to maintain pumps for irrigating purposes and also agreed to furnish material for fencing as it should become necessary; also to furnish and develop a reasonable amount of water necessary for conducting the enterprise as occasion should demand and as should be mutually agreed upon between the parties; to build within one year after the execution of the lease a five or six room house for the use of the party of the second part. He agreed further to buy a one-half interest in pigs and to purchase an undivided half interest in a certain number of calves. The party of the second part agreed to supply all labor necessary to work the land under the lease and to plant all land that could be reasonably planted during his first year's tenancy and thereafter to fertilize the soil as provided, and to do everything necessary to the soil to successfully produce crops. Said party agreed to furnish labor for fencing and to repair such small buildings as might be required from time to time; to provide feed for the horses, labor for planting the first year's crops, and to keep all tools, harness, wagons, and all implements in good repair, and in every way promote the best interest of the parties concerned; to pay one-half the water rent and to plant such crops as would prove most profitable and to be mutually agreed upon; to furnish one-half of the purchase price of hogs or other stock to be fed from crops produced on the premises; to buy an undivided half interest in 30 yearling calves on the premises at a price of $35 each, payment to be evidenced by note and mortgage at 5 per cent. interest. Both parties to the contract were equally interested in the chickens, turkeys, and such fowls that should be raised. It was agreed between the parties that the "ranch shall be run on 50 per cent. basis to each party." The party of the first part reserved the right to sell the said property, provided the equity of the second party was properly protected. It was "agreed that lessee is to take possession not later than December 10, 1918." The following forfeiture clause was inserted:

"Party of the second part agrees to forfeit all rights and titles to any interest he may have, covered by this lease, if he fails to comply with this agreement, if within his power to do so."

Under the foregoing lease a crop of red milo maize of the value of $1,822.34 was raised and sold by Wyllie to the defendants, who were warehousemen and grain buyers at Corcoran, Kings county. It appears without dispute that respondent let H. B. Wyllie into possession of said 240 acres of land and that during his occupancy said maize was sown, cultivated, reaped, and sold to appellants, who had no actual notice that the land upon which it was raised was owned by respondent or that Wyllie was not fully authorized to sell the same. The lease or contract was of record.

[1] The proposition to which counsel have devoted much attention is whether the instrument in question is in legal effect a lease of lands or a cropping lease or copartnership agreement, or established a relation of tenants in common. It is labeled "Lease." The first expression found with reference to the relations of the parties is that "the party of the first part agrees to lease," etc. It provides for a definite period of 3 years' tenancy with a privilege of two additional years. In its recitals the term "lessee" appears once. It contains a forfeiture clause. and provides that "the ranch shall be run on a 50 per cent. basis to each party." In the production of crops all labor is to be furnished by said Wyllie. It contains a number of covenants to be performed by both parties. It is the claim of respondent that the instrument in question is a cropping agreement and does not create the relation of landlord and tenant; but, conceding it to be a lease, nevertheless, the parties thereunder were tenants in common as to the particular crop raised and sold by said Wyllie, one-half of which is claimed to be the property of respondent.

Appellants' claim is that the instrument meets all the requirements of an ordinary lease, the rent payable in the products of the soil rather than in money, and that the relation of landlord and tenant existed between the parties. Further, that if said writing was not a lease it constituted as between the parties a copartnership agreement, and that Wyllie had a right as a partner to make a valid sale of crops to appellants. Phrases common to articles of copartnership are intermingled with those essential to constitute a lease. Wyllie was let into possession, but he was not given absolute control as to the kind of crops to be raised. The instrument provides that such crops were to be planted as "will prove most profitable and be *mutually agreed upon.*" (Italics ours.) Impliedly plaintiff would be required to enter the premises to comply with his covenants, and perhaps he would have the right of entry for the purpose of inspection and to enable him to advise as to the kind of crops to be planted, the acreage and locality, and the method of cultivation to be adopted. The instrument is somewhat unusual in some of its provisions. As an illustration, it provides that each party shall hold an "undivided half interest in calves." It bears also some of the features of a cropping contract.

We are of the opinion, however, upon an examination of its terms, that the relation of landlord and tenant as defined in Harrelson v. Miller & Lux, 182 Cal. 408, 188 Pac. 800, existed, and that by the instrument it was intended to create the relation of tenancy in common in the crop to be raised. One of the strong elements noted in that case, to wit, delivery to plaintiff of his share of the crops to be made off the premises, is lacking here. This, however, does not in the least weaken the contention that the parties to the agreement were to become owners of the crops as tenants in common in equal shares. This question did not enter into the consideration of Harrelson v. Miller & Lux, supra.

The rule announced in Clark et al. v. Cobb, 121 Cal. 595, 54 Pac. 74, is not disturbed by the conclusion we have arrived at in the instant case. It was expressly held in that case that the conventional relation of landlord and tenant existed between the parties and that the grains and fruits to be delivered to the landlord when gathered and harvested was but the payment of rent. It is clearly pointed out in that case that the single difference differentiating the contracts there considered from ordinary leases was that the rent was to be paid in the products of the soil rather than in money. The Clark Case recognizes, however, that there is authority in this state holding that under certain conditions, even though a landlord and tenant be not co-tenants in the land, they may, nevertheless, be cotenants in the crops raised on the land, citing cases already referred to. See, also, Adams v. Thornton, 7 Cal. Unrep. 219, 82 Pac. 215. The landlord here, as in the case last cited, was to do more than merely receive a stipulated part of the crop as rent. The facts which sustain the conclusion in Clark v. Cobb, supra, are different in material respects to the covenants which exist in the contract of the parties to the present action.

The greater weight of authority and the better reasoning is to the effect that whether the relationship existing between Wyllie and respondent be that of landlord and tenant or a cropping relation, a tenancy in common in the crops was created by the terms of the contract. This principle was well recognized by this court in Bernal v. Hovious, 17 Cal. 541, 79 Am. Dec. 147; Henderson v. Allen, 23 Cal. 519; Walls v. Preston, 25 Cal. 60; Baughman v. Reed, 75 Cal. 319, 17 Pac. 222, 7 Am. St. Rep. 170; Jones v. Durrer, 96 Cal. 95, 30 Pac. 1027. Baughman v. Reed, supra, strongly supports the claim of cotenancy, which is the pivotal point in this case. Freeman on Cotenancy and Partition (2d Ed.) § 100, states the reason of the rule thus:

> "Every form of agreement, by which land is let to one who is to cultivate the same and give the owner as compensation therefor a share of the produce, creates a tenancy in common in the crops. An arrangement to cultivate land on the shares is not a lease. Landlords, therefore, favor this mode of letting their lands, because they thereby acquire an interest in the produce of the land; whereas, if such an agreement constitute a complete lease, the title to the crop produced would vest in the occupier, and the landlord would have no claim upon it until a division was made, and then his share would come to him as rent. 'Where the reservation is of an undivided share the property of that share is always in the lessor by virtue of his reservation, while the property of the residue is always in the tenant by the implied grant of profits, and they are therefore tenants in common of the crop until division.' 'The true test seems to lie in the question, whether there be any provision, in whatever form, for dividing the specific products off the premises. If there be, a tenancy in common arises, at least in such products as are to be divided.'"

In discussing the same question here presented, the court in Fuhrman v. Interior Warehouse Co., 64 Wash. 159, 116 Pac. 666, 37 L. R. A. (N. S.) 89, said:

> "The weight of authority is that every contract, whereby use of land is given to a party to cultivate and return to the owner a specified portion of the crop produced, creates a tenancy in common in the crop, and that this is true whether the agreement between the parties is a lease or a mere cropping contract. The tendency of the courts is to hold that, whenever there is a provision in any form of contract for a specific division of crops produced, a tenancy in common arises therein. Freeman, Cotenancy and Partition (2d Ed.) § 100; Foote v. Colvin, 3 Johns. (N. Y.) 216, 3 Am. Dec. 478; Putnam v. Wise, 1 Hill (N. Y.) 234, 37 Am. Dec. 309; Aiken v. Smith, 21 Vt. 172; Smyth v. Tankersley, 20 Ala. 212, 56 Am. Dec. 193; Dinehart v. Wilson, 15 Barb. (N. Y.) 595; Abernethy v. Uhlman, 52 Or. 359, 93 Pac. 936, 97 Pac. 540. In Smyth v. Tankersley, supra, the court said: 'In the case of Thompson v. Mawhinney [17 Ala. 362, 52 Am. Dec. 176], supra, it was decided by this court that a contract made with the owner of land, which the other party agreed to cultivate and to divide the products equally with him, was not, technically speaking, a lease, but that a tenancy in common was created in the products. In the contract under consideration, the mode of compensation adopted repels the conclusion that it could have been the intention of the parties that the land should not be cultivated, and thus assimilates its terms more closely to the contract in the case last cited. It is true, the phraseology adopted is that which is usual in leases, but the substance of the agreement is to be regarded, rather than the words (Putnam v. Wise, supra); and in contracts of this description, the true test seems to be, that wherever provision is made for dividing the specific products of the land, a tenancy in common results (Putnam v. Wise, supra, and authorities there cited).'"

The rule that, where a landlord leases land and receives a part of the crop as rent, the tenant cannot sell or dispose of the part so reserved, and the landlord and tenant are cotenants in relation to such crop, is so highly favored as to have become the settled law in at least some of the states. Cooper v. McGrew, 8 Or. 327, and cases cited; Abernethy v. Uhlman, 52 Or. 359, 93 Pac. 936, 97 Pac. 540.

Our conclusion is that the instrument before us possesses the indicia of a lease, and by its terms the parties thereto were made tenants in common in the crops to be raised. The claim that the parties to the writing were copartners is disposed of by the cases already cited, to which may be added the case of Smith v. Schultz, 89 Cal. 526, 26 Pac. 1087.

No mention is made in the instrument as to marketing or disposing of the crop after harvest and no authority was directed or impliedly given to Wyllie to act for respondent. In selling the whole of said crop the former acted without authority. As to what disposition respondent should make of his share of the crops was a matter for his determination alone. If he concluded it would be to his interest to dispose of them jointly with Wyllie, he might have done so; otherwise, he had a right to insist on a partition or division.

[2] Under the present settled state of the law governing sales of personal property, the principle of estoppel could not be applied to the facts of this case. The lease was executed December 14, 1918, and the crop in litigation was sold on December 23, 1919. Respondent was the owner of the land, and we are not advised that Wyllie owned said premises at any time or ever occupied them prior to December, 1918. His occupancy was brief. The lease had been of record for a period of five months before said sale. There is nothing before us to justify the conclusion that Wyllie had ever before the transaction in question made any sales of corn or other produce for respondent or was ever held out by him as being clothed with any such authority. Had appellants examined the records they would have at least been put on inquiry as to the ownership of the products of the premises owned by respondent.

[3] We find nothing to justify us in changing the general rule that a purchaser of personal property acquires only the title or estate of his vendor. California Cured Fruit Assn. v. Stelling, 141 Cal. 713, 75 Pac. 320; Pacific States Corp. v. Gill (Cal. App.) 206 Pac. 489.

The judgment is affirmed.

We concur: WILBUR, C. J.; KERRIGAN, J.; LENNON, J.; LAWLOR, J.; WASTE, J.; MYERS, J.

191 Cal. 58

STEVENS v. SNOW et al. (L. A. 6688.)

(Supreme Court of California. April 23, 1923.)

1. Libel and slander 🔑71—That publication accused one of having done only that which he could legally do no defense.

It is not a sufficient answer to a charge of libel to show that the publication only accuses plaintiff of having done that which he may legally do.

2. Libel and slander 🔑6(1)—Publication exposing person to hatred, contempt, ridicule, or obloquy libelous, if false and unprivileged; "libel."

"Libel" includes any publication which exposes a person to hatred, contempt, ridicule, or obloquy, if false and unprivileged, irrespective of whether it charges a violation of law, and this definition includes almost any language which upon its face has a natural tendency to injure a man's reputation, either generally or with respect to his occupation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Libel.]

3. Libel and slander 🔑19—Libelous character to be determined from natural effect on readers.

In determining whether newspaper readers understood the publication as charging plaintiff only with doing that which he had a right to do, the publication should be measured not so much by its effect when subjected to the critical analysis of a trained legal mind as by the question as to what would be its natural and probable effect upon the mind of the average lay reader.

4. Libel and slander 🔑6(2) — Publication charging crooked methods in procuring change in school district boundary libelous per se.

A newspaper article in effect charging plaintiff with procuring by crooked methods an unjust change in school district boundaries and by bad faith in so doing *held* libelous per se and without any elements in it negativing its defamatory imputations.

5. Libel and slander 🔑6(2)—Statement in libelous article held to imply plaintiff succeeded in imposing on public officers.

The statement in an alleged libelous publication charging plaintiff with procuring by crooked methods an unjust change in the boundaries of a school district, reading, "However, when we learn that S. worked the thing up and got it done, we do not so much blame the public officers who are involved in it," *held* clearly to imply that plaintiff succeeded in imposing upon the officers by some means.

6. Libel and slander 🔑93—Privilege not absolute must be pleaded specially.

The defense of privilege, to be available, must be specially pleaded; the exception that, when privilege appears upon the face of the complaint, it may be availed of by demurrer, being limited to cases of absolute privilege, under Civ. Code, § 47, subds. 1, 2.

7. Libel and slander 🔑101(4)—Defense of privilege one of confession and avoidance, and under it burden of proving absence of actual malice rests on defendant.

The defense of privilege in a libel action is essentially one of confession and avoidance, and under it the burden of proving absence of actual malice rests upon defendant.

8. Libel and slander 🔑107(1)—Admission of testimony of mental suffering of plaintiff's wife error.

In a libel action admission of testimony that plaintiff's wife was affected by the publication, that she cried and did not want to live in the same community where she and her husband were called pigs and hogs, and that she became sick and did not sleep, *held* erroneous.

9. Libel and slander 🔑124(5)—Instruction authorizing jury to consider plaintiff's mental suffering because members of his family suffered by publication erroneous.

Where plaintiff's testimony of the effect of the publication on his wife was erroneously admitted, an instruction permitting the jury to consider the mental suffering of plaintiff resulting from his consciousness that members of his family suffered by reason of the publication was erroneous as emphasizing the error in the admission of plaintiff's testimony.

10. Libel and slander 🔑121(1)—Verdict of $5,000 based in part upon incompetent evidence miscarriage of justice within Constitution so as to require reversal.

Verdict of $5,000 in a libel action *held* based in part upon erroneous admission of evidence of mental suffering of plaintiff's wife, resulting in miscarriage of justice within Const. art. 6, § 4½, requiring reversal, unless reduced one-half.

11. Appeal and error 🔑1140(1) — Appellate court powerless to determine what portion of verdict attributable to errors at trial.

The appellate court has no criterion by which to determine what portion of a verdict is attributable to errors in the admission of incompetent evidence and the giving of an erroneous instruction.

In Bank.

Appeal from Superior Court, Santa Barbara County; Merle J. Rogers, Judge.

Action by E. T. Stevens against Ernest Snow and another. Judgment for plaintiff, and defendants appeal. Reversed unless plaintiff consents to remission of damages.

Ford & Bodkin, of Los Angeles, and G. H. Gould and Harry W. T. Ross, both of Santa Barbara (Leon R. Yankwich, of Los Angeles, of counsel), for appellants.

John C. Benton, of Santa Barbara, for respondent.

MYERS, J. Defendants appeal from a judgment for plaintiff upon a verdict in his favor in an action for damages for libel. The action was based upon the following publication in the form of a letter signed by the defendants, and published in the Santa

Barbara Daily News (the plaintiff and defendants being residents of the Summerland district in the county, of which Santa Barbara is the county seat):

"Through no fault of our own we seem to be dragged into Summerland disputes. If there are factions in that town we are not interested in them. But we are interested in the crookedest deal in the shape of annexation of the territory of one school district to another that was ever put over on the quiet in the state of California. However, when we learn that E. P. Stevens—Ed. Stevens, well known to the readers of the Daily News—worked the thing up and got it done, we do not so much blame the public officers who are involved in it.

"What is it that causes a number of the people of Summerland to call us kickers and disturbers because we do not quietly submit to a form of legalized robbery? Let us show you and all fair-minded men and women what was done in November, 1917, without our knowledge and consent and of which we were not informed until we found it out by our tax statements. We cannot on this short notice furnish the Daily News with a plate from which to print a map; but that will be done later when it may do some good.

"This Ed. Stevens, with the help of some others in good faith, drew a description for a petition for annexation to Summerland school district of certain adjoining territory which looks as if it might properly belong to Summerland. The petition upon which the actual change was made was based upon a description altogether different from the original, and we do not know whether that change was made before or after the names were attached, but we do know that persons who assisted with the original description refused to sign the petition.

"Not knowing whether or not we can hope for fair play or a fair hearing in Summerland, we respectfully ask your readers in Santa Barbara, Montecito, and Carpinteria, who may have access to a map of East Montecito to trace out the description of Summerland school district as established two years ago. Here it is in brief: Beginning at the southeast corner of the Ortega rancho, and running thence north to the south line of section 11 (T. 4 N., R. 26 W., S. B. M.); thence east to the southeast corner of section 11; thence north to the northeast corner of section 2 near the summit of the Santa Ynez Mountains; thence west to the middle of the north line of section 3; thence south to the pueblo line; thence southeasterly along that line to a point north of lands of Allen S. Whiting; thence south to north line of lands of D. C. Williams, being now about one-fourth of a mile from the first line given herein; thence meandering gracefully southwesterly to the Pacific Ocean; and thence on the seashore to the place of beginning. It will be noticed that some one discovered that extreme tight lacing about the middle was about to prove fatal to the scheme, so the narrow connection along the Valley road is left for an example to the school children of an isthmus or a strait—but not of straight dealing. Will any person, kindly tracing this thing out on the map, let us know if in his opinion anybody not belonging to the species of animals from which we make pork will call it fair play or straight dealing or common decency.

"Now the boss down there in Summerland, Ed. Stevens, who owns the pool and card room on the corner, is in the background pulling wires to carry an election to vote bonds on us to help him build a schoolhouse—or something. If the people of Summerland love him and his pool room, we do not object. Let them have him. But why should we be called on to support him? We are not complaining of the extra taxation itself. But we do not belong to Summerland. We were unjustly taken from Ortega district without our knowledge. In order to reach Summerland, we pass immediately by the Ortega schoolhouse, down to the Coast highway, and over the Ortega hill, two miles beyond the Ortega school. Or we may pass through Ocean district, immediately by the schoolhouse, and go two miles further to Summerland. There are no other than those two roads.

"We need our funds for the district in which we rightfully belong; and we therefore appeal to the people of Summerland, if they do not approve of legalized robbery, not to vote their burdens upon us, but to give us a chance to undo the injustices done us in the past. After the present bond issue is defeated and we are permitted to pay our taxes into our own school funds, Summerland may tax herself to death for the benefit of her local bosses if she wants to. But please leave us out of it."

[1] Appellants complain that the trial court erred in instructing the jury that the publication was libelous per se, and they invoked the rule that "it is never libelous to accuse a person of having done that which he may legally and properly do." The validity of this rule may be conceded, but in its application the words "and properly" must not be ignored. It is not sufficient answer to a charge of libel to show that the publication only accuses the plaintiff of having done that which he may legally do. It has never been the law that a publication, to be libelous, must accuse a person of having committed a crime or otherwise violated some law.

[2] Libel, in this state, includes a publication "which exposes any person to hatred, contempt, ridicule or obloquy" (if false and unprivileged), irrespective of whether or not it charges a violation of law. "This definition is very broad, and includes almost any language which, upon its face has a natural tendency to injure a man's reputation, either generally or with respect to his occupation." Schonberg v. Walker, 132 Cal. 224, 227, 64 Pac. 290, 291. If the publication above quoted, disregarding the attempted enlargement thereof by innuendo, is libelous at all, it is libelous per se. "Where there is a statutory definition, * * * language which is fairly included in such definition is libelous per se." 132 Cal. 227, 64 Pac. 291. Considering the publication herein, "as well from the expressions used as from the whole scope and apparent object of the writer" (Cooper v. Greeley, 1 Denio [N. Y.] 358), it in effect charges the plaintiff with procuring by crooked methods an unjust change in the bound-

aries of a school district and with being actuated by bad faith in so doing. So regarded, it cannot be doubted that the natural tendency thereof would be to expose the plaintiff to obloquy, which is the equivalent of censure, reproach, blame, or reprehension. Bettner v. Holt, 70 Cal. 270, 11 Pac. 713; Tonini v. Cevasco, 114 Cal. 273, 46 Pac. 103.

Appellants urge that, conceding that some of the language used, if taken alone, would be libelous, nevertheless, when read in the light of the context, its defamatory character disappears, and it becomes apparent that the plaintiff is accused therein of only doing that which every citizen has a right to do under the law. They invoke the rule illustrated by the dictum that, "if a man be called a murderer, but it appears that the epithet was so applied to him because he unlawfully hunted on another's man's premises and killed several hares, there is no slander." They point out that the change of school district boundaries here referred to could only be made by action of the board of supervisors upon a proper petition therefor signed by the requisite number of heads of families, and that in acting upon such petition the supervisors have the authority under the law to change the boundaries therein proposed, as they actually did in this case upon the recommendation of the superintendent of schools. They point out that every citizen is accorded by law the right to prepare, circulate, file and urge the adoption of such a petition, and that all men are presumed to know the law. They submit that, when the publication herein is read in the light of these circumstances, it becomes apparent that it charges plaintiff only with doing that which he had a right to do under the law, that it should have been so understood by the readers, and that it is therefore not libelous.

[3-5] In the application of this rule, the publication should be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law and in the application of the rules of pleading as by the question, "What would be its natural and probable effect upon the mind of the average lay reader of the newspaper?" We have no doubt that the latter would understand therefrom that the plaintiff was accused of bad faith and crooked dealing. But, even when carefully analyzed, we find nothing in the article which destroys or negatives its defamatory imputations. Giving full effect to all of the rules of law invoked by appellants, the fact still remains that the plaintiff could have corruptly changed the description in the petition after the same was signed, and that he could have procured the action of the supervisors by corrupt methods or by "crooked" practices. There is nothing in the article which negatives either of these inferences. On the contrary, the statement that, "However, when we learn that E. P. Stevens * * * worked the thing up and got it done, we do not so much blame the public officers who are involved in it," clearly implies that he succeeded in imposing upon the supervisors by some means. Each one of appellants' claims in this connection was urged upon this court with much force and with equal reason in behalf of appellants in Earl v. Times-Mirror Co., 185 Cal. 165, 192, 196 Pac. 57, and there rejected. We conclude that the trial court correctly instructed the jury that the publication was libelous per se.

[6, 7] The contention that the court erred in instructing the jurors that the publication was unprivileged is without merit because the defendants did not plead privilege. That instruction told the jurors, in effect, that the question of privilege was not an issue in the case, and it was not. In this state the defense of privilege, like that of justification, must be specially pleaded or it cannot be availed of. Gilman v. McClatchy, 111 Cal. 606, 611, 44 Pac. 241; Swan v. Thompson, 124 Cal. 193, 200, 56 Pac. 878; Gosewisch v. Doran, 161 Cal. 511, 516, 119 Pac. 656, Ann. Cas. 1913D, 442; Riley v. Evening Post Pub. Co., 30 Cal. App. 294, 158 Pac. 225. The dictum to the contrary in Schomberg v. Walker, supra, 132 Cal. 229, 64 Pac. 290, was obiter for the reason that the defense of privilege was pleaded in that case. It is out of line with the settled course of decisions in this state and is not to be followed. It is true that under the early common law the defense of privilege was available under the general issue, but that is no longer the law of England, and has never been the law of this state. This defense is essentially one of confession and avoidance, and this is further evidenced by the circumstance that under it the burden of proving the absence of actual malice rests upon the defendant. Snively v. Record Publishing Co., 185 Cal. 565, 198 Pac. 1, 6; Longsworth v. Curson (Cal. App.) 206 Pac. 779. The rule that privilege, to be available as a defense, must be pleaded, is subject to the single exception that when it appears upon the face of the complaint it may be availed of by demurrer. Gosewisch v. Doran, supra; Riley v. Evening Post Pub. Co., supra. But this exception is limited to cases of absolute privilege under subdivisions 1 and 2 of section 47, Civil Code, and manifestly this must be so, because of the fact that in cases of qualified privilege the burden is upon the defendant to prove the absence of malice. The only privilege which could possibly be claimed herein is a qualified privilege, and the defendants, having failed to tender this issue by their answer, cannot be heard to say that it should have been submitted to the jury.

[8] We come now to a serious claim of error, the validity of which must be conceded. The plaintiff upon the witness stand was asked by his counsel the following question:

> "I will ask you what effect if any, it [the publication complained of] had on your wife, so far as you were able to observe—not from

what she told you, but from what you observed yourself?"

This was objected to "as irrelevant, immaterial, and incompetent, as the feelings of the plaintiff's wife are not subject for damages in this action." The objection was overruled, and plaintiff answered:

> "I know it made her feel bad. She cried about it and did not want to live in a community where we were called hogs and pigs; insisted that I sell the home and get out of there. I know that she was sick for two or three days afterwards—worried over it, and did not sleep."

That the admission of this testimony was erroneous cannot be seriously doubted. Respondent makes a half-hearted effort to justify it under the rule in Cahill v. Murphy, 94 Cal. 29, 30 Pac. 195, 28 Am. St. Rep. 88, and cases there cited, wherein it was held proper to show of what members the plaintiff's family consisted, "and the damages consequently enhanced by the fact that the members of the plaintiff's family would suffer by reason of the disgrace visited upon [plaintiff] by the slanderous charge." But that rule has never been extended so as to render admissible evidence to prove that members of plaintiff's family actually did suffer in consequence of the publication. To do so would be to import into the case collateral issues upon which no logical limitations could be placed. Another vice inherent in the ruling is that it would serve to make an element of defendants' liability depend upon, not what would be the natural and probable effect of the wrong done by them, but upon what was its actual effect upon the particular mentality, temperament, and nervous constitution of an individual who was a stranger to the action. The case of Dennison v. Daily News Publishing Co., 82 Neb. 675, 118 N. W. 568, 23 L. R. A. (N. S.) 362, is on all fours with the instant case on this point, and it was there held that the admission of testimony of the precise character here under consideration was prejudicially erroneous.

In Earl v. Times-Mirror Co., supra (see 185 Cal. 170-172, 196 Pac. 60), the plaintiff was himself a newspaper publisher, and the claim of the defense was that the libel complained of was but a circumstance which "occurred in a prolonged newspaper controversy which nobody took very seriously, not even the newspapers themselves." Under these circumstances the plaintiff was permitted to testify that he did take the matter seriously, that he suffered greatly in consequence thereof, and that he believed that his wife also suffered likewise In that case the trial court "was careful to instruct the jury that they were not to consider the plaintiff's testimony as evidence of the fact that the wife was affected by the article." In the instant case the trial court instructed the jury, in effect, that they were to consider that testimony as evidence of such fact. This court held in the Earl Case that under the peculiar circumstances of that case there was no error in admitting the testimony there received, but in doing so it was careful to point out that "such testimony is not received to establish the actual effect upon the community or upon the members of his family, but to prove the effect upon himself." This court also took pains to point out that the plaintiff there "did not testify to the effect of the article upon his wife, or of her grief, if any, upon him." The rule of the Dennison Case, supra, was there considered and its validity, in effect, conceded. In short, the court there indicated, unmistakably, that the admission of such testimony as was here admitted would have been prejudicially erroneous. See, also, Smith v. Atchison, etc., Ry. Co., 179 Cal. 611, 615, 178 Pac. 501.

[9] The trial court, at the request of the plaintiff, instructed the jury that—

> "You may take into consideration as an element of damage the mental suffering on the part of plaintiff, if any, growing out of the fact, if you find it to be a fact, that he was conscious that members of his family suffered by reason of the statements contained in the publication herein complained of."

This instruction adopted the theory which in the Earl Case was said to be "untenable." It emphasized and magnified the error in the admission of the testimony, as that was the only testimony in the case to which this instruction could have referred. It also, in effect, suggested to the jurors that they could base a finding of fact upon this testimony of conclusions which were incompetent, even if the subject-matter thereof had been otherwise admissible.

[10, 11] The admission of that testimony and the giving of this instruction were erroneous, and it remains only to consider whether these errors require a reversal of the judgment. Respondent calls attention to article 6, § 4½, of the Constitution, and suggests that they do not. The amount of the verdict was $5,000. Appellants make no claim that this was excessive, in the sense that it was so grossly disproportionate to the damages proved as to at once suggest the influence of prejudice or passion or improper motives. But it was sufficiently large, when considered in the light of the evidence produced, to give support to appellants' claim that it is attributable in part to the consideration by the jury of the evidence of the actual suffering of plaintiff's wife. There was no evidence as to the plaintiff's status in life, or as to the nature or extent of his business, social or political acquaintance, or associations. There was no evidence of the extent of the circula-

tion of the newspaper in which the publication was made, and no evidence that it had any circulation at all in the community in which the plaintiff and defendants resided. There was no evidence and no claim that the plaintiff suffered any injury in respect to his business or occupation. The compensatory damages were thus limited to the injury to his reputation and his mental suffering, and the evidence as to the former was most meager. We are thus impelled to the conclusion that a very substantial portion of the award was based upon a consideration by the jury of the evidence which was improperly admitted and then unduly emphasized and called to the particular attention of the jury by the court's instruction, which referred to the mental suffering of the plaintiff's wife. To the extent to which the verdict was based thereon, it resulted in a miscarriage of justice.

We do not overlook the fact that under the pleadings and the evidence a portion of the amount awarded by the verdict may be attributed to punitive damages. But no evidence was produced of the wealth of either of the defendants which would justify the imposition of a very heavy penalty by way of punishment or example, and the verdict is still sufficiently large, in the light of the evidence, to suggest that it must have been based in part upon the evidence erroneously admitted. It is therefore our duty to reverse the judgment and remand the case for retrial. It may be that the respondent, rather than suffer the expense and delay incident to a retrial of the action, would prefer to consent to a very liberal reduction of the judgment. We are not disposed nor have we any criterion by which to determine what portion of the verdict is attributable to the errors in the admission of the evidence and the giving of the instruction. But, if the respondent should be willing to consent that the amount awarded him by the verdict should be reduced by one-half, it could not then be said that in the judgment as so modified there is any miscarriage of justice.

The judgment is therefore reversed, unless the plaintiff shall, within 30 days after the filing of the remittitur in the superior court, file with the clerk and give to the defendants a stipulation remitting from the judgment the sum of $2,500. If such stipulation be so filed and delivered, the superior court is directed to amend the judgment in conformity therewith, and thereupon the judgment shall stand affirmed; appellants to recover their costs of appeal.

We concur: WILBUR, C. J.; LENNON, J.; KERRIGAN, J.; LAWLOR, J.; SEAWELL, J.; WASTE, J.

---

191 Cal. 46

LEE et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 10432.)

(Supreme Court of California. April 21, 1923. Rehearing Denied May 21, 1923.)

1. Prohibition 🔑10(1)—Lies to restrain assumption of jurisdiction of matter over which another court is exercising concurrent jurisdiction.

Prohibition will lie to restrain one court from assuming jurisdiction of a matter over which another, having concurrent jurisdiction, has assumed and is exercising jurisdiction.

2. Master and servant 🔑396—Court's jurisdiction to appoint guardian for dependent compensation claimants ousted by proceeding before Industrial Commission for appointment of trustee to administer award.

While the pendency of a proceeding before the Industrial Accident Commission, which has power, under Workmen's Compensation Act, §§ 11d, 14e, 28c, 55a, 57a(3), to appoint a trustee to receive and disburse an award by it for the benefit of a deceased employee's minor dependents, would not oust the probate court of jurisdiction to appoint a guardian to care for other property of such dependents, such court's jurisdiction is ousted where the estate consists merely of such award, though the commission's jurisdiction to appoint a trustee, in either case, is ousted by a prior proceeding in the probate court for the appointment of a guardian, who, however, must administer the award under the commission's orders.

3. Master and servant 🔑414—Appointment of trustee to administer compensation award held valid, as made in pending proceeding.

In view of Workmen's Compensation Act, § 20d, giving the commission continuing jurisdiction over its findings and awards for 245 weeks after the injury, and section 63a, giving it full power to do everything necessary or convenient in the exercise of its powers, an order appointing a trustee to administer an award some 8 months after the filing thereof is not a nullity.

4. Constitutional law 🔑24 — Constitutional amendment ratifying act may cure infirmities not impairing contract obligations or divesting vested rights.

A constitutional amendment ratifying and confirming a statute does not validate it, if it impairs contract obligations or divests vested rights, but may otherwise cure its infirmities.

5. Master and servant 🔑347—Compensation Act provision empowering commission to appoint trustee to administer awards constitutional.

In view of Const. art. 20, § 21, as amended in 1918 (see St. 1919, p. lxxv), vesting the Legislature with plenary power, unlimited by the Constitution, to create and enforce a workmen's compensation system, and ratifying and confirming the creation and existence of the

Industrial Accident Commission, with all the functions vested therein by the Workmen's Compensation Act, the commission's power to appoint trustees to administer awards is within the Legislature's constitutional authority, though it trenches on the superior court's probate jurisdiction.

In Bank.

Application by **Minnie Mae Lee and others** for a writ of prohibition, directed to the Superior Court of California in and for the City and County of San Francisco and others, to prevent further proceedings in a guardianship matter. Writ granted.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for petitioners.

C. A. Linn and H. C. Kelsey, both of San Francisco, for respondents.

KERRIGAN, J. This is an application for a writ of prohibition to prevent the superior court of the city and county of San Francisco from further proceeding in a certain guardianship matter, pending before that court, upon the ground of lack of jurisdiction. There is no dispute about the facts.

The petitioner, Minnie Mae Lee, an adult, Raymond R. Lee, Robert H. Lee, Herbert A. Lee, Edward T. Lee, and Howard G. Lee, minors, were the children of Robert S. Lee and Mittie Lee. In March, 1913, a decree of divorce was granted to Robert S. Lee from Mittie Lee. Prior to the commencement of any of the proceedings hereinafter mentioned, the children and Mrs. Lee resided in the state of Texas, and Mrs. Lee was duly appointed in that state the general guardian of said minors. The father of the above-mentioned minors and Minnie Mae Lee was killed August 2, 1920, in San Francisco, while in the employ of the Western Pacific Railroad Company. Thereafter an application was made to the Industrial Accident Commission for a death benefit on behalf of such minors. In that proceeding the children were represented by a firm of lawyers residing in Texas and by C. A. Linn, an attorney at law practicing in California. After a hearing the Industrial Accident Commission entered its decision awarding the children the sum of $4,900. In its decision it also fixed the amount of the fees to be paid to the said attorneys in the aggregate sum of $100, and directed the amount of the award to be paid in installments to Mittie Lee, as guardian and custodian of the minor applicants. No petition was filed in that proceeding for a rehearing, and the findings and award of the commission have been final since December 30, 1921.

At the first hearing of the case the referee of the commission, with the consent of C. A. Linn, attorney for the minors, appointed F. B. Lord as guardian ad litem and trustee for said minors. Through inadvertence no confirmation of this appointment was made by the commission until after its decision in the case, at about the time the present controversy arose in the superior court, to wit, August 12, 1922. In this order of confirmation the employer was directed to pay the installments of the death benefit to F. B. Lord, guardian ad litem and trustee, who, in turn, was to remit the payment to the Texas guardian for the support of the minors. The employment of said Texas firm of lawyers was for the purpose of representing the heirs of said Robert S. Lee in all proceedings arising out of his death. These lawyers, in turn, employed C. A. Linn to represent the Lees in California. Their employment was contingent, they to receive one-third of the amount recovered. The attorneys, being dissatisfied with the amount of the fees allowed them by the Industrial Accident Commission, assigned their claim to one Sidney Rhein, who commenced an action against the Lee minors for the sum of approximately $1,600. About the same time Linn, claiming to be a person interested in the estate of said minors, filed in the superior court, over their objection, a petition for the appointment of H. C. Kelsey as guardian of the estate of said minors, which appointment was in due course made. The proceeds of the award of the commission are now the subject of conflicting demands made upon the employer by Lord and Kelsey, each claiming the exclusive right to receive it—the first as trustee appointed by the commission; the second as guardian of said minors' estate.

[1] It is conceded that prohibition will lie to restrain one court from assuming jurisdiction over a matter when another tribunal having concurrent jurisdiction has assumed and is exercising it over the same matter. Dungan v. Superior Court, 149 Cal. 98, 84 Pac. 767, 117 Am. St. Rep. 119; 16 Corp. Jur. 1134 (6), § 583; Evans v. Evans, 154 Cal. 644, 98 Pac. 1044. That much being conceded, it is claimed by the petitioners, first, that the appointment on August 12, 1922, by the commission, of its trustee, F. B. Lord, ousted the superior court of jurisdiction to appoint a guardian of the estate of said minors, inasmuch as said estate consisted exclusively of the award in their favor by the commission, in the proceeding to obtain which the commission was empowered to appoint a trustee to carry out the terms of the award.

The Workmen's Compensation Act (Stats. 1917, c. 586), by section 11 (d), provides that a general guardian appointed by the superior court, or a guardian ad litem or trustee, may exercise before the commission any right given therein to any minor or incompetent, and the commission may appoint a trustee to receive and disburse compensation payments for the benefit of such minor or incompetent. Section 14 (e) of said act provides that an award or benefit granted by the commission to dependents of a deceased injured employee shall be paid to a trustee appointed by the commission or by a commissioner for the benefit of the person or persons entitled, and that the person to whom the benefit is paid shall apply the same in compliance with the findings and directions of the commission, and, further, that the commission may set apart or *reassign* the award to any one or more of the dependents, in accordance with their respective needs and as may seem just and equitable, and may order payment to a dependent subsequent in right or not otherwise entered. Section 28 (c) provides that the commission may order the award to be paid directly to the injured employee or his dependents, or deposited with any savings bank or trust company authorized to transact business within this state, or may order it deposited with the state compensation insurance fund, and that payments from such fund when so deposited shall be made by the trustee only in the amounts and at the times fixed by the order of the commission.

Section 55 (a), establishing the jurisdiction of the commission, provides, among other things, that all proceedings for obtaining any order which by the act the commission is authorized to make, "or for the determination of any other matter, jurisdiction over which is vested by this act in the commission, shall be instituted before the commission, and not elsewhere, except as otherwise in this act provided, and the commission is hereby vested with full power, authority and jurisdiction to try and finally determine all such matters," subject only to review by the Supreme Court or District Courts of Appeal; and section 57 (a) again provides that the commission shall have full power and authority:

> "(3) To appoint a trustee or guardian ad litem to appear for and represent any such minor or incompetent * * * and such guardian or trustee shall not be discharged from liability until he shall have filed an account with the commission or with the probate court and such account shall have been approved. The trustee or guardian shall be entitled to receive such compensation for his services as shall be fixed and allowed by the commission or by the probate court."

[2] It appears from a consideration of the foregoing provisions of the Workmen's Compensation Act that the Legislature has conferred upon the Industrial Accident Commission jurisdiction to appoint a person, designated a trustee, to receive and disburse an award made by it for the benefit of the dependents of a deceased employee—functions which, in the absence of this legislation would, in the case of minors or incompetents, devolve upon the guardian of their estate, appointed either by will or by the probate court. This jurisdiction is evidently not so extensive as that of the probate court, since it is limited to that portion of the ward's estate which consists of the award of compensation; it does not extend to any other property owned by the ward. The pendency of a proceeding before the commission, therefore, in which the commission has power to appoint such trustee would not oust the probate court of jurisdiction to appoint a guardian to care for such other property. But where the estate consists merely of the claim for compensation, or an award based thereon, the power and duty to administer which are conferred upon the commission, the jurisdiction of the probate court with regard thereto is, we think, ousted by the commencement, before the power of the probate court is invoked, of the proceeding before the commission by which it acquires jurisdiction to make and administer it. Conversely, the jurisdiction of the commission to appoint its own trustee is ousted by a prior proceeding in the probate court for the appointment of a guardian for the minor or incompetent, whether the estate consists of the claim for compensation or the resultant award only, or includes additional property. It is to be noted, however, that, when the award is being administered by a guardian appointed by the probate court, he must administer the same under the orders of the commission, since that body is granted powers in relation to the award which the probate court does not possess. Workmen's Compensation Act, § 14 (e).

[3] It is objected by the respondents that the order of the commission appointing F. B. Lord trustee is a nullity, for the reason that the proceeding in which the appointment was made was no longer pending before the commission; this contention referring to the fact that such appointment was made some eight months after the filing of the award. But section 20 (d) of the act gives to the commission continuing jurisdiction over its findings and awards for 245 weeks after the date of the injury giving rise to the proceeding; and section 63 (a) vests the commission with full power and authority "to do and perform any and all things, whether herein specifically designated, or in addition thereto, which are necessary or convenient in the exercise of any power, authority or jurisdiction conferred upon it under this act." The powers thus conferred are certainly ample to uphold the order of the commission appointing a trustee to carry out the terms of its award where, by the terms of the award itself, it has omitted to do so.

[4, 5] An objection is raised by the respondent to the appointment of a trustee by the commission, upon the ground that the duties of such trustee relate to matters of probate, and that the Constitution of the state vests probate jurisdiction exclusively in the superior court. Whatever merit there might have been in this contention when the act

was originally passed, it has ceased to exist since the amendment of 1918 (see St. 1919, p. lxxv) to article 20, § 21, of the Constitution, whereby the power of the Legislature to create an Industrial Accident Commission and to confer upon it governmental powers was considerably broadened, and the act theretofore passed by it expressly ratified and confirmed. That section, as amended, reads (in part):

> "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create and enforce a complete system of workmen's compensation, by appropriate legislation" including "full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character. * * * Nothing contained herein shall be taken or construed to impair or render ineffectual in any measure the creation and existence of the Industrial Accident Commission of this state * * * the creation and existence of which, with all the functions vested in them, are hereby ratified and confirmed."

Following this amendment, the Legislature, at its session of 1919 (St. 1919, p. 910), amended and re-enacted certain sections of the act of 1917, including the section authorizing the commission to appoint trustees for the collection and disbursement of awards made by it. While an amendment to a state Constitution ratifying and confirming an act of its Legislature is ineffectual to validate that act, if it impair the obligations of a contract or divest vested rights, still such an amendment may otherwise cure the infirmities of an act, and to that extent the act is thenceforth to be regarded as constitutional. 12 Corp. Jur. 1092. It follows that the power conferred upon the commission to appoint such trustees for the purpose indicated, even though it trenches upon the probate jurisdiction of the superior court, is within the constitutional authority of the Legislature.

In view of the conclusions reached upon the matters discussed, it is not necessary to consider other questions raised by the respondents. The superior court, for the reasons stated, was without jurisdiction to appoint a guardian for the nonresident minors and dependents of Robert S. Lee, deceased, and the writ of prohibition prayed for in the present proceeding should issue.

It is so ordered.

We concur: WILBUR, C. J.; MYERS, J.; WASTE, J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.

---

191 Cal. 12

O'MEARA v. SWORTFIGUER.
(S. F. 10051.)

(Supreme Court of California. April 12, 1923.)

1. Municipal corporations 🔑706(8)—Instruction that automobile driver was negligent if he violated ordinance held ground for reversal in view of conflicting statutes.

In an action for injuries sustained when struck by defendant's automobile at street intersection, in which there was evidence that defendant was driving more than 10 miles but less than 15 miles an hour with obstructed view of street traffic, instruction that defendant was negligent if he violated ordinance prohibiting the driving of an automobile at a greater rate of speed than 10 miles an hour, where driver's view of street traffic is obstructed, *held* ground for reversal, in view of St. 1919, p 220, § 22, subd. a, fixing the speed limit at a street intersection at 15 miles per hour.

2. Appeal and error 🔑930(1)—The appellate court must assume that jury accepted view most favorable to respondent.

In determining whether or not a verdict is supported by the evidence, the Supreme Court must assume that the jury accepted the view most favorable to the respondent.

3. Appeal and error 🔑928(1)—Supreme Court must assume that jury might have believed evidence on which refused instruction was predicated.

In determining whether or not the instructions given are correct, the Supreme Court must assume that the jury might have believed the evidence on which the instruction favorable to the losing party was predicated, and that if a correct instruction had been given the jury might have rendered a verdict in favor of the losing party.

4. Municipal corporations 🔑706(7)—Contributory negligence of plaintiff struck by defendant's automobile while running to board street car held for jury.

In action for injuries sustained when struck by defendant's automobile while running from one street car to board another which had been traveling in front of and in same direction as defendant's automobile, the question of whether the plaintiff was guilty of contributory negligence *held* for the jury.

5. Trial 🔑194(16)—Instruction that automobile driver was negligent if he failed to keep as near to curb as possible in violation of an ordinance held ground for reversal.

In an action for injuries sustained when struck by defendant's automobile in which there was evidence that defendant was not driving as near the curb as possible, instruction that defendant was negligent if he had not kept as near the curb as possible, in violation of an ordinance requiring him to so do, *held* error.

6. Trial 🔑194(16)—Instruction as to automobile driver's duty in passing street car held erroneous in view of evidence.

In an action for injuries sustained when struck by defendant's automobile, as plaintiff was running from one street car to board other

car which had been traveling in front of and in same direction as defendant's automobile, where the uncontradicted evidence showed that the street car in front of the automobile did not stop until it had turned off into other street, and that the automobile either proceeded directly forward, as defendant himself testified, or swerved to the left to pass around the rear end of the car as it turned, as other witnesses testified, instruction concerning the defendant's duty in passing a street car, which was stopping for the purpose of taking on or discharging passengers under an ordinance and Motor Vehicle Act of 1919, *held* erroneous.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Bertha O'Meara against Thomas Q. Swortfiguer. Judgment for plaintiff, and defendant appeals. Reversed.

E. S. Bell, of Oakland, for appellant.

L. T. Jacks, of San Francisco (Horatio Alling, of San Francisco, of counsel), for respondent.

WILBUR, C. J. This is an action to recover for personal injuries resulting to the plaintiff by reason of a collision between her and an automobile operated by the defendant at the intersection of Jones and O'Farrell streets, in the city of San Francisco, on the 6th day of September, 1919. The defendant was proceeding westerly along O'Farrell street and the plaintiff had alighted from a north-bound Jones street car to transfer to a north-bound cable car which turned into Jones street northerly from O'Farrell street. Defendant's automobile had been following the O'Farrell street car which turned from O'Farrell street to Jones street. The testimony as to how the accident occurred varied from that of the defendant to the effect that his automobile was standing still at the time of the collision and that the plaintiff heedlessly ran into its side, and the testimony on behalf of the plaintiff that the automobile operated by the defendant suddenly swerved to the left from behind the O'Farrell street car, which was turning from O'Farrell to Jones street, and, passing beyond the center line of O'Farrell street, struck her when she was about in the middle of the street intersection. The testimony also varied as to the speed at which the defendant was operating his machine at the time of the accident, from 15 miles per hour, to his own testimony to the effect that he was at a standstill at the time of the collision.

[1] The plaintiff offered in evidence certain ordinances of the city and county of San Francisco regulating street traffic, and the court instructed the jury upon the theory that these ordinances established the law of San Francisco with relation to such street traffic, and that if the defendant violated the terms of the ordinance he was guilty of negligence. The case of Ex parte Daniels, 183 Cal. 636, 192 Pac. 442, 21 A. L. R. 1172, had not been decided at the time of the trial of the action, which occurred July 26, 1920. By that decision it was determined that an ordinance of a county, city, or city and county in conflict with the Motor Vehicle Act (St. 1915, p. 397, as amended by St. 1917, p. 382), was void in the particulars where the conflict existed. There was testimony to the effect that the defendant was traveling more than 10 miles and less than 15 miles an hour. If, under the law, it was permissible for him to travel 15 miles per hour, under the circumstances the instruction was erroneous. It is contended by the respondent, however, that the instruction limits the speed of 10 miles an hour to those occasions where the view was obstructed and that defendant's testimony shows that his view was not obstructed. On the other hand, there is the evidence of the plaintiff that she looked towards the direction from which the automobile was approaching and did not see it, and there was other evidence to the effect that the automobile was following the street car, and plaintiff's explanation of the accident seems to be that the defendant suddenly swerved out from behind the street car and almost immediately struck her. Under these circumstances the instruction was erroneous.

[2-4] It is claimed, however, that this instruction was not prejudicial. The same contention is made with reference to the instruction to the effect that it was the duty of the defendant to travel as near the north curb line of the street as possible. In order to maintain this proposition the respondent sets out in her brief the two possible versions of the accident, the one most favorable to the respondent, the other the extreme view favorable to the appellant, and then asserts that the jury accepted the view most favorable to the respondent. It is true that in determining whether or not a verdict is supported by the evidence, we must assume that the jury accepted the view most favorable to the respondent. However, in determining whether or not the instructions given are correct, we must assume that the jury might have believed the evidence upon which the instruction favorable to the losing party was predicated, and that if the correct instruction had been given upon that subject the jury might have rendered a verdict in favor of the losing party. Any instruction applicable to the case which is clearly erroneous may and usually does result in a miscarriage of justice where the facts are as complicated as those involved in a collision upon the public streets of a populous city. The appellant relies upon the proposition that the evidence shows without conflict that the plaintiff was guilty of contributory negligence. It is sufficient to say in this respect that the question was for the trial jury. Burgesser et al. v. Bullock's et al., 214 Pac. 649.

[5] The jury were instructed that there was an ordinance of the city and county of San Francisco "requiring every person riding, driving, propelling, or in charge of any automobile to on all occasions travel on the right-hand side of such street, as near the right-hand curb thereof as possible," and that if the jury believed that the defendant "violated said ordinance by driving said automobile upon and along the southerly or left-hand side of said O'Farrell street in a westerly direction, and not as near the right-hand curb thereof as possible, then you are instructed in that behalf that you will find as a matter of law that the defendant was guilty of negligence in violating said ordinance." In this connection it should be stated that the defendant testified that his automobile was straddling the north rail of the north street car tracks up to the time of the accident, and consequently was not as near the north curb of the street as possible. He denied swerving his car to the left of the center of the street, as testified to by some of the witnesses. The jury were also instructed that the defendant was guilty of negligence as a matter of law if he "drove his automobile at a greater rate of speed than 10 miles an hour where his view of the street traffic was obstructed, either upon approaching an intersecting street or in traversing a crossing or intersection of ways, or in approaching or traversing across an intersection of ways, then you are instructed in that behalf that you will find as a matter of law that the defendant was guilty of negligence in violating said ordinance." It is difficult to determine from this instruction whether the defendant was guilty of negligence as a matter of law in traversing the street intersection at a speed greater than 10 miles an hour, or whether he was negligent in so doing only in the event that his view was obstructed. The Motor Vehicle Act as amended in 1919 fixes the speed limit at a street intersection at 15 miles per hour. Stats. 1919, § 22, subd. a, p. 220.

If the jury believed from the evidence in this case that the defendant was traveling in excess of 10 miles an hour in approaching the intersection and that the accident resulted from this rate of speed, they may readily have determined under the instructions that the rate of 10 miles per hour applied to the circumstances shown in the evidence and have based their verdict upon this rate of speed. We cannot say that they did not do so. With reference to the instruction concerning the duty of the defendant to travel as near the north curb line of the street as possible, it is contended that although the court instructed the jury that the law required the defendant to travel as near as possible to the north curb line, and although the defendant himself testified that he was not doing so, that the instruction did not direct a finding of negligence unless it appeared to the jury that the defendant crossed over to the south side of the street. It is true that the instruction was apparently framed upon this theory, but the jury were repeatedly told the terms of the ordinance, the ordinance was introduced in evidence, and it was repeatedly stated in the instruction that a violation of the ordinance in certain particulars was negligence. We doubt if it can be said with any degree of assurance that the jury were impressed by the instructions with the fact that it was only permissible for them to find negligence as a result of the violation of the provision of the ordinance where the defendant passed beyond the center line of O'Farrell street. It is clear, we think, from the instructions as a whole, that the jury understood that if the defendant violated the municipal ordinance in any respect he was guilty of negligence in that regard, and that if such negligence was a proximate cause of the injury the verdict should be for the plaintiff.

[6] The jury were also instructed at length concerning the duty of the defendant in passing a street car which was stopping for the purpose of taking on or discharging passengers, and the defendant's duties with reference to passing the car at a distance of at least 6 feet from the lower step was stated to the jury, and a violation thereof was declared to be negligence as a matter of law. The evidence is uncontradicted that the street car which the defendant was following did not stop until it turned completely off of O'Farrell street on to Jones street in a right angle position to that which it had occupied while defendant was following it. He did not pass alongside the street car at all, but either proceeded directly forward, as he testified, or swerved to the left to pass around the rear end of the car, as other witnesses testified. Neither the ordinance nor the statute (Motor Vehicle Act of 1919, Stats. 1919, § 20, subd. *o*, pp. 192, 217) applied to the situation as disclosed by the evidence, and this instruction should not have been given. The jury may have inferred from this instruction that if the defendant passed the street car within four feet, either while proceeding directly forward, as he claimed, or swerving to the left, as other witnesses claimed, that he was negligent, and they may have concluded that such negligence was the proximate cause of the injury. From the foregoing it is evident that the jury was erroneously instructed. We have no means of ascertaining the exact conclusions of the jury upon the facts. There were no special findings, and we cannot for that reason say whether the jury, if properly instructed, would have rendered a verdict in favor of the plaintiff or the defendant. The parties were entitled to have a jury determine the facts. The failure of the jury to pass upon and determine the facts is, of itself, a miscarriage of justice, unless, under the facts that are admitted as proved beyond controversy, this court can say that

the defendant was liable for the injury. In this case we need not inquire to what extent this court may weigh the evidence in determining whether or not there has been a miscarriage of justice, for it is clear that the ascertainment of fact in this case should have been left to the jury.

Judgment reversed.

We concur: MYERS, J.; SEAWELL, J.; KERRIGAN, J.; LENNON, J.; WASTE, J.; LAWLOR, J.

---

191 Cal. 83

HORNBLOWER (EDWARDS et al., Interveners) v. MASONIC CEMETERY ASS'N OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 10200.)

(Supreme Court of California. April 27, 1923.)

1. Cemeteries 🔑15—Conveyance of cemetery lot passes interest, not fee.

Conveyance by cemetery corporation of a cemetery lot does not pass any title or estate, but merely an interest, and the fee remains in the grantor, subject to the grantee's right to the exclusive use thereof for burial purposes.

2. Cemeteries 🔑15—Rights of lot owner stated.

The right of a purchaser of a cemetery lot, whether denominated an easement, license, or privilege, is a right of property, cognizable at least in courts of equity, and entitled to protection from invasion whether it be by a mere trespasser or from the unauthorized and illegal acts of the directors of the cemetery corporation itself, and is not a mere license or privilege revocable at the will of the corporation.

3. Cemeteries 🔑14—Morris Act does not permit cemetery corporation to abandon cemetery contrary to wishes of lot owners.

The Morris Act (St. 1921, p. 199), permitting certain cemetery associations by resolution ratified by majority of lot owners to abandon all or a part of the cemeteries and remove the remains interred therein, is merely an enabling act, expressing the consent of the state that the public use, under Code Civ. Proc. § 1238, subd. 14, section 1963, subd. 38, St. 1854, p. 20, § 4, Pol. Code, §§ 3105, 3109, be abandoned, and leaves private rights and obligations as between lot owner and a cemetery association unimpaired, and hence does not permit a cemetery association to abandon its cemetery and remove the remains interred therein against the objection of an owner of a lot therein which has been used for burial purposes.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by William B. Hornblower against the Masonic Cemetery Association of the City and County of San Francisco, in which F. E. Edwards and another intervened. From judgment for defendant, the named intervener appeals. Reversed and remanded with instructions.

Geo. Clark Sargent, of San Francisco (Sumner Hurd, of San Francisco, of counsel), for appellant.

Frank E. Powers, of San Francisco, for William B. Hornblower.

Byron C. Parker and Thos. P. Wickes, both of San Francisco, for Martin Kelly.

R. M. J. Armstrong and Charles L. Patton, both of San Francisco, for Masonic Cemetery Ass'n.

Francis J. Sullivan, Edgar D. Peixotto, James P. Langhorne, Harry S. Young, and George Lull, all of San Francisco, amici curiæ.

MYERS, J. This is a suit to enjoin the respondent cemetery association from carrying out its announced intention to abandon its cemetery within the city and county of San Francisco, and to remove the bodies therefrom and reinter them in another cemetery in an adjoining county. The respondent association was incorporated in 1864 under the provisions of the Rural Cemetery Act (Stats. 1859, p. 281). This act provides that any number of residents of the state, not less than seven, may form a cemetery association in the manner therein prescribed enumerates the power of such association, provides for the acquisition by it of the necessary lands and the platting and subdivision thereof into lots, for the sale and conveyance of such lots, for the annual election of trustees for the management and conduct of the business of the association, and that the proprietor or proprietors of any lot therein, not less than 200 square feet in area, shall have one vote at such election; provides that the land and property of such association shall be exempt from all public taxes, rates, and assessments and shall not be liable to be sold on execution or to be applied in payment of debts due from any individual proprietor; and provides (section 11) that whenever a cemetery lot shall be transferred to individual holders, after there shall have been an interment therein such lot "shall be forever thereafter inalienable, and shall upon the death of the holder or proprietor thereof, descend to the heirs at law of such holder or proprietor, and to their heirs at law forever; provided, nevertheless, that any one or more of such heirs at law may release, to any other of the said heirs at law, his, her, or their interest in the same, on such conditions as shall be agreed on and specified in such release. * * *" In 1866 the ancestor of intervener Edwards purchased from respondent a cemetery lot exceeding

200 square feet in area for a valuable consideration, and received from respondent a deed of grant, bargain, and sale thereto, purporting to convey the fee, with a habendum clause "unto the said party of the second part, his heirs and assigns forever, but to be held, owned, used and disposed of by said party of the second part, his heirs, executors, administrators or assigns subject to the provisions of section 11" [of the Rural Cemetery Act above referred to] "and also subject to and in accordance with such rules, regulations and by-laws as are hereunto annexed and such as may be hereafter adopted by the trustees of said cemetery association for the management of said cemetery." The regulations attached to the deed and those thereafter adopted, so far as appears from the record, all deal entirely with the management of the cemetery as such. Several bodies have been interred in this lot and are still there, and the intervener Edwards is the sole descendant and sole heir of said original grantee. In 1900 the board of supervisors of the city and county of San Francisco passed an ordinance reciting that "the burial of the dead within the city and county of San Francisco is dangerous to life and detrimental to health" and forbidding the same from and after August 1, 1901. The validity of this ordinance has since been affirmed by this court (Odd Fellows' Cemetery Ass'n v. San Francisco, 140 Cal. 226, 73 Pac. 987; Laurel Hill Cemetery v. San Francisco, 152 Cal. 464, 93 Pac. 70, 21 L. R. A. (N. S.) 260, 14 Ann. Cas. 1080), and by the Supreme Court of the United States (Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 30 Sup. Ct. 301, 54 L. Ed. 515). In 1904 the respondent elected to continue its existence under the provisions of the Civil Code, by unaminous vote of its trustees, in the manner prescribed in section 287 thereof. In December, 1912, by resolution of its board of trustees, ratified by a vote of the lot holders, at a meeting called for that purpose, it elected to continue its existence for a period of 50 years from and after the date of such extension, pursuant to the provisions of article 12, § 7, of the Constitution. In 1921 the Legislature passed a law, referred to by counsel, and to which we shall for convenience refer as the Morris Act (Stats. 1921, p. 199). It provides that any cemetery association owning a cemetery within the boundaries of an incorporated city or city and county having a population not less than 100,000, wherein burials shall have been prohibited for more than 15 years, may, by resolution of its governing body, ratified by a majority vote of its lot owners as are entitled to vote at corporate elections, at a regular meeting or special meeting called for the purpose, declare for the abandonment of the whole or a part of the cemetery and for the removal of the remains interred therein to another cemetery without the boundaries of such city; provides for the fixing of a date for the removal of the remains, and the publication of a declaration of abandonment specifying such date, which shall be not less than 10 months after the first publication; provides that after completion of the required publication the association shall have power to remove all remains and reinter them in such other cemetery or deposit them in a mausoleum or columbarium; specifies the manner of such removals; provides for the voluntary removal prior to such time by the lot owners; provides that if the improvements on the lot are not removed by the lot owners within a given time they may be removed and disposed of by the association, and no one shall thereafter be allowed to assert any claim or maintain any action with relation thereto; provides that whenever a cemetery or a portion thereof shall have been abandoned and the remains removed in the manner specified, the land from which such remains have been removed may be sold by the cemetery corporation, or mortgaged or pledged as security for loans, without order of court, provided that such sales must be confirmed by the superior court; authorizes the association to employ any money in its treasury to defray the expenses of such removal and reinterment, and that the surplus funds thereafter remaining shall be devoted to the perpetual care of the places of reinterment. Pursuant to the provisions of this act, the trustees of respondent adopted a resolution in August, 1921, for the abandonment of its cemetery and the removal of the remains therein, which was thereafter submitted to a meeting of the members and ratified by the vote of more than a majority thereof. This action was thereupon commenced to enjoin respondent from so proceeding. Appellant Edwards and others intervened therein, the case was submitted to the trial court for decision upon an agreed statement of facts, judgment rendered for defendant, from which intervener Edwards prosecutes this appeal.

[1] Respondent rests its right to proceed upon the provisions of the Morris Act. Appellant contends that if this act be construed as authorizing respondent to abandon its cemetery, remove the remains, and sell the land without his consent, it must be held unconstitutional as impairing the obligation of a contract, depriving him of his property without compensation and without due process, and denying him the equal protection of the law. Appellant claims to be the owner in fee of his cemetery lot subject only to a limitation of the use thereof to burial purposes. He further claims that if the cemetery shall be lawfully abandoned he will thereupon own the absolute fee, freed from that limitation. Respondent contends that its deed to the cemetery lot, though in form

a grant purporting to convey the fee, in legal effect passed no title or estate, but merely a right to the exclusive use thereof for burial purposes; that the entire title and estate remains in it, subject only to this use; and that if the cemetery shall be lawfully abandoned appellant's rights therein will be thereby terminated and it will own the land freed from all claims of appellant. The question thus raised, of the nature and extent of the estate or interest conveyed by a deed of a cemetery lot, has never been passed upon in this state so far as we are advised. The decisions thereon in other states are many and various. The interest thus conveyed has been variously held to be "a fee with limited use," "a base fee," "a qualified fee," "an easement," "a license," "a qualified and usufructuary right," and "a privilege." The great majority of the cases, however, do agree in the conclusion that such a conveyance does not pass any title or estate, but merely an interest, and that the fee remains in the grantor, subject to the right of the grantee to the exclusive use thereof for burial purposes. It remains to consider the extent and the limitations of this right of the lot owner.

[2] Counsel for respondent define the rights of a purchaser of a cemetery lot as follows:

> "He becomes a member of the corporation; he gains the right to bury in the lot so long as burials are not prohibited by competent authority; and he also gains the right to maintain the bodies buried in the lot so long as no lawful authority enforces the removal of them."

This definition seems to accord, both with reason and with the preponderant authority, and for the purposes of this decision we shall accept it as correct. It matters not, for the purposes hereof, whether we denominate this right an easement, or a license, or a privilege. The cases all agree, either expressly or by implication, in recognizing it as a right of property, cognizable at least in courts of equity, and entitled to protection from invasion whether it be by a mere trespasser or from the unauthorized and illegal acts of the directors of the corporation itself. See, for example, Hertle v. Riddell, 127 Ky. 623, 106 S. W. 282, 32 Ky. Law Rep. 477, 15 L. R. A. (N. S.) 796, 128 Am. St. Rep. 364; Brown v. Hill, 284 Ill. 286, 119 N. E. 977; Anderson v. Acheson, 132 Iowa, 744, 110 N. W. 335, 9 L. R. A. (N. S.) 217; Gowen v. Bessey, 94 Me. 114, 46 Atl. 792; note in 67 L. R. A. 118 et seq. The interest of appellant in the instant case must be something more than a mere license or privilege revocable at the will of respondent, because it was granted upon a valuable consideration and because it is expressly recognized by the law as a heritable right or property. In the case of Chew v. First Presbyterian Church (D. C.) 237 Fed. 219, a great many of the decided cases were reviewed, and the court there said:

> "Language has been employed in some of the decisions touching the relations between cemetery companies or religious societies owning burying grounds, and persons holding burial lots therein, which if applied to this case would be palpably inaccurate and unsound. It has been said that such lot holders possess only a mere license or privilege to use and maintain their lots during the continuance of the cemetery or burial ground as such. But such a doctrine is wholly inapplicable to the relation between the corporation defendant and the holders of lots in its cemetery. They have much more than a mere license or privilege to use the lots appropriated or assigned to them. Were it otherwise their right to continue in the possession of burial lots would be revocable and determinable at any time at the whim or pleasure of the corporation defendant. A mere license or personal privilege to enter upon and occupy land is not only revocable and terminable at any moment, but is nonassignable and nondescendible. If not earlier ended it terminates with the death of the licensee. In De Haro v. United States, 5 Wall. 599, 627 (18 L. Ed. 681), the court said:
>
> " 'There is a clear distinction between the effect of a license to enter lands, uncoupled with an interest, and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable, unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act, which, without it, would be unlawful, and while it remains unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death of either party, and cannot be transferred or alienated by the licensee, because it is a personal matter, and is limited to the original parties to it. A sale of the lands by the owner instantly works its revocation, and in no sense is it properly descendible to heirs. These are familiar and well-established principles of law, hardly requiring a citation of authorities for their vindication.'
>
> "But if what would otherwise be a mere license has for its object the permanent occupation of land, and its accomplishment involves the expenditure by the person to whom granted of money upon or in connection with the land, and the circumstances attending and surrounding the grant clearly evince an understanding and intention by both parties that its operation shall be permanent and not confined to the lifetime of the person to whom granted, and money be expended accordingly, there is presented the case of a license so executed as to constitute in equity, if not at law, an irrevocable contract good as against the original parties and their heirs or successors."

That case is not directly in point here because the question of the effect of a statute such as the Morris Act was not there involved. It is cited rather for the clarity of its reasoning and its comprehensive investigation of the authorities.

We conclude that prior to the passage of the Morris Act appellant had a right, cognizable in equity, to the continued and undisturbed use of his cemetery lot, which the respondent was bound by its contract to respect. Undoubtedly the Legislature had the power to terminate this right of appellant's by the enactment of a statute in the proper exercise of its police power. If the Legislature should find and determine that the continued maintenance of cemeteries in cities of the class described in the Morris Act will be dangerous or detrimental to the health of the citizens, it could compel the removal of the bodies and the abandonment of the cemeteries, and thus terminate the right of the lot owners to their continued maintenance. But the power to thus invade property rights exists only to the extent to which its exercise is reasonably necessary to protect the health, safety or welfare of the people. The question whether or not such necessity exists is for the Legislature, and its determination thereof is conclusive upon the courts if there is any basis in reason therefor. But it is clear that the Legislature has not found or determined that the continued existence of these cemeteries in any way threatens or endangers the health or welfare of the people, because it has provided, in effect, that they may continue to be maintained without let or hindrance as long as their trustees desire to do so.

[3] The Morris Act is nothing more nor less than an enabling act. It neither commands nor prohibits, but provides, in effect that these cemeteries may be either abandoned or continued at the discretion of their governing bodies, and it leaves that discretion uncontrolled and unguided. Its effect, as construed by respondent, would be to make the property right of appellant, resting in a contract executed upon a valuable consideration, subject to destruction at the will of others. This may not be done. Los Angeles v. Hollywood Cem. Ass'n, 124 Cal. 349, 57 Pac. 153, 71 Am. St. Rep. 75.

The maintenance of a cemetery is a public use (Code Civ. Proc., § 1238, subd. 14), to which the land here in question has been dedicated. (Stats. 1854, p. 20, § 4; Code Civ. Proc., § 1963, subd. 38; Pol. Code, §§ 3105, 3109). The state, therefore, has an interest in its maintenance, and the Morris Act should be considered as expressing the consent of the state to the abandonment of the public use, leaving the private rights and obligations as between the lot owners and the cemetery association unimpaired. The holding in Stockton v. Weber, 98 Cal. 433, 33 Pac. 332, that the Legislature may enact a general law under which cemeteries may be lawfully abandoned and the bodies lawfully removed therefrom, went no further than this. There were no contract rights of lot owners involved in that case, the burials having been made under a mere verbal license from the owner of the land without any contract. It is not practicable to discuss in detail the many cases from other states which have been cited in the briefs. Some of them are in conflict with the conclusions here expressed, others are distinguishable from the instant case, and others are in accord herewith. We are of the opinion that the learned trial judge erred in concluding that the Morris Act empowered the respondent to proceed in disregard of its contract obligations to the appellant. It is therefore unnecessary to consider the other points made by appellant in his briefs.

The judgment is reversed, and the case remanded, with instructions to the trial court to enter its judgment upon the findings, enjoining the defendant from abandoning its said cemetery or from in any way interfering with the remains now buried in the lot of intervener against his will or consent.

We concur: WILBUR, C. J.; LAWLOR, J.; LENNON, J.; WASTE, J.; KERRIGAN, J.; SEAWELL, J.

191 Cal. 35

Ex parte MATHEWS. (Cr. 2515.)

(Supreme Court of California. April 20, 1923. Rehearing Denied May 17, 1923.)

1. Municipal corporations 🔑605—City's power to make police regulations to suppress nuisances not limited to suppression of nuisances per se within statute.

A city has power to pass general police regulations to prevent nuisances, which power is not limited to the suppression of those things which are nuisances per se within the meaning of Pen. Code, § 370, and Civ. Code, §§ 3479, 3480.

2. Municipal corporations 🔑604—Keeping animals subject to municipal police regulations.

The keeping of animals is a proper subject of municipal police regulation, which regulation may limit the number of such animals that may be kept.

3. Municipal corporations 🔑604—Board of directors sole judges of expediency of ordinance regulating keeping of animals.

The board of directors of a municipality are the sole judges of the expediency of an ordinance regulating the keeping of animals within its limits.

4. Evidence 🔑13—Matter of common observation that herding together of animals may result in annoyance to persons residing near by.

It is a matter of common observation that the herding together of even the least offensive animals within a city may be conducive to noise, foul odors, and insect life, and may be a source of annoyance to persons residing in the vicinity.

5. Municipal corporations 🔑625—Ordinance regulating keeping of goats within city limits held not unreasonable.

An ordinance limiting the number of goats which may be kept within the city within certain distances of a residence, enacted under authority of Const. art. 11, § 11, *held* not unreasonable.

6. Municipal corporations 🔑626—Ordinance regulating right to keep goats held not invalid because not based on division of city into districts.

An ordinance declaring it to be a nuisance and unlawful to keep or maintain any goat within 50 feet or two goats within 100 feet or three goats within 300 feet or five goats within 1,000 feet of any dwelling house *held* not invalid because it makes each dwelling house the center of a zone within which an excessive number of goats may not be kept, rather than dividing the city into definite areas in which they might or might not be kept.

7. Municipal corporations 🔑625—Ordinance regulating keeping of goats not invalid because number permitted disproportionate to limits prescribed.

An ordinance limiting the number of goats which may be kept within certain distances from a dwelling house is not invalid because the number of goats permitted to be kept is entirely disproportionate to the distances or area prescribed.

8. Municipal corporations 🔑626—Ordinance precluding keeping of goats within certain distance of dwelling house not invalid because keeper's house excepted.

An ordinance precluding the keeping of goats within certain distances of a dwelling house is not invalid because it exempts the keeper's own house.

9. Municipal corporations 🔑120—In giving effect to ordinance, intention of board of directors must be considered.

In giving effect to a municipal ordinance, the intentions of the board of directors must be considered.

10. Municipal corporations 🔑604—"Person" as used in ordinance relating to keeping of goats held to include plural.

The word "person" as used in an ordinance declaring it a nuisance and unlawful "for any person, firm, or corporation to keep or maintain a goat within * * *" *held* to include the plural, and preclude several persons jointly from keeping more than the permitted number of goats within the areas prescribed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Person.]

11. Municipal corporations 🔑604—Ordinance relating to keeping of goats held not invalid because circumstance defeating its purpose might arise.

An ordinance declaring it unlawful for a person to keep certain numbers of goats within certain distances of a dwelling house *held* not invalid because under it a circumstance might arise where the number of goats permitted might be kept on each side of a dwelling by different persons, thus giving a total number within the area greater than could be kept by one person, and defeat the purpose of the ordinance.

In Bank.

Application by Mrs. Frank Mathews for a writ of habeas corpus, to be directed to the Chief of Police of the City of Pasadena. Writ discharged.

See, also, 209 Pac. 220.

J. G. Rossiter and B. M. Marble, both of Los Angeles, for petitioner.

James H. Howard, City Atty., of Los Angeles, and Leonard L. Riccardi, City Pros. Atty., of Pasadena, for respondent.

LAWLOR, J. Petitioner, Mrs. Frank Mathews, was convicted of a violation of section 14 (c) of Ordinance No. 1940 of the city of Pasadena, entitled, "An ordinance of the city of Pasadena defining nuisances ad prohibiting their maintenance." Section 14 (c) provides:

> "It is hereby declared to be a nuisance and it shall be unlawful for any person, firm, or corporation to keep or maintain any goat within fifty (50) feet of any dwelling house other than that occupied by him or it, or more than two (2) goats within one hundred (100) feet of any dwelling house other than that occupied by him or it, or more than four goats within three hundred (300) feet of any dwelling house other than that occupied by him or it, or more than five (5) goats within one thousand (1000) feet of any dwelling house other than that occupied by him or it.
>
> "(cc) It shall be unlawful to keep or maintain any male goat exceeding the age of six months within the limits of the city of Pasadena."

Petitioner's alleged offense consisted of keeping more than five goats within 1,000 feet of a dwelling house other than her own. Pursuant to her application therefor, a writ of habeas corpus was issued. directed to the chief of police of the city of Pasadena, and it is now claimed the section of the ordinance under which she was convicted is invalid.

Section 11, art. 11, of the Constitution provides that—

> "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

The ordinance involved was obviously adopted under the authority conferred by this section, as it also prohibits within the city limits the maintenance of such places as slaughter houses, filthy stables or yards, laundries unconnected with sewers, the pollution of water, and regulates the removal of garbage, the operation of rock crushers, and the keeping of fowls and animals, including dogs and cats kept for breeding purposes, rabbits, cattle, horses, and hogs. Section 5 provides for the regular cleaning and care of premises where stock, including goats, is kept, and section 21 (a) forbids the keeping of any noisy fowls or animals.

[1] Petitioner first contends that the ordinance conflicts with the state law. She points out that by section 370 of the Penal Code and sections 3479 and 3480 of the Civil Code certain things have been declared to be nuisances, they being, in so far as is material here, anything which is injurious to the health, indecent, offensive to the senses, or which interferes with the comfortable enjoyment of life or property by any community, neighborhood, or considerable number of persons. It is insisted that a municipality is without authority to determine that a specific act is within the Code definitions, such a question being a judicial and not a legislative one, and that the city of Pasadena, by providing regulations on the subject of keeping goats, has recognized that, when so kept, they are not a nuisance; that by the ordinance, which is designated as an act to define nuisances and prohibit their maintenance, it is attempted to bring the keeping of goats within the definition of a nuisance. A city clearly has power to pass general police regulations to prevent nuisances, and such power is not limited to the suppression of those things which are nuisances per se within the meaning of the Code sections. In Odd Fellows' Cemetery Association v. San Francisco, 140 Cal. 226, 231, 73 Pac. 987, 988, it is said that—

> "The exercise of this [police] power is not limited to the regulation of such things as have already become nuisances or have been declared to be such by the judgment of a court. * * * The decisions of this court show that ordinances have been upheld in many cases prohibiting things which could not be said to be nuisances per se, and which had not been declared to be such by any court. * * * Whenever a thing or act is of such a nature that it may become a nuisance, or may be injurious to the public health, if not suppressed or regulated, the legislative body may, in the exercise of its police powers, make and enforce ordinances to regulate or prohibit such act or thing, although it may never have been offensive or injurious in the past."

In Ex parte Shrader, 33 Cal. 279, 284, it is said that—

> "The power to regulate or prohibit conferred upon the board of supervisors not only includes nuisances, but extends to everything 'expedient for the preservation of the public health and the prevention of contagious diseases.'"

See, also, In re Lacey, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93.

The mere fact that in the ordinance the subject-matter is referred to as a nuisance cannot invalidate the enactment if the city had the power to pass it (Ex parte Johnson, 47 Cal. App. 465, 190 Pac. 852), and, in our opinion, it is to be regarded as a provision that the keeping of goats at any point within the city limits is inimical to the public welfare unless the sanitary regulations provided are complied with, and, under section 14 (c), that, even when kept as required by the ordinance, they may be obnoxious if kept within the stated distances of dwelling houses.

The question presented here is whether the keeping of goats is a proper subject of municipal regulation, and, if so, whether the regulation in question is a reasonable one. In Boyd v. City of Sierra Madre, 41 Cal. App. 520, 527, 183 Pac. 230, 233, with respect to the power of a city to pass police regulations, it is declared:

> "Primarily, it is for the city's legislative body, clothed with police power by direct grant from the Constitution, to determine when and what regulations are essential; and its determination in this regard, in view of its better knowledge of all the circumstances and the presumption that it is acting with due regard for the rights of all parties, will not be disturbed by the courts, unless it plainly can be seen that the regulation has no relation to the protection of health, safety, comfort, or well-being of the community, but is a clear invasion of personal or property rights under the guise of police regulation."

[2, 3] That the keeping of animals may be a proper subject of municipal regulation, and that by such regulation the number of animals which may be kept may be limited, does not admit of question. In re Linehan, 72 Cal. 114, 13 Pac. 170. The board of directors of the city of Pasadena have deemed the presence of all male goats and the unrestricted keeping of herds of female goats in the city injurious to the welfare of the residents. Petitioner alleges that the keeping of milk goats is a large, growing, and profitable industry; that such goats are not noisy, are not offensive to the senses, and do not at all interfere with the comfortable enjoyment of life or property. In support of these contentions petitioner in her brief refers to many treatises on goats, which would be proper subjects of consideration by the board of directors, who are the sole judges of the expediency of the ordinance. No answer to the petition was filed, but respondent in its brief takes issue with these claims, stating that—

> "The offensiveness of the goat lies in its persistent and nerve-racking bleat and in the foul odors which emanate from the animal and its abode, as ordinarily kept."

In our opinion petitioner's allegations are not conclusive of the question, in view of the strong presumption in favor of the validity of the ordinance. It was said in Odd Fellows' Cemetery Association v. San Francisco, supra, 140 Cal. 233, 73 Pac. 989, that—

> "There are some allegations in the complaint intended to show that this particular ordinance is unreasonable. It is well settled, however, that, except where the court can see, in the light of facts properly brought to its knowledge, that a given police regulation has no just relation to the object which it purports to carry out, and no reasonable tendency to preserve or protect the public safety, health, comfort, or morals, the decision of the legislative body as to the necessity or reasonableness of the regulation in question is conclusive."

See, also, Vanderhurst v. Tholcke, 113 Cal. 147, 45 Pac. 266, 35 L. R. A. 267.

[4, 5] It is a matter of common observation that the herding together of even the least offensive animals within a city may be conducive to noise, foul odors, and insect life, and may be a source of great annoyance and discomfort to persons residing in the vicinity. Assuming it to be a fact of which we may take judicial notice that female goats are, as claimed by petitioner, animals of high qualities, whose merits are underestimated by the public at large, still they might not be entirely free from all the characteristics which make other barnyard animals the proper subject of municipal regulation. We cannot say that when kept in numbers in a city they are so incapable of offending the senses and affecting the health and comfort of the residents, and, in the instance before us, are so unlikely to interfere with the public welfare, that they are beyond the power of regulation of a city government.

[6] Petitioner emphasizes the fact that the goat-keeping industry is increasing, and is as yet undeveloped in this part of the country. If this is so, and the animals tend to interfere with the comfort and health of the community, it is a stronger reason why municipal authorities should regulate their maintenance before they become too numerous, if for no other reason than to prevent the growth within the city of an industry which may subsequently become a nuisance and necessarily be suppressed. The regulation, in our opinion, is not unreasonable. Petitioner's most serious objection is to its plan, which in effect makes each dwelling house the center of a zone within which an excessive number of goats may not be kept. We see no objection to this method of determining what shall constitute such areas. A similar system was held valid in State v. Hord, 122 N. C. 1092, 29 S. E. 952, 65 Am. St. Rep. 743, which decision upheld an ordinance providing that no person should keep a hog pen with a hog in it within 100 yards of another's dwelling. See, also, In re Lacey, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93. In any city such a regulation would insure equal protection against the evil to all within its limits, and in a city built up irregularly, with a population unevenly scattered, a greater freedom would be accorded the inhabitants in the matter of keeping animals than by a general ordinance dividing the territory into business and residential districts, or by attempting to divide the city into definite areas in which goats might or might not be kept.

[7] It is claimed by petitioner that the regulation in this instance is unreasonable in that the distances prescribed in the ordinance are entirely disproportionate to the number of goats kept. Thus it is pointed out that the distances provided in the case of six goats is three times that provided for the keeping of five. The objection to six goats may be but little greater than that to five, but in a regulation such as this some definite number must be fixed where a division is to be made. The ordinance may not be held invalid unless the distances are clearly unreasonable, the question of reasonableness being primarily one for the legislative body. We cannot say that the distances up to 300 feet for the keeping of five goats are excessive, nor that they are unreasonable because they do not increase in direct ratio with the number of goats. Many things might enter into such a regulation, for example, the greater difficulty of properly caring for a larger number of goats. Petitioner especially objects to the distance of 1,000 feet for six or more goats. Such an ordinance might have the effect of prohibiting the keeping of that number within the limits of the city, and certainly would within any but a sparsely settled neighborhood. Such an objection is not tenable, for the city has the right to suppress as well as to regulate objectionable conditions in the community. Fischer v. St. Louis, 194 U. S. 361, 24 Sup. Ct. 673, 48 L. Ed. 1018. The same result was held not to invalidate the ordinance in State v. Hord, supra.

[8] Nor does the fact that the ordinance does not preclude the goat owner from keeping the animals within the stated distance of his own home impair its uniformity or reasonableness. In State v. Hord, supra, it was said:

> "The object of the ordinance is not to prevent a man from injuring himself by keeping his hog pen too near his own house, for that is a matter he can remedy at will, but to protect the public against a nuisance which they have no power to prevent except through the authority of a town ordinance acting on the offender.
>
> "A nuisance is to the public, or to others, and not an injury or annoyance which a person causes to himself and family. It is an anomaly that the defendant, who has disobeyed the ordinance forbidding him to commit a nuisance upon the public, should be complaining that the town did not go further and forbid him being a nuisance to himself. He could refrain from that without official help."

[9] Finally, it is objected, first, that, while it is made unlawful for one person to keep goats within the prescribed distance of another's dwelling, there is no objection if they

are kept by several persons; and, second, that the operation of the law may also be defeated when an allowable number of goats are kept within a certain distance on one side of a given person's dwelling and an allowable number within the same distance on the other side, but the total number within the area is more than could be kept by one person. Considering the first objection, we are of the opinion the ordinance may be held to cover a case where the goats are owned by several persons in common. In giving effect to the ordinance, the intention of the board of directors must necessarily be considered, and it was their evident intention to prevent the keeping of the prescribed number of goats in close proximity to dwelling houses. Although the ordinance only refers to "any person, firm or corporation," it is entirely immaterial, so far as securing the desired result is concerned, whether the goats are owned by one person or by several.

[10] In the Codes of this state the word "person" includes "persons," for it is expressly declared that the singular shall include the plural. Civ. Code, § 14; Code Civ. Proc. § 17; Pen. Code, § 7; Pol. Code, § 17. No such definition is contained in the ordinance in question. When used in a statute, it would appear from the decisions that, in the absence of an express declaration that it shall include the plural, "person" may or may not include "persons," according to the context. Thus in People v. Croton Aqueduct Board, 26 Barb. (N. Y.) 240, it was held the singular included the plural as used in a municipal ordinance requiring a certain estimate to contain the name and place of residence of the person making it, where more than one person joined in making the estimate. In Dixon v. Ricketts, 26 Utah, 215, 72 Pac. 947, 949, the singular was construed as implying the plural in a statute imposing an inheritance tax upon any property passing by will or inheritance to any person in trust or otherwise. But in Denny v. Smith, 18 N. Y. 567, 568, "person" was held not to include "persons" in a statute suspending the running of the statute of limitations as against any person out of the state, so that both of two joint debtors must reside out of the state the length of time required to avoid the statute.

The ordinance involved herein would be entirely ineffectual, if not discriminatory, if it made the keeping of goats lawful when done by several persons and unlawful when done by one. Construing the word "person" as including the singular only, the intention of the Legislature would be defeated and an absurd result reached. We are therefore of the opinion it should be read as including the plural, and, in view of this conclusion, petitioner's contention fails.

[11] With reference to the second objection, even if the ordinance is defective in not providing for such a possibility, it is not to be held invalid for that reason, as the board of directors cannot be expected to have guarded against every contingency. The likelihood of such a situation arising may be very remote, and the reasonableness of a police regulation is not to be tested by its possible application to extreme cases. Commonwealth v. Plaisted, 148 Mass. 375, 382, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566 The means adopted in the ordinance are appreciably related to the end sought to be accomplished, which is all that is required. Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385.

The writ is discharged.

We concur: WILBUR, C. J.; LENNON, J.; WASTE, J.; MYERS, J.; SEAWELL, J.; KERRIGAN, J.

---

191 Cal. 44

Ex parte LUSHER. (Cr. 2514.)

(Supreme Court of California. April 20, 1923. Rehearing Denied May 17, 1923.)

Municipal corporations ⚷604—Kids less than six months old held within ordinance relating to keeping of "goats."

Kids less than six months old *held* to so partake of the nature of mature goats as to come within a city ordinance regulating their keeping within the city limits, notwithstanding the ordinance expressly recognized the difference between kids and goats in the case of males, by providing, "It shall be unlawful to keep or maintain any male goat exceeding the age of six months within the limits of the city."

In Bank.

Application by Vada Lusher for a writ of habeas corpus, to be directed against the Chief of Police of the City of Pasadena. Writ discharged.

See, also, 209 Pac. 223.

J. G. Rossiter and B. M. Marble, both of Los Angeles, for petitioner.

James H. Howard, City Att'y., of Los Angeles, and Leonard L. Riccardi, City Pros. Atty., of Pasadena, for respondent.

LAWLOR, J. This is a companion case to In re Mathews (Cr. 2515) 214 Pac. 981, this day filed. Petitioner, Vada Lusher, was convicted of the offense of violating section 14(c) of ordinance No. 1940 of the city of Pasadena, the violation consisting of keeping more than four goats within 300 feet of another person's dwelling house. Upon her petition a writ of habeas corpus was issued, the briefs and arguments being identical with those in Re Mathews, supra, with the exception hereinafter considered. Upon the authority of that decision we hold that, the ordinance being a valid and reasonable exercise of the police power, petitioner is not entitled to her release upon any of the considerations urged therein. In the case at bar, however, petitioner alleges that two of the six goats which she kept were kids under the age of six months, and insists they should not be subject to the provisions of the ordinance. It is pointed out that all the authorities on goats refer to the progeny of goats under six months of age as kids. No other facts are presented to show wherein kids so differ in nature from goats that they should not be subject to such an ordinance as that involved herein. It is our opinion that, in view of the nature of the regulation, kids should be held to be included within it. A kid is "a young goat." Webster's Dictionary. The ordinance expressly recognizes the difference between kids and goats in the case of males. No objection is made to the keeping in the city of male goats under six months of age, and, in view of their generally recognized characteristics, the reason for such a distinction is readily discernible. No such distinction is made in the case of females, and no reason appears why we should draw it. If, as petitioner suggests, the female is free from the peculiar odor of the male, the reason of the ordinance would appear to be the noise made by the animals, the odors attendant upon the keeping of them, and the difficulty of maintaining such a condition of sanitation that they will not be offensive. In these respects the young may well be as great, if not a greater, source of discomfort than the more mature. Moreover, although the age of six months is accepted by petitioner as the time when a kid becomes a goat, we cannot say it is invariably true, as it appears from the Encyclopædia Britannica that at least in the case of Angora goats the age of maturity is less than among other breeds. Volume 12, p. 162. In view of these considerations we cannot hold that the age of the goats is a matter of defense under the ordinance.

The writ is discharged.

We concur: WILBUR, C. J.; LENNON, J.; WASTE, J.; MYERS, J.; SEAWELL, J.; KERRIGAN, J.

61 Cal. App. 447

ROHAN v. PROCTOR. (Civ. 4461.)

(District Court of Appeal, First District, Division 1, California. March 19, 1923. Hearing Denied by Supreme Court May 17, 1923.)

1. Frauds, statute of 🔑106(2)—Essentials of memorandum of agreement for lease stated.

To satisfy the statute, a written memorandum of agreement for lease must contain the essential parts of the lease to be executed thereafter according to its terms, and particularly a definite agreement as to the extent and boundary of the property to be leased, a definite and agreed term, and a definite and agreed rental and the time and manner of its payment.

2. Frauds, statute of 🔑106(2)—Memorandum of agreement for lease should state when term is to begin.

A memorandum of agreement for lease should define when the term of tenancy is to begin.

3. Frauds, statute of 🔑106(2)—Agreement for lease to begin on completion of alterations not invalid for failure to state beginning of term.

A memorandum of agreement for a lease *held* not invalid because the term was to begin on the completion of alterations and improvements rather than at a fixed date.

4. Frauds, statute of 🔑106(2)—Memorandum of agreement for a lease not invalid because conditional.

A memorandum of agreement to lease was not invalid as uncertain because contingent on the landlord's making alterations and constructing improvements, where the agreement was in the form of an offer to lease provided the landlord would agree to so alter and improve, since, by the landlord's acceptance of the offer, he agreed to make such alterations and improvements, and, by so doing, made the promise unconditional.

5. Frauds, statute of 🔑106(2)—Agreement for a lease not invalid for uncertainty as to alterations and improvements where parties had an understanding as to them.

A memorandum of agreement to lease provided the landlord made certain alterations and improvements, "these improvements to be subject to our mutual approval," was not invalid as failing to define the alterations and improvements, for the uncertainty was one removable by oral evidence as to the kind and character of the alterations and improvements which were, at the time of making the memorandum, within the contemplation and understanding of the parties; such an agreement being collateral and supplemental to the written contract, so that parol evidence thereof would not alter the contract.

6. Frauds, statute of 🔑106(2)—Memorandum of agreement for lease was invalid for uncertainty as to alterations where they were left to subsequent agreement.

A memorandum of agreement for a lease by which the landlord was to make alterations and improvements "to be subject to our mutual approval" was invalid for uncertainty where the oral agreement and understanding between the parties as to the kind and character of improvements was not entered into between the parties until several months after the written agreement was made, since a subsequent oral agreement would render the whole contract between the parties oral, contrary to the statute, and would show that the minds of the parties had not met at the time of execution of the written agreement as to the essential feature when term of the lease was to begin.

---

7. Frauds, statute of ⚷129(5)—Payment under invalid memorandum of agreement for lease held not to validate the agreement.

A memorandum of agreement for lease under which the landlord was to make alterations and improvements "to be subject to our mutual approval," which was invalid because the alterations and improvements were not agreed upon except by oral agreement subsequent to the execution of the written memorandum, was not validated by the receipt of a substantial sum from the contemplated lessee after the making of the subsequent oral agreement, since the consideration for such payment was not the making of the subsequent oral agreement, but the acceptance of the written offer, and the acceptance of money under an agreement void under the statute of frauds would not validate it.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by James G. Rohan against Frank H. Proctor. From judgment for defendant, plaintiff appeals. Affirmed.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for appellant.

Chapman, Trefethen & Chapman and Nusbaumer & Bingaman, all of Oakland, for respondent.

RICHARDS, J. This appeal is presented upon the judgment roll and is from a judgment in favor of the defendant after an order sustaining his demurrer to the plaintiff's last amended complaint; the latter having declined to further amend his pleading. The action is one for damages in a large sum alleged to have been caused by the defendant's breach of an agreement to execute a lease to certain premises in the city of Oakland. The agreement, which is in the form of a written offer to lease said premises on certain terms, which offer the defendant accepted upon its face, reads as follows:

"Oakland, California, July 17, 1919.

"Mr. Frank H. Proctor, Union Savings Bank Building, Oakland, California—Dear Sir: I am prepared to make you the following proposal of lease on the ground floor of the property now known as No. 1728–1744 Broadway and the abutting land running through to Franklin street approximately an area of one hundred (100) feet on Broadway by three hundred (300) feet deep to Franklin street with a frontage on Franklin street of one hundred (100) feet on the following basis of rental: First year, $1,000.00 per month; second year, $1,250.00 per month; third year, $1,500.00 per month; fourth year, $1,750.00 per month; fifth year, $2,000.00 per month; next five years $2,250.00 per month—and with an option of renewal for another ten-year period of $2,500.00 per month, providing that you alter the present ground floor space in the Broadway building and construct a suitable building on the Franklin street property for my uses; these improvements to be subject to our mutual approval.

"I am prepared to furnish you with a cash bond of twenty thousand ($20,000.00) dollars as evidence of good faith of my fulfilling the terms and conditions of the lease to be drawn which would contain the usual safeguards and covenants.

"Kindly advise me immediately if the above offer is acceptable. If so I will deposit two thousand ($2,000.00) dollars with you as evidence of good faith on my part.

"As to the conditions of the other payments and the like, these are to be made according to the verbal arrangements that we have discussed.

"Yours very truly, Jas. G. Rohan.

"Accepted by Frank H. Proctor."

The plaintiff alleges in his said complaint that, as to the provision of said agreement that the lease to be executed "would contain the usual safeguards and covenants," these were to be in accordance with the custom and usage prevailing in the city of Oakland at the time said agreement was made, and were to cover and provide for the payment of rent in advance, for re-entry in case of tenant's default, for the surrender of the premises at the expiration of the term or of any renewal thereof in as good state and condition as reasonable use and wear thereof permitted, and for the further covenant that the lessee would not assign said lease without the written consent of the lessor. The plaintiff further alleged that some time after the offer and acceptance of said agreement the parties thereto came to an oral agreement as to the alterations to be made upon the ground floor of the building then upon said premises and also as to the building to be constructed by the lessor for the use of the lessee upon that portion of the premises fronting upon Franklin street. The plaintiff further alleged that, after the kind and character of said improvements had been thus orally agreed upon and the plans therefor approved by the parties, he deposited with the defendant the sum of $1,500 on account of the sum of $2.000 to be deposited by him as evidence of his good faith, which sum the defendant accepted, and that thereafter he tendered to the defendant the sum of $500 as the balance of said deposit, but the defendant refused and has ever since refused to accept the same. The plaintiff further alleged that prior to July 17, 1919, the date of said agreement for a lease, the plaintiff had discussed the matter of the cash bond provided for therein and the payments to be made on account thereof with defendant and had come to an oral understanding and agreement with relation thereto, which agreement the plaintiff proceeded to set forth at length in his complaint, and which he alleged himself to be at all times ready, willing, and able to perform. He then proceeded to allege that the defendant on February 17, 1920, repudiated said agreement and notified plaintiff of his intention not to perform the same nor the

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

terms and conditions thereof, nor to execute said lease, to the plaintiff's damage in the sum of $500,000, no part of which had been paid. The defendant demurred to said last amended complaint upon the general ground and also upon the ground specifically that it appeared upon the face of said complaint that the agreement alleged to have been breached by the defendant was oral, and was therefore void under the statute of frauds. The court sustained said demurrer, and from the judgment which followed the plaintiff's declination to further amend this appeal has been taken.

[1-3] At the outset of this discussion it may be stated as settled law that a memorandum of agreement for a lease which is required to be in writing, in order to satisfy the statute of frauds, must contain all of the essential and material parts of the lease which is to be executed thereafter according to its terms, and particularly must contain three essentials in order to its validity under the statute of frauds. These are: First, a definite agreement as to the extent and boundary of the property to be leased; second, a definite and agreed term; and third, a definite and agreed rental and the time and manner of its payment. Jones on Landlord and Tenant, § 137a; Dodd v. Pasch, 5 Cal. App. 686, 91 Pac. 166; Levin v. Saroff (Cal. App.) 201 Pac. 961. It may also be taken to be well settled that as to the second of the above essentials the agreement for a lease should define when the term of the tenancy is to begin. Taylor on Landlord and Tenant (9th Ed.) § 70; Manufacturing Co. v. Hobbs, 128 N. C. 46, 38 S. E. 26, 83 Am. St. Rep. 661. The respondent contends that the agreement in question is fatally defective in the second of these essentials in that it contains no agreement as to the beginning of the term of the lease to be executed thereunder. It would seem to be true that the said agreement does not state when the term of the lease is to begin, but the question remains as to whether this omission is fatal to its validity under the statute of frauds. The lease to be executed under said agreement was to be for a term of 10 years at a certain increasing rental for the first 5 years and with an option of renewal for an additional period of 10 years at a fixed rental specified therein. Its only uncertainty in this regard was as to the time when said term was to begin. This uncertainty arose primarily out of the fact that alterations and improvements were to be made by the landlord before the tenant could enter into the occupation and beneficial use of the premises, and that the writing did not contain a definite description of what said improvements were to consist of nor did it contain a fixed date when such improvements were to be completed. This, however, is not such an uncertainty as would render void a lease or an agreement to enter into one. It frequently occurs that changes and improvements are to be made in premises prior to the entry of the tenant into the possession and beneficial use thereof, and that the time when such changes and improvements are to be completed is of necessity uncertain. As that uncertainty is one which will be made certain by the completion of such improvements according to the agreement and understanding of the parties at the time, it will not have the effect of rendering void the lease or the agreement to enter into the same. In Jones on Landlord and Tenant, § 113, the rule is thus stated:

> "If a lease has a certain appointment of the number of years, although the commencement or the end of it is certainly appointed upon an uncertain time, yet such lease shall be good as a lease for years. When a lease is to run for a certain term of years, it is not rendered invalid by the circumstance that it is to begin upon the completion of an unfinished building."

The cases cited by the learned text-writer in support of this rule are quite similar as to their facts with the case at bar. In the case of McClain v. Abshire, 72 Mo. App. 390, the lease was for a term of five years beginning when the rooms in a certain building were ready for occupation. It was held a good lease. In the case of Noyes v. Loughead, 9 Wash. 325, 37 Pac. 452, it was held that a lease for a building for five years after completion was a good lease and was to be presumed to be a lease the term of which should begin from the completion of the structure. It was also held in Billings v. Canney, 57 Mich. 425, 24 N. W. 159, and in Clarke v. Spaulding, 20 N. H. 313. In Hammond v. Barton, 93 Wis. 183, 67 N. W. 412, the court upheld a written lease of a room in a building under construction for five years, the court holding that the element of certainty in the commencement of the term was satisfied by the completion of the building. The same principle was applied by the same court in the case of Colclough v. Carpeles, 89 Wis. 239, 61 N. W. 836.

[4] The respondent, however, contends that this agreement to enter into a lease is fatally uncertain because it is contingent upon the following proviso:

> "Providing that you alter the present ground floor space in the Broadway building and construct a suitable building on the Franklin street property for my uses; these improvements to be subject to our mutual approval."

It is the respondent's insistence that this proviso leaves it entirely to the whim of the landlord as to whether or not he will make the improvements in question and thus fulfill the condition upon which the future leasing of the premises depends. We do not so construe this proviso. The agreement here is in the form of an offer to lease the premises, provided the landlord will agree to make alterations and improvements. By the landlord's acceptance of the offer he agreed to make such alterations and improvements, and by so doing put an end to that portion of the proviso. The agreement as thus consummated was an agreement on the part of the landlord to make alterations and improvements upon the premises and an agreement on the part of the tenant to lease said premises when such alterations and improvements were completed.

[5] The respondent, however, further insists that this proviso, even as thus construed, is fatally uncertain in that it does not define what alterations and improvements the landlord has thus agreed to make, and that this uncertainty cannot be supplied by parol without taking said agreement out of the statute of frauds. It must be conceded that the foregoing proviso in said agreement is uncertain in this regard, but it does not follow therefrom that this is such an uncertainty as would have the effect of avoiding the agreement to enter into a lease. The landlord having agreed to make alterations and improvements in the premises for the tenant's uses, without specifying in the writing what those alterations and improvements were to consist of, the uncertainty in that respect was one which might have been removed by oral evidence as to the kind and character of the alterations and improvements which were within the contemplation and understanding of the parties to the written agreement at the time it was made. The case of Blahnik v. Small Farms Imp. Co., 181 Cal. 379, 184 Pac. 661, is an instructive case upon this point; for, while the facts differ somewhat from those of the case at bar, the principle involved is the same. In that case the parties had entered into a contract of sale of certain real estate which contained the following stipulation:

> "The seller agrees that it will have the roads in said division R [of which the land in question was a subdivision] constructed during the fall of 1913 after the rains or when the ground is able to be worked, and construct the necessary bridges."

The action was against the seller of the land for damages for breach of the agreement of sale. Objection was made to the sufficiency of the complaint in failing to describe the kind and character of the work to be done by the seller under the contract and to the sufficiency of the contract itself; it being silent in that respect. The trial court refused to permit the introduction of the oral evidence for the purpose of showing what the agreement of the parties was in that regard. In holding this to be error the Supreme Court said:

> "This ruling was erroneous. The contract was altogether silent in regard to the character and kind of work that was to be done upon the roads. If there was any agreement on that subject, or any plan relating thereto adopted by the defendant and acquiesced in by the plaintiffs, it was not set forth in the contract. So far as appears, it was in parol only. Such an agreement would be collateral and supplemental to the contract contained in the writing, and, as parol evidence thereof would not be inconsistent with the contract and would not alter it in any respect, evidence thereof would be admissible if material to the issues. Sivers v. Sivers, 97 Cal. 521, 32 Pac. 571; Daly v. Rudell, 137 Cal. 676, 70 Pac. 784."

It is to be noted that in the case above cited the oral evidence offered for the purpose of explaining away the uncertainty in the writing as to the kind and character of the roads to be constructed was in the form of conversations between parties to the writing prior to or at the time of its execution.

[6] The respondent contends that the plaintiff's last amended complaint is fatally defective in this very particular, since it appears upon the face of said agreement that the parties thereto had not, either prior to or contemporaneous with the making of such written agreement, come to any agreement or understanding, either written or oral, as to the kind or character of the alterations and improvements to be made by the landlord upon the premises in question, but that, on the contrary, it affirmatively appears both upon the face of said complaint and of said agreement that the parties to said agreement for a lease had not theretofore arrived at any agreement or understanding as to the detail of said improvements, and that they did not do so until several months after the date of said agreement, and that such later understanding and agreement between the parties was oral. It must be conceded that both the agreement and the complaint show this to be the fact. In the proviso in said agreement above quoted it is expressly stated that "these improvements are to be subject to our mutual approval," while in the plaintiff's complaint it is expressly alleged that the oral agreement and understanding between the parties as to the kind and character of said improvements was not entered into between the parties until several months after the written agreement was made. The plaintiff in thus interpreting the writing and in thus alleging that the kind and character of said improvements was to be and was a matter of subsequent oral understanding between the parties to said written agreement has failed to state a cause of action. In order to the validity of the written agreement for a lease it must either be in itself certain as to the kind and character of the improvements to be made upon the premises, the completion of which would fix the beginning of the term, or it must be susceptible of being made certain

by oral evidence showing the prior or contemporaneous understanding of the parties in that regard. But, if the parties have come to no such understanding at the time the written agreement is made, the uncertainty of the writing in that regard is fatal, since it is an uncertainty in a respect essential to its validity which no amount of oral evidence as to a later understanding could remove. The effect of such evidence would merely be to create an additional oral agreement touching a vital and omitted essential of the writing, and thus render the entire contract between the parties oral, and hence of necessity obnoxious to the statute of frauds. Fly v. Cline et al., 49 Cal. App. 414, 193 Pac. 615; Dillingham v. Dahlgren, 52 Cal. App. 322, 198 Pac. 832; Haviland v. Sammis, 62 Conn. 44, 25 Atl. 394, 36 Am. St. Rep. 330; Mentz v. Newwitter, 122 N. Y. 491, 25 N. E. 1044, 11 L. R. A. 97, 19 Am. St. Rep. 514; Norris v. Blair, 39 Ind. 90, 10 Am. Rep. 135. The further effect of such evidence would be that of showing conclusively that the minds of the parties had not met at the time of the execution of such written agreement as to a matter essential to the validity of such agreement, viz. as to when the term of the lease was to begin. The plaintiff in the instant case, in pleading that the details of the alterations and improvements of the premises was a matter which was left to the subsequent agreement of the parties, and that such subsequent agreement was oral, has pleaded himself out of court.

[7] The fact alleged in the plaintiff's last amended complaint that the defendant received the sum of $1,500 from the plaintiff after the oral agreement as to the details of the improvements had been arrived at could not serve to validate the otherwise void agreement for a lease for two reasons: First, that the consideration of said payment was not the making of the subsequent oral agreement, but was the acceptance of the original written offer, according to its express terms; second, the acceptance of money under an agreement void under the statute of frauds would not validate such agreement so as to permit a recovery thereon in an action at law for damages for its breach.

As to the appellant's averment that the defendant in repudiating said agreement for a lease was actuated by bad faith, it will suffice to say that no right of recovery could be based upon a defendant's bad faith in refusing to carry into effect a void agreement.

We do not deem a discussion of the other points urged by respective counsel necessary to the determination of this appeal.

Judgment affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

---

61 Cal. App. 488

WRIGHT et al. v. WESTERN STATES LIFE INS. CO. (Civ. 4468.)

(District Court of Appeal, First District, Division 1, California. March 20, 1923.)

1. Insurance ⟹629(1)—Pleading mailing of notice by insured of exercise of option as to payment held sufficient.

In view of Code Civ. Proc. § 452, and section 1963, subd. 24, providing that pleadings should be construed with liberality, and the presumption that a letter duly directed and mailed was received in the regular course of the mail, where an insurance policy permitted the insured, by written notice to the company at its home office, to elect that the net commuted value of the sums otherwise payable under the policy at insured's death should be paid in cash, *held*, in an action on the policy, that an allegation that insured, by written notice deposited in the mails, notified insurer of such election, was sufficient allegation of giving of such notice, although not alleging that insurer received it.

2. Pleading ⟹7—Presumptions of law need not be pleaded.

Presumptions of law need not be pleaded.

3. Insurance ⟹523½, New, vol. 17A Key-No. Series—Right of election under payment options held absolute in insured, and effectual without consent of insurer.

Under an income protection policy, providing that insured, by written notice to the company, could elect that the net commuted value of the sum otherwise payable at insured's death should be paid in cash, *held*, that insured's right of election was an absolute, irrevocable right in insured, election under which could not alter or vary the policy, and was effectual, though not consented to or agreed to in writing by insurer.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Annie Louise Wright and another against the Western States Life Insurance Company. Judgment for defendant, and plaintiffs appeal. Reversed.

Gerald C. Halsey and Frederic T. Leo, both of San Francisco, for appellants.

T. G. Crothers, of San Francisco, for respondent.

ST. SURE, J. This is an action to recover $4,325 from the defendant upon a life insurance policy issued upon the life of one William Edgerton Wright. The policy conforms to the plan known to life insurance companies as an "income protection policy," whereby, in consideration of the payment of an annual premium for a period of years, or until the death of the insured, an income is provided of $25 per month for 20 years from and after the death of insured, with a provision for the payment to the insured of a life income of $25 per month beginning March 13, 1954, in case he then be living, and also a further provision for a life income for the insured in case of total disability. The policy provided for various options, one of which, the chief subject of dispute here, reads as follows:

> "*Options at the Death of the Insured.* (Available during the insurance period as specified under provisions [1] and [h], on the reverse side hereof.)
>
> "The insured, by written notice to the company, at its home office, * * * may elect that the net commuted value of the sums payable under this policy at the death of the insured (see general provisions, par. [h] on the reverse side hereof) shall be payable either in cash or as follows."

Paragraph (h), referred to above, fixes the commuted value of the policy at $4,325.

The real estate firm of which the insured was a member was first designated as the beneficiary, and thereafter plaintiffs were designated. The insured died July 3, 1921. Proofs of death were presented. Defendant acknowledged liability under the terms of the policy, and issued its check to the beneficiaries for the first monthly payment. The beneficiaries returned the check, refused to accept the monthly payments, and demanded cash payment of the net commuted value of the policy. The demand of plaintiffs being refused, this action followed. Plaintiffs' amended complaint alleges, among other things, the following:

> "That on the 4th day of May, 1917, at said city and county, said William Edgerton Wright, by a written notice to defendant at its home office in said city and county, which said notice was deposited in the United States post office on said day in a sealed envelope addressed to defendant at its said office, and the postage thereon prepaid, stated to and notified defendant in writing that he elected that the net commuted value of the sums payable under said policy at his death should be payable in cash."

A general demurrer to the amended complaint was interposed. The trial court sustained the demurrer without leave to amend, and judgment was entered against plaintiffs and in favor of defendant, from which judgment plaintiffs appeal.

The defendant, in support of the judgment, makes three points, as follows:

> "(1) That, even admitting the allegations of the complaint, the insured did not give notice either in the manner or form specified in the policy, of his election to change the terms of the policy; (2) that the policy should have been presented for indorsement of the change; or, (3) in lieu of such indorsement, the insured should have obtained the written agreement or assent of the company, signed by the president or secretary."

[1] Defendant's first point is that it is nowhere pleaded in the complaint that the alleged notice of the insured's election to change the mode of payment was ever given to or received by the defendant; that plaintiffs merely pleaded mailing of a notice, and depend upon the presumption of law that it was received. Under our system courts are told to construe pleadings with liberality. Code Civ. Proc. § 452. Pleadings are no longer to be strictly construed against the pleader, but are to be liberally construed with a view to promoting justice. Buriam v. Los Angeles Café Co., 173 Cal. 625, 627, 161 Pac. 4.

Defendant cites 20 R. C. L. § 5, p. 344, to the effect that—

> "Where a contract requires notice, but does not specify the manner in which the notice is to be given, mere mailing of the notice is not sufficient unless it is received."

Kavanaugh v. Security Trust & Life Insurance Co., 117 Tenn. 33, 96 S. W. 499, 7 L. R. A. (N. S.) 253, 10 Ann. Cas. 680, and Wheeler v. McStay, 160 Iowa 745, 141 N. W. 404, L. R. A. 1915B, 181, also cited, state the same rule.

[2] The policy under consideration does not specify the manner in which notice is to be given, and we known of no law which inhibited plaintiffs from giving notice by mail. This being so, by grace of the presumption established by subdivision 24 of section 1963, Code of Civil Procedure, the pleading comes within the rule cited by defendant. For the mailing of the notice raises the presumption of receipt. Stockton, etc., Works v. Houser, 109 Cal. 1, 41 Pac. 809. And presumptions of law need not be pleaded. Cuthill v. Peabody, 19 Cal. App. 304, 125 Pac. 926, and cases cited therein. Of course, the presumption is not conclusive, but, upon such issue made and tried, evidence may be received for the purpose of establishing the fact of both the mailing and the receipt of the notice. It would seem that the defendant's objection to the pleading is completely overcome by the provisions of our statute and the rule making it unnecessary to plead presumptions of law.

[3] Summarized, defendant's remaining contentions amount to this: The conceded right of election given to the insured contemplates a change in the policy, and is wholly ineffectual unless consented to or agreed to in writing by the insurer. Plaintiffs argue, in reply, that, as the right of election is expressly provided for by the terms of the policy itself, it is therefore unnecessary to secure the consent of the insurer in any form. Defendant calls our attention to several instances wherein the policy gives to the insured absolute rights or options, and insists that the exercise of any one of these options involves a change in the policy, and requires

written request or notice and written consent or indorsement by the insurer. An examination of the policy shows that the provision converting the policy from a *life* policy to a *disability* policy provides that "the company *will agree by endorsement in writing on this contract,*" etc. The provision relating to loans reads, in part: "The company will advance *on the execution of a proper loan agreement and upon proper assignment and delivery of this policy,*" etc. The provision relating to "cash value" provides that "*upon written request * * * and on surrender of this policy the company will,*" etc. And "change of beneficiary" may be made "*by filing written notice thereof at the home office of the company, accompanied by the policy for suitable indorsement thereon,*" etc. The policy further provides that "no assignment hereof shall be binding upon the company *unless made by an instrument in writing indorsed upon his policy or attached hereto,*" etc. There is also a general provision, upon which stress is laid by defendant, that "no agent can make, alter, or discharge this policy or extend the time for payment of premiums, nor can the policy be varied or altered or its conditions waived or extended in any respect except by the written agreement of the company, signed by the president or secretary." On the back of the policy is printed "Options at Death of Insured," from which we have hereinbefore quoted, and which forms the basis of plaintiffs' claim. There also appears on the reverse side of the policy the caption, "Register of Change of Beneficiary," and thereunder the words: "Note.—No change, designation or declaration shall take effect until indorsed on this policy by the company at the home office."

We think it significant that in the several provisions from which we have quoted and italicized clauses, the policy makes explicit requirements for "*indorsement in writing,*" "*execution of proper agreement and proper assignment and delivery,*" "*surrender of policy,*" etc. In each instance the language used is apt and free from ambiguity. If it had been the intention of the insurer that the option giving the right to prefer payment of the commuted value should be inoperative without consent or approval or agreement by indorsement or otherwise, it would have been a simple matter to have said so. In the absence of any such particular provision or requirement, and considering that a contract of insurance is to be interpreted by the same rules as are other contracts (Schroeder v. Imperial Insurance Co., 132 Cal. 18, 63 Pac. 1074, 84 Am. St. Rep. 17); that the option was an absolute, irrevocable right in the insured's favor which he could claim or not as he pleased; that the option was created when the contract was executed, and that the insured's election under same neither could nor did alter, change, or vary the policy—we are led to the inevitable conclusion that the defendant's contention is wholly without merit. We adopt plaintiffs' view as to the paragraph on the reverse side of the policy appearing under the caption "Register of Change of Beneficiary." We think it should be given no effect beyond the subject-matter of the heading to which it is appended as a note.

The judgment appealed from is reversed, with directions to the trial court to overrule the defendant's demurrer and require it to answer.

We concur: TYLER, P. J.; RICHARDS, J.

61 Cal. App. 411

ROMER v. WEHNER. (Civ. 4473.)

(District Court of Appeal, First District, Division 2, California. March 16, 1923.)

1. Pleading 🔑129(2)—By failure to deny allegations of cross-complaint held admitted.

Where cross-defendant failed to deny cross-plaintiff's allegation that by the terms of an agreement cross-defendant was to furnish boxes for delivery of grapes and barrels for grape juice, cross-defendant admitted those allegations.

2. Trial 🔑396(3)—Finding unsupported by pleadings and evidence to be disregarded.

Where the pleadings were framed upon the theory that one single contract was made involving the sale of grapes and grape juice, and the evidence supported such pleadings, the finding that a single contract was made for the sale of the grapes alone *held* not within the issues and to be disregarded, since, under Code Civ. Proc. § 462, the trial court is bound by the pleadings.

3. Trial 🔑396(7)—Finding contrary to admitted allegation is beyond issues.

When the allegations are admitted, a finding contrary to such admission is beyond the issues of the controversy and will not support a judgment.

4. Customs and usages 🔑19(3)—Evidence held not to support finding as to custom of payment on final delivery among producers and buyers of grapes and grape juice.

Evidence that, when producers of grapes and grape juice came from the outside, or that when the grapes were to be exported, the uniform custom was that payment should be made before delivery or upon delivery of each installment, *held* not to support a finding that there was a general, uniform, and recognized custom among producers that payment was to be made after final and complete delivery.

5. Sales 🔑82(4)—Payment due upon delivery of installments in absence of contrary agreement.

When an agreement is silent as to the terms of payment, payment is fixed as of the time of delivery under Civ. Code, § 1784, and hence, where fruit or farm products are to be delivered in installments, payment is due upon delivery of each installment, unless otherwise agreed.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Robert Romer, doing business under the name of Robert Romer & Co., against William Wehner. Judgment for plaintiff, and defendant appeals. Reversed.

A. M. Free and F. H. Bloomingdale, both of San Jose, and Courtney L. Moore, of San Francisco, for appellant.

Louis Oneal and Wm. F. James, both of San Jose, for respondent.

NOURSE, J. Plaintiff sued to recover damages for the breach of a contract for the sale of grapes and grape juice. The defendant answered and filed a cross-complaint seeking the recovery of damages from plaintiff for his breach of the same contract. In his amended complaint the plaintiff alleged:

> That "said defendant agreed to sell to plaintiff, and plaintiff agreed to buy, 200 tons of black grapes of the crop of 1919 * * * for the sum of $35.00 per ton, and also 25,000 gallons of unfermented black grape juice * * * for the price of 45 cents per gallon: that by the terms of said agreement all of said personalty was to be paid for when delivered. * * *
>
> "That plaintiff is, and has at all times been, ready, willing, and able to receive and pay for the said grapes and grape juice, according to said agreement, and to otherwise perform all of the terms of said agreement on his part to be done or performed. * * *
>
> "That said personal property so agreed to be sold, and remaining undelivered, if the same had been delivered according to said agreement, would be now, and when delivered, of the value to plaintiff of $21,706.01."

The execution of the agreement as alleged in the amended pleading was admitted by the defendant in his answer, but some of its terms were controverted, such as place of delivery of the grapes, color of the grape juice, and the time of payment for both the grapes and the grape juice. In the cross-complaint the defendant alleged:

> That the cross-plaintiff and cross-defendant "entered into an agreement whereby cross-plaintiff agreed to sell to said cross-defendant, and said cross-defendant agreed to purchase from cross-plaintiff, 200 tons of grapes of the crop of 1919, at the agreed price of $35 per ton and 25,000 gallons of grape juice at the agreed price of 45 cents per gallon; said cross-defendant to furnish and provide the boxes for delivery of said grapes, and the barrels for delivery of said grape juice, and said grape juice to be taken from a stock of grape juice which had theretofore been manufactured by cross-plaintiff, and which was then being stored by cross-plaintiff upon his premises."

It was further alleged that the parties expressly agreed that both the grapes and the grape juice were to be delivered in installments as harvested or prepared for delivery, and that payment therefor was to be made upon the delivery of each installment; that various installments of the grapes were delivered to the cross-defendant and accepted and paid for by him; but that cross-defendant, though often requested to do so, had failed and refused to pay for certain installments thereof, the agreed price of which amounted to $1,516.84. As a second cause for cross-complaint it was alleged that the cross-defendant, though often requested to do so, had failed to deliver to cross-plaintiff, any barrels for the shipment of the grape juice, and had refused to receive, accept, or pay for any of the grape juice, to the damage of the cross-plaintiff in the sum of $3,750.

[1] In the answer to this cross-complaint the plaintiff and cross-defendant "admits that said parties entered into an agreement whereby cross-plaintiff agreed to sell to cross-defendant, and cross-defendant agreed to purchase from cross-plaintiff, 200 tons of grapes of the crop of 1919 at the agreed price of $35 per ton, and 25,000 gallons of grape juice at the agreed price of 45 cents per gallon." By failing to deny, the cross-defendant admitted the allegation in the cross-complaint that by the terms of said agreement he was to furnish and provide the boxes for the delivery of said grapes and the barrels for the delivery of the grape juice. He did deny that said grape juice was to be taken from the stock theretofore manufactured by the cross-plaintiff and which had been stored upon his premises, and alleged that such grape juice was to be "unfermented black grape juice."

Upon the issues so framed the parties went to trial, and the trial court found that the parties executed an agreement whereby the plaintiff agreed to buy 200 tons of black grapes to be delivered by said defendant as said grapes were ripened, gathered, and harvested for the sum of $35 per ton, and that by the terms of said agreement all said personalty was to be paid for when delivered; that it was not true that at the time said agreement was made there was a general or uniform or recognized custom among producers in the locality where said agreement was to be performed that, when such products were to be delivered in installments, payment was to be made for each installment upon delivery thereof, but that the custom among such producers was that in such cases payment therefor was to be made after final and complete delivery; that there was no express agreement between these parties that each installment was to be paid for upon delivery thereof; and that the payments made by plaintiff were not made in accordance with the terms of the said contract, but were merely advancements made by plaintiff to defendant on account thereof. It was further found that there was never any contract or agreement between said parties for the sale of 25,000 gallons or any other quantity of grape juice; that there were negotiations between said parties tending to such a contract; but that because of their failure to agree upon the color and quality of such grape juice no contract was made between them. Deliveries under the contract were made of approximately 109 tons, and the damage suffered by the plaintiff for the failure to deliver the remaining 90 tons was found to be $2,273.34. As against this plaintiff had an offset of $1,426.84, the unpaid balance on the amount of grapes which had been delivered. Plaintiff was awarded a judgment for the difference, amounting to $846.50, and from this judgment defendant prosecutes the appeal.

The grounds of appeal urged by the appellant are: (1) That there is a fatal variance between the pleadings, findings, and proof, the parties having admitted and proved one contract, and the court having found an entirely different contract; (2) that the conclusion of the trial court that the appellant breached the contract is unsupported by the evidence.

[2] 1. The first point raised by appellant as to the variance between the pleadings, findings, and proof must be sustained and requires a reversal of the judgment. The pleadings were all framed upon the theory that one single contract was made involving the sale of grapes and grape juice. The evidence unmistakably proves that a single contract was made. The answer, the cross-complaint, and the answer to the cross-complaint all admitted this fact. The finding that a separate contract was made for the sale of the grapes alone was not within the issues and was not supported by the evidence. All the evidence went to prove that the arrangements for the sale of the grapes and the grape juice were all made at the same time, in the same conversation, and as a part of the same transaction; but, notwithstanding the evidence, the trial court was bound by the pleadings, and its finding of a separate contract must be disregarded. This is the unquestioned rule of a long line of decisions. In the first place, section 462, Code of Civil Procedure, provides:

> "Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true."

In Burnett v. Stearns, 33 Cal. 468, 474, the Supreme Court said:

> "The finding should be confined to the facts in issue. The province of the court in respect to facts is to determine, but not to raise, the issue. It is insisted on the other side that it will be presumed the court found the fact in question from competent evidence. The answer is, it will not be presumed that evidence was introduced to contradict the admission of record."

In White v. Douglass, 71 Cal. 115, 119, 11 Pac. 860, 862, the Supreme Court said:

> "Where a complaint in an action contains an allegation of fact which is distinctly and unqualifiedly admitted by the answer, there is no issue as to the fact. The allegation of the fact being admitted is conclusive. A finding against the admission is therefore outside the issues, and a judgment based upon such a finding, or upon a finding, which is not justified by or is contrary to the evidence, cannot be sustained."

In the Matter of Doyle, 73 Cal. 564, 570, 571, 15 Pac. 125, 128, the same court said:

> "When a trial is had by the court without a jury, a fact admitted by the pleadings should be treated as 'found.' * * * If the court

does find adversely to the admission, such finding should be disregarded in determining the question whether the proper conclusion of law was drawn from the facts found and admitted by the pleadings. * * * In such case the facts alleged must be assumed to exist. Any finding adverse to the admitted facts drops from the record, and any legal conclusion which is not upheld by the admitted facts is erroneous."

[3] The foregoing authorities were all cited with approval in Welch v. Alcott, 185 Cal. 731, 754, 198 Pac. 626, and it therefore may be taken as the settled rule in this state that, when the allegations in a pleading are admitted, a finding contrary to such admission is beyond the issues of the controversy and will not support a judgment. In this case, as has been said, the respondent up to the time of judgment was insisting upon an entire and indivisible contract for the sale of grapes and grape juice, and was demanding damages for the failure to deliver both. On the other hand, the appellant was conceding a contract for the sale of grapes and grape juice, but disputed respondent's claim regarding the color of the grape juice and other minor details of the contract, but both parties at all times treated the transaction as an entirety; and if, as found by the trial court, their minds did not meet on the grape juice, it is obvious that the contract which was pleaded was not proved.

[4] 2. As to the second point, little need be said. In the amended complaint it was alleged that by the terms of the agreement "all of said personalty was to be paid for when delivered." The trial court found that this allegation was true. Respondent himself testified that it was not true. There was no evidence to support the finding. The trial court also found that there was a general, uniform, and recognized custom among the producers in the locality where the agreement was to be performed that payment therefor was to be made after final and complete delivery. The only evidence on this issue was to the effect that when the producers came from the outside or that when the grapes were to be exported (both of which conditions applied to respondent's case), the uniform custom was that payment should be made either before delivery or upon delivery of each installment. There was therefore no evidence to support the finding of the trial court relating to the custom of payment. On the other hand, the allegation in the answer that it was the general, uniform, and recognized custom "that, where such products were to be delivered in installments, payment was to be made for each installment upon delivery thereof," finds support in the evidence and in the action of the parties. Proof was made that deliveries began on October 15, 1919, and continued until November 14th; that three payments were made, to wit, on October 25th, November 1st, and November 7th; that on November 1st respondent wrote to appellant asking him to send weight tags upon each delivery and added:

> "Then it won't even be necessary for you to make out a bill. We will mail the check on receipt of the weight tags."

Thereafter three other deliveries were made, the price of which the court found to be $1,426.84. Payment of this sum was demanded of the respondent, and he was notified that unless payment was made further deliveries would be refused. His only answer was the commencement of this action.

[5] When the agreement is silent as to time of payment, the law fixes it as of the time of delivery. Section 1784, Civ. Code. And where fruit or farm products are contracted to be delivered in installments as they ripen or are harvested, payment is due upon delivery of each installment unless otherwise fixed in the contract. Veerkamp v. Hulburd C. & D. Co., 58 Cal. 229, 41 Am. Rep. 265.

Judgment reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

61 Cal. App. 314

MORRIS v. MOORE. (Civ. 3803.)

(District Court of Appeal, Second District, Division 2, California. March 9, 1923.)

1. Appeal and error 🔑110—Order denying new trial not appealable.

Order denying a new trial is not appealable.

2. Malicious prosecution 🔑20—"Probable cause" defined.

In an action for malicious prosecution, plaintiff has burden of proving want of "probable cause" which means a suspicion founded on circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Probable Cause.]

3. Malicious prosecution 🔑71(2)—Probable cause question for court.

Whether particular facts constitute probable cause is question of law for the court.

4. Malicious prosecution 🔑18(4)—Payee of worthless check held to have probable cause for prosecution.

Where a check, returned unpaid for want of funds in the drawee bank, was not paid by the maker, who gave no explanation and subsequently entered into an arrangement whereby he was to work out his indebtedness, which he failed to do, *held*, that the payee had probable cause for prosecution of the maker under Pen. Code, § 476a, for giving a check with intent to defraud, the arrangement to work out the indebtedness not constituting a satis-

faction, nor the compounding of a felony forbidden by Pen. Code, §§ 153, 1377–1379, there being no agreement not to prosecute.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by G. E. Morris against Elmer C. Moore. Judgment for plaintiff, and defendant appeals. Reversed.

A. L. Wissburg, James E. O'Keefe, and C. H. Van Winkle, all of San Diego, for appellant.

Shreve, Dorn & Shreve and E. L. Johnson, all of San Diego, for respondent.

FINLAYSON, P. J. [1] This is an action to recover damages for an alleged malicious prosecution of plaintiff by defendant, who, in an affidavit sworn to by him and filed in the justice's court of San Diego township, charged that plaintiff, in violation of section 476a of the Penal Code, willfully and with the intent to defraud defendant, drew and delivered to the latter his check on a San Diego bank, knowing that he had not sufficient funds in or credit with the bank to meet the check upon its presentation. After his preliminary examination before the justice, plaintiff was discharged, and the criminal proceeding against him was dismissed upon the ground that there was no sufficient cause to believe him guilty. Thereafter plaintiff brought this action for alleged malicious prosecution. The case was tried by the court without a jury. The trial court found that defendant instituted the criminal proceeding against plaintiff without probable cause and with malice, and gave judgment for plaintiff accordingly. Defendant appeals from the judgment and likewise from an order denying him a new trial. The order denying a new trial is not appealable, and for that reason the attempted appeal therefrom must be dismissed.

[2, 3] In an action of this character the burden rests upon the plaintiff to prove want of probable cause, which has been defined to be "a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." Lee v. Levison, 173 Cal. 169, 159 Pac. 440. What facts, or whether particular facts, constitute probable cause is a question of law for the court. Davis v. Pacific Telephone, etc., Co., 127 Cal. 319, 57 Pac. 764, 59 Pac. 698. With these elementary principles in view we deem it unnecessary to go beyond an examination of the question of probable cause for the prosecution.

The evidence introduced by plaintiff discloses the following: Plaintiff, who had been employed as a chauffeur in the operation of automobiles on a stage route running out of San Diego, on May 29, 1921, at the city of San Diego, drew his check on a bank of that city for $109.70, and delivered it to defendant. The sum for which it was drawn was the amount due by plaintiff to defendant as the latter's share of the proceeds of the sale of certain tires which plaintiff had sold for defendant. At the time when the check was drawn, plaintiff was likewise indebted to defendant in about $400 for automobile accessories theretofore sold to him by defendant.

Defendant deposited the check in a bank at San Diego in which he kept his account. In due time that bank presented it to the drawee bank. Payment was refused by the latter institution, upon the ground that plaintiff did not have sufficient funds. On June 4, 1921, defendant's bank mailed him a written notice that plaintiff's check had been returned unpaid for lack of funds. A few days later defendant met plaintiff on the street in San Diego and informed the latter that his check had been returned for want of sufficient funds to pay it.

Plaintiff, testifying as a witness in his own behalf, upon being asked by his counsel what he did when defendant informed him that the bank had refused payment on the check, testified as follows:

> "When he [defendant] told me there was not enough money for the check I couldn't understand it. I thought there was something wrong, so I went up and checked over my account, and I saw I had made a $50 mistake in my check stubs, and he didn't put the check in, it was several days after I gave it to him, and there was only $60, or something like that, in the bank."

It will be noted that, while plaintiff said that he "could not understand it" and that he "thought" there was something wrong, he did not testify that he told defendant that he could not understand why the check was returned or that he told defendant that he thought something was wrong. Nowhere in his testimony does he say that he ever informed defendant of the mistake which he claimed to have made in his figures on the check stubs. When he was met on the street by defendant and told that the check had been returned for lack of sufficient funds to meet it, a situation presented itself which called for candor and frankness on plaintiff's part. If he did indeed make an error in his calculations, as he claimed that he had, it would be but natural for him to explain the matter fully to defendant at the first opportunity after his examination of his check stubs. If a mistake had been made, and if plaintiff did in fact draw the check in ignorance of the exact state of his checking account, defendant, who met plaintiff often during the ensuing six weeks, might well have expected that he would be given some sort of a satisfactory explanation by plaintiff. But no explanation was offered. At any rate there is no evidence that any ever was given. Plaintiff simply testified that, when informed by defendant that the bank had refused to pay the check, he "thought" there was something wrong, and that he later discovered how he had made the mistake. The record is barren of any fact from which it might be inferred that he ever explained the matter to defendant before the latter instituted the criminal prosecution.

A week or so after the return of the check unpaid, the debt evidenced by that instrument still remaining unsatisfied and plaintiff still being indebted for the other sums which were due to defendant for automobile accessories previously sold by the latter to plaintiff, the two entered into an agreement whereby two automobiles which had been operated by plaintiff on a stage line running out of San Diego were turned over to defendant, with the understanding that the former would continue to drive one of his automobiles and that all of the net profits arising out of the operation of the two cars should be applied on plaintiff's total indebtedness to defendant—including the $109.70 for which the check had been drawn. The automobiles were incumbered with liens to secure debts due third parties.

The arrangement whereby plaintiff thus undertook to "work out" his indebtedness to defendant continued for about a month, when, without previous notice to defendant, plaintiff left San Diego and went to Taft, in Kern county, to seek employment there. According to plaintiff's testimony, which on this appeal must be accepted as true, he mailed a letter to defendant about three days after leaving San Diego. He testified that he mailed it at San Bernardino while on his way to Taft, and that in it he notified defendant of his departure. Defendant testified that he never received the letter.

When plaintiff left for Taft the amount of the check and a considerable part, if not all, of his orginal indebtedness to defendant remained unpaid. Plaintiff took with him one of the two automobiles which he previously had delivered to defendant under the arrangement whereby he had agreed to "work out" his indebtedness.

On July 19, 1921, which was shortly after learning that plaintiff had left San Diego and gone to Taft, defendant called upon the district attorney of San Diego county and narrated all of the facts connected with the giving of the check, but he failed to tell about the subsequent arrangement which he had entered into with plaintiff to enable the latter to "work out" his indebtedness. Upon the strength of the facts thus related to him, the district attorney advised defendant that there was probable cause for plaintiff's prosecution, and thereupon the criminal proceeding was inaugurated, resulting finally in plaintiff's discharge, as already mentioned.

[4] Upon these facts, unexplained, it is manifest that appellant did have probable cause for the prosecution. The facts and circumstances of which he had knowledge were such as would naturally excite the belief in a reasonable mind that respondent had committed the crime denounced by section 476a of the Penal Code—that is, that respondent gave the check knowing that he had not sufficient funds in or credit with the bank to meet it in full upon its presentation, and that he gave it with the intent to defraud appellant.

Not only was the check returned unpaid for want of funds, but it never was paid, although some days elapsed between the time when appellant notified respondent of the return of the check unpaid and the time when the parties entered into the arrangement whereby respondent was to "work out" his obligation. This fact, unexplained, was sufficient to arouse in the mind of a reasonable man the belief that there were not sufficient funds in or credit with the bank to meet the check upon its presentation. And the fact that respondent never vouchsafed any explanation for the lack of sufficient funds in the bank—the fact that he never told appellant how it was that he made a miscalculation in his check stubs—although the situation was one which would naturally call for an explanation, if any there were, warranted a reasonable man in believing that, when respondent gave the check, he knew that he had not sufficient funds in the bank to meet it. And if respondent gave the check knowing that he had not sufficient funds in or credit with the bank, the inference was but natural that he drew it and gave it to appellant with the intent to defraud the latter. People v. Kawano, 38 Cal. App. 612, 177 Pac. 174. Moreover, respondent's subsequent behavior, his surreptitious departure from San Diego, for example, was such as naturally would tend to strengthen the belief that he was a man who could not be trusted—a man who might give a check fraudulently, knowing that there were not sufficient funds in or credit with the bank to meet it when presented.

From certain remarks made by the learned judge of the court below during the course of the trial, we opine that the case was decided in that court upon the theory that the subsequent arrangement, whereby respondent undertook to "work out" all of his indebtedness to appellant, amounted to a settlement and satisfaction of the debt for which the check had been drawn and that for that reason respondent's crime, if he was guilty of any public offense, had been extinguished, and he no longer was subject to prosecution. There is no valid basis for any such theory.

The record is barren of any fact tending to show that appellant ever agreed not to prosecute respondent. Had such an agreement been made, it would have constituted the compounding of a felony—a crime denounced by the Penal Code. The crime defined by section 476a is punishable by imprisonment in the state prison. It is true that it also is punishable by imprisonment in the county jail. But when a crime is punishable by imprisonment in the state prison or by imprisonment in the county jail, in the discretion of the court, it must be deemed to be a felony for all purposes until after a judgment imposing a punishment by imprisonment in the county jail. Pen. Code, § 17; People v. War, 20 Cal. 117. A felony may not be compromised by leave of court. Pen. Code, §§ 1377–1379. Every person who, for a consideration, agrees to abstain from the prosecution of a crime which may not be compromised by leave of court is guilty of compounding a crime. Pen. Code, § 153. There is no direct evidence that appellant ever agreed not to prosecute respondent; and, since appellant would have been guilty of compounding a crime had he made any such agreement for a consideration, the presumption of innocence compels the rejection of any ill-founded inference that there ever was an agreement not to prosecute.

A compromise arrangement, entered into solely for the purpose of enabling a creditor ultimately to recover the money due to him from his criminal debtor, will not suffice, of itself, to bar a criminal prosecution or furnish evidence of a want of probable cause. Appellant had the legal right to the money evidenced by the check. Having such right, he had the legal right to make such arrangement for the payment of the debt as the parties might voluntarily agree to, provided, of course, there was no attempt at the compounding of a felony.

> "The defendant," said the New York Court of Appeals in Fagnan v. Knox, 66 N. Y. 532, "had a legal right to settle with the plaintiff, and receive payment for the amount abstracted as and for a debt upon an implied contract, and such settlement was no bar to a criminal prosecution, nor did it furnish evidence that the defendant did not believe that the money had been embezzled. The mere fact of settlement had no legitimate bearing on that question, certainly not against the defendant, and was equally consistent with a belief of guilt or innocence."

The Michigan Supreme Court states the rule thus:

> "When a plaintiff is shown to have taken and appropriated to his own use property belonging to his employer, proof of an attempt by the defendant to settle the matter and obtain his own does not of itself tend to show a want of criminal intent upon the part of such plaintiff, or belief in his innocence upon the part of the defendant." Harris v. Woodford, 98 Mich. 147, 57 N. W. 96.

See, also, Rankin v. Crane, 104 Mich. 6, 61 N. W. 1007.

The showing made by respondent at the trial in the court below failed to disclose a want of probable cause for his prosecution.

The appeal from the order denying a new trial is dismissed. The judgment is reversed.

We concur: WORKS, J.; CRAIG, J.

---

61 Cal. App. 271, 799, 800

HUNT v. INNER HARBOR LAND CO. (Civ. 3714, L. A. 7676.) MANN v. SAME. (Civ. 3713, L. A. 7675.) JONES v. SAME. (Civ. 3715, L. A. 7677.)

(District Court of Appeal, Second District, Division 2, California. March 5, 1923. Hearing Denied by Supreme Court May 3, 1923.)

1. **Vendor and purchaser 🔑133—Contract held to require conveyance of unincumbered title.**

A contract to deliver to a purchaser a good and sufficient deed to property and also a certificate of title showing title to the same vested in the grantor of the deed calls for a good title to the land unincumbered and free from defect.

2. **Vendor and purchaser 🔑130(5)—Pending suit for condemnation of land is "incumbrance."**

The pendency of a suit to condemn land at the time for conveyance of the title is an incumbrance upon the land.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Incumbrance (On Title).]

3. **Vendor and purchaser 🔑112(1)—Purchaser's equitable right to condemnation award does not defeat right to rescission.**

The right of a purchaser under an executory contract, who has equitable title to the property, to receive the award of condemnation made in pending condemnation proceedings, does not defeat his right to rescind for the vendor's inability to perform his contract to convey an unincumbered title.

Opinion of Supreme Court Denying Hearing.

4. **Vendor and purchaser 🔑334(5)—Vendor cannot retain payment after receiving compensation for taking of land in condemnation proceedings.**

Where judgment in condemnation proceedings had been rendered and possession of the property taken, it is presumed the vendor thereof has received full compensation for the property, and he cannot retain the purchase money already paid by the purchaser.

5. **Vendor and purchaser 🔑334(3)—Vendor conceding inability to perform contract consents to rescission and must return payments.**

Where vendor, in his answer to a complaint for return of the payments by a purchaser, conceded his inability to comply with the contract, and alleged that the contract was at an end because the premises had been condemned, he in effect consented to the rescission of the contract by the purchaser and must return the payments.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Three separate actions by C. W. Hunt, by David C. Mann, and by Anna M. Jones against the Inner Harbor Land Company for rescission of contracts to purchase real property. Judgment for plaintiff in each case, and defendant appeals. Affirmed.

Daly, Daly & Todd, of Long Beach, for appellant.

Birney Donnell, of Los Angeles, for respondent.

H. S. Laughlin, of Los Angeles, amicus curiæ.

Opinion in Case No. 3714.

FINLAYSON, P. J. [1, 2] This is an action to recover moneys which plaintiff had paid to defendant as part of the agreed purchase price under a written contract of sale whereby defendant had agreed to convey and plaintiff had agreed to purchase a certain parcel of land in Los Angeles county. Subsequent to the contract and to the payment of the moneys sought to be recovered, a condemnation action was commenced by the Los Angeles flood control district to condemn the land for flood control purposes. In its contract to convey defendant covenanted to deliver to plaintiff, upon payment of the agreed purchase price, "a good and sufficient deed of grant, bargain, and sale to said property, and also a certificate of title, showing title to the same vested in the grantor or grantors in said deed." This covenant calls for a good title to the land, unincumbered and free from defect. Haynes v. White, 55 Cal. 38; Easton v. Montgomery, 90 Cal. 307, 314, 27 Pac. 280, 25 Am. St. Rep. 123. The pendency of the condemnation action is an incumbrance upon the title. Block v. Citizens' Trust, etc., Bank (Cal. App.) 207 Pac. 510. Subsequent to the commencement of the condemnation suit and prior to bringing this action, plaintiff rescinded his contract to purchase upon the ground that defendant, by reason of the condemnation suit, could not give the title which it had obligated itself to convey. He likewise demanded repayment of the moneys already paid by him on the purchase price. Defendant refused to repay; hence this action. Plaintiff recovered judgment in the court below, and defendant appeals.

[3] An executory contract to convey has the effect of vesting the equitable estate in the vendee, leaving in the vendor the naked legal title. As the equitable owner of the land, the vendee is entitled to any award which may be made on condemnation of the property. Wherefore appellant contends that respondent can look to the flood control district for compensation, that the money he thus is entitled to receive from that source will stand in lieu of the real property which appellant covenanted to convey to him, and that therefore there was no warrant for the rescission of the contract. The contention lacks merit. The fact that upon the execution of the contract respondent became the equitable owner of the property, and as such would be entitled to any award which might be made on condemnation of the land did not deprive him of the benefit of appellant's covenant to convey to him the legal title to the land clear of all incumbrances. The equitable ownership of a vendee under an executory contract neither satisfies nor releases his vendor's covenant to convey to him the legal title free from incumbrance. The covenant refers to title to land, not title to personal property. Therefore if, by reason of a subsequently commenced condemnation suit, the vendor, at the time when he should execute the deed, is not able to give that title to the land which he covenanted to grant, his vendee may rescind the executory contract and sue for the return of any purchase money which may have been paid by him before the condemnation suit was instituted. Kares v. Covell, 180 Mass. 206, 62 N. E. 244, 91 Am. St. Rep. 271. Nixon v. Marr, 190 Fed. 913, 111 C. C. A. 503, 36 L. R. A. (N. S.) 1067, is not in point. There the vendee did not rescind. He sought to recover damages. For that reason the prevailing opinion differentiates that case from Kares v. Covell, supra. For the same reason it may be differentiated from the present case.

Appellant claims that the commencement of the condemnation action excused it from performing its contract to convey an unincumbered title to the land. Even so, appellant is not entitled to retain moneys which it accepted as the consideration for that good and unincumbered title which it expressly obligated itself to convey.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

Opinion in Cases Nos. 3713 and 3715.

PER CURIAM. The facts are substantially the same as those involved in Hunt v Inner Harbor Co., Civil No. 3714, this day decided. For the reasons stated in the opinion in that case, the judgment in this case is affirmed.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [4, 5] The petitions for transfer to this court are denied upon the ground that it appears from the judgment roll that the property has actually been condemned by the Los Angeles County flood control district by judgment entered September 22, 1920; that possession of the property was taken May 15, 1919, and presumably the defendant has received full compensation for the property; and for the further reason that the defendant by its answer herein concedes its inability to comply with the contract and alleges that the contract is at an end, and this, in effect, is a consent to the rescission of the contract by the plaintiffs.

The applications for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division 2, are denied.

WILBUR, C. J., and LAWLOR, LENNON, WASTE, SEAWELL, and MYERS, JJ., and RICHARDS, Justice pro tem., concur.

61 Cal. App. 375

RADICH v. GAK. (Civ. 2577.)

(District Court of Appeal, Third District, California. March 14, 1923.)

1. **Appeal and error ⟹1012(2)—Finding of trial court, if supported by testimony of one witness, may not be disturbed.**

Appellate courts cannot interfere with the finding of the trial court, if it is supported by the testimony of one witness, unless such testimony is inherently improbable, the only exception being in a criminal case of perjury or of treason wherein the testimony of two witnesses or of one witness and corroborating circumstances must be shown, under Code of Civ. Proc. § 1844.

2. **Money lent ⟹7(3)—Evidence held to support finding defendant became indebted to plaintiff for money loaned.**

Evidence, in an action to recover money lent, *held* to support finding that defendant became indebted to plaintiff on account of loans made.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by John Radich against Mike Gak. Judgment for plaintiff, and defendant appeals. Affirmed.

Peter J. Wilkie and Donald McKisick, both of Sacramento, for appellant.

Evan J. Hughes, of Sacramento, for respondent.

BURNETT, J. [1] The action was brought to recover the sum of $560, the balance due, according to the claim of plaintiff, on the loan of $810 which he had made to defendant. The judgment was in favor of plaintiff for the sum of $560, and the appeal is from said judgment. The only point made is that the evidence is insufficient to support the finding of the court "that, at various times between the 1st day of January, 1920, and the 1st day of April, 1920, the defendant became indebted to the plaintiff in the sum of $810 on account loaned by the plaintiff to the defendant." Strange to say, however, appellant admits that, as to this material finding, there is a conflict in the evidence. Appellant seems to be of the opinion that this court must hold that it was necessary for the testimony of the plaintiff to be corroborated in order to justify the finding. Of course such contention is utterly untenable. The proposition is so elementary and well established that appellate courts cannot interfere with the finding of the trial court if it is supported by the testimony of one witness unless such testimony appears inherently improbable that the citation of authority is not needed. The only exception to the rule, manifestly, is in the criminal case of perjury and of treason, wherein the testimony of two witnesses or of one witness and corroborating circumstances must be shown. Section 1844, Code Civ. Proc.

[2] To show that the testimony of plaintiff is abundantly sufficient to support the said finding of the trial court, we may quote from his testimony, shown by the record, as follows:

"That he (witness) and his brother, Nick, and his uncle, Jos. Widowich, were partners, and had rented a ranch, near Mather Field, in the county of Sacramento, state of California. That some time in the month of January, 1920, the defendant, Mike Gak, came to witness, in the said county of Sacramento, and that said Gak stated to witness that he (Gak) was without funds, that he had been in trouble in the state of Oregon, and that he had been compelled to leave there. That he (Gak) had requested witness to permit him (said Gak) to come onto the ranch of witness, and stay with witness, until he (Gak) could find something to do, and that when he got work he would then pay witness for his board and lodgings. Plaintiff and defendant are Slavonians, and had known each other before coming to the United States. That witness granted defendant's request, and let defendant stay and board with witness. That upon various occasions, between the latter part of January, 1920, and the 1st day of April, 1920, witness loaned to said defendant various sums of money; the dates and amounts of each being specified by witness, the whole of said loans amounting to $810.00, and which sums, witness testified, defendant had personally received from witness. That the largest of said loans, so made, was as follows: On or about the 5th day of March, 1920, in the house, on the aforesaid ranch, in the presence of 'Nick Radich.' Defendant had requested that witness loan to him (said Gak) the sum of $500; said Gak explaining to witness, that he (Gak) wanted to purchase an automobile with which to start in business; whereupon witness asked 'Nick Radich,' his brother, and partner, to get said sum of $500. That while witness and defendant remained in the house, Nick Radich procured said sum of $500 from a can, which was hidden in the barn, and gave said money to witness. That witness then gave to said Gak the sum of $500, and loaned said sum to said defendant at the request of said defendant. That no payments have been made on said loans, except the sum of $250."

We may add that there was even corroboration of this by plaintiff's brother, and the testimony of defendant to the contrary was greatly discredited by his cross-examination.

The case involving not the least shadow of a disputable proposition should never have been appealed.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

---

61 Cal. App. 417

MONAHAN v. WATSON et al. (Civ. 4029.)

(District Court of Appeal, Second District, Division 2, California. March 16, 1923.)

1. Fraud 🔑35—Waived by maker's asking extension of note.

Where defendant, maker of note, after discovering all the particulars of plaintiff payee's alleged fraud, requested an extension of the note and induced the attorney for plaintiff to refrain from carrying out his instructions to collect the note as soon as it fell due, defendant thereby waived the alleged fraud.

2. Evidence 🔑441(9)—Contract of sale not to be varied by parol warranty.

A written contract of sale could not be varied by evidence of a parol express warranty.

3. Sales 🔑270—No implied warrant of merchantability where buyer assisted in inventorying goods.

Civ. Code, § 1771, as to implied warranty of merchantability of merchandise inaccessible to buyer's examination, cannot apply to a case where buyer assisted in taking an inventory of the goods.

4. Bills and notes 🔑443(2)—Payee held proper party plaintiff.

The payee of a note, in possession thereof, is presumed to own it, although indorsed by him to another, and in his suit thereon his title cannot be inquired into except for defendant's protection or to let in a defense which he seeks to make; so that, where the only defense made is one available only as against the payee, the contention that the payee is not the real party in interest is without merit.

5. Bills and notes 🔑56, 489(3)—Delay in affixing revenue stamps to notes held no defense.

In an action by payee of a note against makers thereof, delay in affixing revenue stamps to the note was not an available defense where not pleaded by defendant; and, in any event, the note, even if not regularly stamped, was not void, as Congress is without power to legislate concerning rules of evidence administered in state courts.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by J. J. Monahan against Jessie F. Watson and G. Mitchell Hopkins. From judgment for plaintiff, the last-named defendant appeals. Affirmed.

Chas. W. Fourl, of Los Angeles, for appellant.

Milton K. Young, Lyndol L. Young, William K. Young, and Forrest F. Murray, all of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action on a promissory note executed by both defendants to plaintiff as the payee. The defendant Watson was not served with summons and did not appear. The defendant Hopkins filed an answer and a cross-complaint wherein he alleged that the note, which had been given for a part of the purchase price of certain personal property in the city of Los Angeles purchased by defendants from plaintiff, was procured by fraud in that plaintiff made certain alleged false and fraudulent representations respecting the property. Hopkins claimed to have been damaged in the sum of $20,000 by reason of the alleged fraud. The action was tried before a jury. Plaintiff recovered a verdict, and from the judgment entered thereon the defendant Hopkins appeals.

Appellant urges as grounds for reversal: (1) That the court erroneously excluded certain evidence which it is claimed would have established not alone the alleged false and fraudulent representations, but also certain express warranties; (2) that the evidence shows that plaintiff was not the owner or holder of the note; and (3) that all of the requisite United States revenue stamps were not placed on the note at the date of its execution, and that therefore that instrument was void and should not have been admitted in evidence.

Upon the uncontradicted testimony of one of respondent's witnesses the trial court held that appellant had waived the fraud alleged by him as a defense in his answer and as a cause of cross-action in his cross-complaint. Because of such waiver the trial court excluded all evidence offered by appellant to prove his averments of deceit. In this there was no reversible error. It seems that respondent, who resided in the east, had instructed his attorney at Los Angeles to collect the note as soon as it fell due. Some three or four days before the maturity of that instrument, appellant called upon respondent's attorney and requested him to telegraph to his client for an extension of 30 days within which to pay the note. When making this request for an extension of time, appellant told respondent's attorney that the stock of goods which had been sold to defendants, and for which the note had been given, would remain where it then was and thus could be readily levied upon in the event that any action should be brought on the note and a writ of attachment issued. In acceding to appellant's request the attorney told him that in view of the former's statement that the goods would be allowed to remain where they were he would wire his client for the requested extension. Thereupon the attorney wrote or telegraphed to his client advising him of appellant's request. Some days later he received a telegram in reply notifying him that if appellant would pay one-half of the amount due on the note the requested extension would be granted as to the balance. Upon receipt of his client's telegram the attorney communicated its contents to appellant. In the meantime the attorney, upon his own responsibility, had personally extended the due date of the note. This he did upon the strength of appellant's assurance that the stock of goods would remain where it was and thus be subject to attachment in the event that it should be necessary to bring suit on the note. Appellant not only did not accept respondent's counter proposal to pay one-half of the note as a condition to any further extension of time, but, shortly after being informed of the latter's telegraphic reply to his request for an extension, sold his entire stock of goods, thus making it impossible for respondent to attach it.

[1] Appellant's conduct was a waiver of any fraud of which respondent may have been guilty when he sold the personal property to defendants. From the averments of the answer and cross-complaint it is evident that at the time when appellant requested the extension of time and induced respondent's attorney to refrain from carrying out his instructions to collect the note as soon as it fell due, appellant had discovered all the particulars of the alleged fraud. This brings the case fairly within the rule announced in Schmidt v. Mesmer, 116 Cal. 267, 48 Pac. 54, where it was said that, after discovering the deceit, the party defrauded "must stand toward the other party at arm's length; he must comply with the terms of the contract on his part, must not ask favors of the other party, or offer to perform the contract on conditions which he has no right to exact, and must not make any new agreement or engagement respecting it; otherwise he waives the alleged fraud." To the same effect is Tucker v. Beneke, 180 Cal. 588, 594–595, 182 Pac. 299. Having waived the deceit, if any there was, appellant is not in a position to complain that the trial court took the issue of fraud from the jury and refused to allow him to introduce evidence in support of his averments of misrepresentation.

[2] There is no merit in appellant's claim that the representations which are set up in his pleadings constituted warranties which it was permissible to prove by parol. The contract of sale was reduced to writing. It was not competent, therefore, to show any express warranty by parol evidence. No rule is better settled than that where there is a complete written contract, oral representations or warranties, and implied warranties, and all oral negotiations, are merged in the written contract, and by its terms the parties must be bound. Kullman, etc., Co. v. Sugar, etc., Co., 163 Cal. 725, 731–732, 96 Pac. 369, and authorities there cited.

[3] Nor can we perceive that appellant's position is bettered by the invocation of the sections of the Civil Code respecting implied warranties. Section 1767 is to the effect merely that one who sells personal property, knowing that the buyer relies upon his advice or judgment, warrants to the buyer that the seller does not know of the existence of any fact concerning the thing sold which would to his knowledge destroy the buyer's inducement to buy. No pleading touches this section of the Code. Section 1771 is to the effect that one who sells or agrees to sell merchandise inaccessible to the examination of the buyer thereby warrants it sound and merchantable—a provision which by no possibility can be held applicable to the case at bar, since appellant assisted in taking an inventory of the goods which were the subject of the sale.

[4] There is no merit in the point that the action was not brought by the real party in interest. Respondent, the payee of the note, was a trustee under a written declaration of trust in which two corporations were named as the beneficiaries. One of these was the Standard Tire Company. The property for which the note was given was sold by respondent under his authority as such trustee, and the note was made payable to him as trustee. The following indorsement appears on the note: "For deposit to the account of the Standard Tire Company. J. J. Monahan, Trustee." Wherefore it is claimed that the evidence shows that, when the action was brought, the Standard Tire Company, and not respondent, was the real party in interest. The note was sent by mail to the attorney who brought the action. He was the attorney of J. J. Monahan, in whose name, as trustee, the action was brought. It matters not whether the note was mailed to the attorney by his client or by the Standard Tire Company. In either event, the attorney's possession was his client's possession. And the payee's possession overcame any inference which might have been drawn from the indorsement on the note. The payee of a promissory note, in possession of the same, is presumed to own it, although his indorsement thereon, in full or in blank, may stand uncanceled. He may sue upon such note, and his title to the same cannot be inquired into unless it be necessary for the protection of the defendant or to let in a defense which he seeks to make. Bomar v. Equitable Mortgage Co., 111 Ga.

143, 36 S. E. 601. Here the only defense pleaded was one which, if available at all, could be set up to defeat an action brought by the payee.

[5] The note was dated July 17, 1920. It is claimed that it bears evidence on its face that one of the stamps required by the United States revenue law was not affixed until July 28, 1920. Wherefore it is urged that the instrument is void. Appellant's pleadings do not present any issue respecting the validity of the note on account of delay in affixing the stamps. He is therefore is no position to take advantage of any dereliction in stamping the instrument. Oviatt v. Wojcicky, 95 Conn. 562, 111 Atl. 837. Moreover, while Congress may lay an excise tax upon business operations and may collect such tax by means of stamps, and to enforce observance of the law may provide penalties for its nonobservance, it is without power to legislate concerning the rules of evidence administered in the state courts. Duffy v. Hobson, 40 Cal. 240, 6 Am. Rep. 617; Thomasson v. Wood, 42 Cal. 416. The note, even if not regularly stamped, was not void. Moore v. Moore, 47 N. Y. 467; Thomas v. State, 40 Tex. Cr. R. 562, 51 S. W. 242, 46 L. R. A. 454, 76 Am. St. Rep. 740.

The judgment is affirmed.

We concur: CRAIG, J; WORKS, J.

---

61 Cal. App. 275

PEOPLE v. FRENCH. (Cr. 679.)

(District Court of Appeal, Third District, California. March 6, 1923.)

1. Escape 🔑1—Prisoner held "committed" to prison to which he was transferred.

Where one sentenced to imprisonment in particular state prison was transferred to another prison, and was a prisoner therein prior to being taken to a road camp, from which he escaped, he was "committed" to the second prison within Pen. Code, § 106, as amended by St. 1921, p. 77.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Committed.]

2. Criminal law 🔑806(1)—Court not required to repeat instructions substantially given.

On a trial for escape, the court was not required to repeat an instruction as to necessity of intent to escape when once substantially given.

3. Statutes 🔑118(6)—Provision as to escape held within title of amendatory act, referring to attempts to escape.

Pen. Code, § 106, as amended by St. 1921, p. 77, so far as it applies to escapes, is not unconstitutional as not within the title of the amendatory act, which recites that it is an act to amend such section "relating to attempts of prisoners to escape."

4. Statutes 🔑105(1)—Constitutional provision as to titles to be construed liberally and not to embarrass legislation by construction which is unnecessary.

The constitutional provision relative to the titles of acts is intended to guard against the passage of bills, the titles of which give no intimation of their contents, and is to be construed liberally, rather than to embarrass legislation by construction, which is unnecessary to its beneficial purposes.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

L. B. French was convicted of escaping from prison guards, and he appeals from the judgment and from an order denying a new trial. Affirmed.

Charles A. Bliss, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones Deputy Atty. Gen., for the People.

FINCH, P. J. While a prisoner in the state prison at Folsom, the defendant was taken out to work under guard on a highway in Trinity county. The information charges him with the crime of escaping from the surviellance of his guards in that county. He was duly convicted of the crime charged, and prosecutes this appeal from the judgment of conviction and the order denying his motion for a new trial.

On his arraignment the defendant entered a plea of not guilty. Thereafter he moved the court for permission to withdraw his plea in order to interpose a demurrer to the information. The motion was denied. After conviction, the defendant's motion in arrest of judgment was denied. These rulings need not be specifically considered because the questions of law involved are the same as those raised by other contentions hereinafter noticed.

[1] It is contended that the evidence is insufficient to support the verdict, in that, while the defendant was committed to the state prison at San Quentin, he was taken from the prison at Folsom to the road camp in Trinity county. The defendant was sentenced to imprisonment in the state prison of the state of California, and the sheriff was directed, as the law requires, to deliver the prisoner to the warden of the state prison at San Quentin. When thereafter the defendant was transferred to Folsom prison he was committed to that prison in the sense in which the word "committed" is used in section 106 of the Penal Code, as amended by St. 1921, p. 77, under which he was charged. The evidence shows that the defendant was a prisoner in Folsom prison at and prior to the time he was taken therefrom to the road camp. That fact is sufficient to meet the requirements of the statute.

[2] Complaint is made of the court's re-

fusal to instruct the jury that, if the defendant believed he had permission to leave camp and, so believing, went and remained beyond the limits thereof he is not guilty of escape, unless, at the time of leaving or while away, he had or formed the intention of escaping, and that such intention must be proved beyond a reasonable doubt. At defendant's request, the court instructed the jury that—

> "Before you can find the defendant guilty in this case, you must be satisfied in your own mind, beyond all reasonable doubt, that he intended to escape from confinement, and you are further instructed that, even though the defendant might have gone beyond the limits of the road camp, he is not guilty of escape unless he went or remained away with the intent to escape."

A court is not required to repeat an instruction which has been once given.

[3, 4] It is contended that section 106 of the Penal Code, as amended in 1921, is unconstitutional in that the provision of the act making it a crime to escape is not embraced within the title, "relating to attempt of prisoners to escape." The amending act reads as follows:

> "An act to amend section one hundred six of the Penal Code, relating to attempt of prisoners to escape.
>
> "The people of the state of California do enact as follows:
>
> "Section 1. Section one hundred six of the Penal Code is hereby amended.
>
> "106. Every prisoner committed to a state prison for a term less than for life, who escapes or attempts to escape while being conveyed to or from or while confined within such prison or while at work outside such prison under the surveillance of prison guards is guilty of a felony and on conviction thereof the term of imprisonment therefor shall commence from the time such convict would otherwise have been discharged from said prison."

Sections 105 and 106 of the Penal Code were amended in the year 1880 by a single act (St. 1880, p. 42) entitled: "An act to amend sections one hundred and five and one hundred and six of the Penal Code, relating to escapes and attempts to escape from state prison." "An act to amend section 106 of the Penal Code" would have been a sufficient title for the amendment of 1921. Had such title been adopted, the subject of the act of 1921 would be ascertained by reference to the act of 1880, the title of which embraced both escapes and attempts to escape. In discussing a similar question it was said:

> "Under the decision of this court, the title of the act would have been sufficient if it had read simply: 'An act to amend section 61 of the Civil Code.' * * * The addition of further descriptive words cannot vitiate this sufficient title, unless such further words indicate a subject not really related to the matters covered by the body of the bill." Estate of Elliott, 165 Cal. 339, 345, 132 Pac. 439, 441.

It would hardly be contended that the crimes of escaping and attempting to escape might not properly be included in a single act, under an appropriate title, or that both might not be included in an act under a title "relating to escapes." No reason suggests itself why both may not be included under a title "relating to attempts to escape." The constitutional provision is intended—

> "to guard against the passage of bills the titles of which give no intimation to the members of the Legislature or to the people of the matters contained therein." Ex parte Liddell, 93 Cal. 633, 636, 29 Pac. 251, 252.

It is to be construed—

> "liberally, rather than to embarrass legislation by a construction which is unnecessary to the accomplishment of the beneficial purposes for which the provision was adopted." Beach v. Von Detten, 139 Cal. 462, 465, 73 Pac. 187, 188.
>
> "Where the title suggests to the mind the field of legislation which the text of the act includes, the title will not be held misleading or insufficient, or the act restricted in its operation." People v. Jordan, 172 Cal. 391, 394, 156 Pac. 451, 453.
>
> "The objections should be grave, and the conflict between the statute and the Constitution palpable, before the judiciary should disregard a legislative enactment." Inhabitants, etc., of Montclair v. Ramsdell, 107 U. S. 147, 2 Sup. Ct. 391, 27 L. Ed. 431.
>
> "It is not essential that the best or even an accurate title be employed, if it be suggestive in any sense of the legislative purpose. The remedy to be secured and mischief avoided is the best test of a sufficient title which is to prevent it from being made a cloak or artifice to distract attention from the substance of the act." State v. Board of Control, 85 Minn. 165, 88 N. W. 533.

See, also, Ex parte Wilson, 85 Tex. Cr. R. 554, 213 S. W. 984; Burton v. Commonwealth, 122 Va. 847, 94 S. E. 923.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

61 Cal. App. 280

PEOPLE v. LEWIS. (Cr. 676.)

(District Court of Appeal, Third District, California. March 6, 1923.)

1. Escape 🔑1—Statute does not use "surveillance" as meaning close watch on one not in custody.

Pen. Code, § 106, as amended by St. 1921, p. 77, making it a felony for prisoner at work outside prison, under "surveillance" of prison guards, to escape, does not use "surveillance" as meaning oversight or close watch of one not in custody.

2. Indictment and information 🔑110(14)—Information for escape in language of statute held sufficient; "surveillance."

Information charging in language of Pen. Code, § 106, as amended by St. 1921, p. 77, that defendant, while at work outside prison under surveillance of prison guards, escaped from such surveillance, did not use "surveillance" as meaning oversight or close watch of one not in custody, and was sufficient.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Henry Lewis was convicted of the crime of escape, and he appeals. Affirmed.

Wm. V. Cowan, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The information in this case charges that the defendant was—

"a prisoner lawfully committed to the state prison, and as such lawfully confined in the state prison at Folsom, county of Sacramento, * * * for a term less than life; and the said Henry Lewis, while at work outside such prison under the surveillance of prison guards, to wit, in the county of Trinity did then and there willfully and unlawfully and feloniously escape from the surveillance of said prison guards."

The defendant was duly convicted, and he prosecutes this appeal from the judgment.

[1, 2] It is contended that the information does not state a public offense. It is argued that to escape from the surveillance of the guards is not the equivalent of escaping from the custody of the guards; that the word "surveillance" means "oversight or close watch"; that "frequently a suspected criminal is under surveillance without being in custody or even detained or deprived of his liberty." It is very plain that the word is not used in such limited sense either in section 106 of the Penal Code, as amended by St. 1921, p. 77, or in the information. The lexicographer's definition of a word must yield to the plain meaning of the word as gathered from the context of the statute in which it is used. The information follows the language of the statute, and must be held sufficient.

It is urged that section 106 is unconstitutional on the grounds considered in the case of People v. French (Cal. App.) 214 Pac. 1003, this day decided. On the authority of that case the objection to the validity of the statute is held untenable.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

---

61 Cal. App. 278

PEOPLE v. PIMENTEL. (Cr. 677.)

(District Court of Appeal, Third District, California. March 6, 1923.)

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Frank Pimentel was convicted of escaping from prison guards, and he appeals. Affirmed.

M. S. Wahrhaftig, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. While a prisoner in the state prison, the defendant was taken outside thereof to work. He was convicted of the crime of escaping from the surveillance of his guards while so outside. The defendant gave notice of appeal from the judgment of conviction, but no brief has been filed in his behalf nor was any appearance made for him at the time set for oral argument. No error appears in the record. The information is substantially the same as those in the cases of People v. French (Cal. App.) 214 Pac. 1003, and People v. Lewis (Cal. App.) 214 Pac. 1005, this day decided.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

---

61 Cal. App. 279

PEOPLE v. McDONALD. (Cr. 678.)

(District Court of Appeal, Third District, California. March 6, 1923.)

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

J. A. McDonald was convicted of escaping from prison guards, and he appeals. Affirmed.

S. R. Hart, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. While a prisoner in the state prison, the defendant was taken outside thereof to work in a road camp, under guard. He was convicted of the crime of escaping from the surveillance of his guards while in such camp. He gave notice of appeal from the judgment of conviction, but no brief has been filed in his behalf nor any appearance made for him at the time set for oral argument. No error appears in the record. The information is substantially the same as those in People v. French (Cal. App.) 214 Pac. 1003, and People v. Lewis (Cal. App.) 214 Pac. 1005, this day decided.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

---

61 Cal. App. 359

FLAGLER v. KROONEN et al. (Civ. 2568.)

(District Court of Appeal, Third District, California. March 13, 1923.)

1. Vendor and purchaser 🔑78—Time held not of essence of contract.

Time *held* not of the essence of a contract providing that vendors should perfect their title within a year, but that, if they failed, the time for making deferred payments might be extended for another year at vendee's option, notwithstanding a provision for recovery of the amounts paid by vendee if vendors failed to perfect title "as above stated."

2. Contracts 🔑211—Intent to make time of essence must be clearly shown.

To make time of the essence of an obligation, it need not be declared so in the words of the statute, but such intent must be clearly, unequivocally, and unmistakably shown.

3. Vendor and purchaser 🔑143—Purchaser held to have waived vendor's failure to perfect title in time allowed.

A purchaser having an option to extend the time for making deferred payments if vendors failed to perfect their title within a certain time *held* to have waived vendors' default by not declaring his intention to take advantage thereof for over a year, with knowledge that vendors, believing that he intended to take the property, were refusing to negotiate with others for the sale thereof.

4. Vendor and purchaser 🔑335—Purchaser in default cannot recover money paid on vendors' subsequent default.

A purchaser in default in payment of interest on deferred payments and making no offer to pay cannot recover money paid on the purchase price, on vendors' subsequent failure to perfect their title within the time set.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action by John H. Flagler against Leo Kroonen and another. Judgment for plaintiff, and defendants appeal. Reversed.

Milton K. Young and Frank L. Stobbs, both of Los Angeles, for appellants.

Carnahan & Clark, of Los Angeles, for respondent.

FINCH, P. J. The parties entered into a contract dated June 16, 1916, by the terms of which plaintiff agreed to purchase from defendants an undivided two-thirds interest in certain mining claims, consisting of clay beds, for $33,333.32, $3,000 cash on execution of the contract, $2,000 six months from date thereof, and installments of $7,083.33 a year until the whole purchase price was paid, the first of such installments to be paid one year after the date of the contract, "deferred payments to draw interest at the rate of 5 per cent. per annum, interest payable semiannually." The contract contained the following:

"Provided, however, that said first parties (defendants) shall proceed with due diligence to perfect and acquire title to all of the above-described property from the United States government and obtain patent thereof, or acquire title to that portion of said property located in section 9 from the Southern Pacific Railway Company, all to be acquired within one year from date hereof, and all to be done at the sole expense of said first parties except as otherwise herein provided.

"In case said first parties shall fail to perfect or acquire title to said property within one year from date hereof, then at the option of second party, the time of the said deferred payments * * * may each be extended one year from the time they become due as hereinbefore stated, and the deferred payments * * * shall not draw interest for the length of time said first parties have been unable to procure and perfect title beyond the year above given, but said deferred payments * * * shall draw interest in such case from the time said first parties perfect and acquire title to said property as herein provided. And in case said first parties shall fail to perfect and acquire title as herein provided, then * * * said second party shall be released from all obligations in law or equity to pay said indebtedness, * * * or any portion thereof.

"The perfection of said title as aforesaid shall be evidenced by the certificate of Geo. R. Freeman, attorney at law, of Corona, California, stating that the title to said property is free and clear of incumbrances and free from any defect, in the name of Leo Kroonen, before the first payment of $7,083.33 is made by said second party.

"In the event of the failure of the said first parties to perfect title as above stated, then the amount paid by said second party shall be repaid by first parties to said second party * * * and this contract shall be at an end.

"And the said parties of the first part on receiving such payments aforesaid * * * agree * * * to execute and deliver to said second party, or assigns, a good and sufficient deed * * * and furnish and deliver to second party an abstract of title or a certificate of title (at the option of the second party) from a reliable abstract company, * * * said title to be passed upon and certified to by said Geo. R. Freeman as aforesaid.

"It is agreed between the parties hereto that from and after the date of this instrument all expense for obtaining patent of said mines from the United States government and development work that shall be done upon said

> mines, or either of them, shall be done at the expense of the parties hereto in the following proportions, to wit: Said first parties one-third of said expense, and second party two-thirds of such expense. * * *
>
> "It is mutually agreed that the parties hereto may do such development work upon said mines from time to time as they may mutually agree upon."

Plaintiff paid the sum of $3,000 on the execution of the contract and $2,000 in the month of January, 1917. The court gave judgment in favor of plaintiff for the recovery of the $5,000 so paid by him on the ground that defendants had not perfected title within one year after the date of the contract. From this judgment the defendants appeal.

At the time the contract was executed the plaintiff knew that Kroonen's right to a patent was being contested; that the local land office had decided the contest in favor of Kroonen; that the general land office had affirmed the decision; and that the contestant had appealed to the Secretary of the Interior, and within a few weeks after the execution of the contract plaintiff was notified by his attorney that the Secretary of the Interior had affirmed the decision. June 9, 1917, the local land office issued to Kroonen its final receipt for the purchase price of the property described in the contract. On account of an error on the part of the local land office in allowing a homestead entry to overlap on one of Kroonen's claims, and which was not cleared up until some time prior to September 22, 1917, Kroonen's patent was not issued until December 10, 1917. Plaintiff failed to make the first deferred payment of $2,000 when it became due, but paid the same in the following January. He failed at any time, however, to pay interest on the $2,000 as provided in the contract, although Kroonen requested him to pay it at the time the $2,000 was paid. Neither did the plaintiff make payment at any time of the interest which fell due December 16, 1916, on the other deferred installments. At different times after the patent was issued Kroonen requested payment of two-thirds of the moneys expended by him in obtaining the patent and developing the property as well as other sums due under the terms of the contract. While such payments were not made as requested, the plaintiff at no time prior to November 29, 1918, intimated to Kroonen that he did not intend to complete the purchase or that he would make the claim that Kroonen was in default in failing to perfect title within the time provided in the contract. On the contrary, the letters passing between plaintiff and his attorney indicate a purpose to conceal from Kroonen the knowledge that any such course was even contemplated. Such letters further indicate that plaintiff had not decided definitely, even in his own mind, prior to November 29, 1918, to take advantage of Kroonen's alleged default.

Freeman had been attorney for plaintiff for a number of years, and continued to act as such in all the transactions between the parties. He acted as attorney for both parties in drawing the contract. He was attorney for Kroonen in procuring the patent. In all other matters he represented the plaintiff only. To hold otherwise would be to impute to the attorney, as will hereinafter appear, a course of unprofessional conduct which the evidence does not warrant. The plaintiff owned other properties in California, but resided in the city of New York. Mr. McCully, mentioned in some of the letters, was general manager of all of plaintiff's properties in this state and conducted, under plaintiff's direction, the negotiations leading up to the execution of the contract. July 18, 1917, Freeman wrote plaintiff as follows:

> "In re Kroonen Mines. I have just received a letter from Gladding, McBean & Co. of San Francisco, relative to joining in the construction and operation of a plant here as I discussed with you while you were here. They are desirous of testing these clays and want me to ship them 50 pounds each of the different kinds of clay. * * * I deem it advisable not to take the matter up with Mr. Kroonen at this time, and I thought if you would write me a letter requesting me to get 50 pounds of the different clays suitable for the purpose of making a test, Mr. Kroonen would comply with that request without asking any questions.
>
> "Mr. Kroonen spoke to Mr. McCully the other night and thought the contract should be closed up. Mr. McCully told him he thought the contract did not warrant his conclusion in that regard in as much as I was to pass upon the title after the patent was obtained. He also told Mr. McCully he had an offer from Gladding & McBean to go in with him, but he did not disclose what the offer was. * * * From another source of information coming from Gladding & McBean, I had heard, but I do not think the proposition was of any definite character. When Mr. Gladding was here at my office, he asked about Kroonen and his clays, and stated to another party in my presence he did not think it was necessary to get any of Kroonen's clays, as no deal could be made with him. I assumed, taking his remark to Mr. McCully and his remark in my presence, that Mr. Kroonen had told him that his mines were tied up and it would be of no use to negotiate a sale of his clays."

August 10, 1917, plaintiff wrote Freeman:

> "I think Gladding & McBean are quite right not to want to do anything with regard to this property, or a deal with us without first testing out the class of clays we have to offer them.
>
> "On further consideration how would it place me towards Kroonen on this matter should I write a letter now at this date, asking Kroonen to get 50 lbs. of the different clays for the purpose as suggested in your letter. Would it not have the effect from my standpoint that I admit the whole contract with Kroonen as being yet in existence? Whereas, Kroonen not get-

ting out title according with his agreement made it a debatable question whether I am in duty bound or in any way obliged to carry out a further deal with him on this clay bank.

"If you think it advisable, possibly Mr. McCully might get this clay, and so send it forward on his own responsibility, rather than commit me in any way as furnishing this clay to the Gladding & McBean Co. Think this over, and let me know further.

"Don't say anything to McCully in regard to the position that I take in this matter, as, of course, you understand Kroonen having failed to carry out his part of the contract on account of the long delay, etc., gives me the opportunity to withdraw, but you don't want to discuss this question of mine with McCully."

January 3, 1918, Freeman wrote plaintiff that Kroonen had received his patent and stated:

"I presume he will now be ready and is ready to have the title to these mines examined and passed upon, and is ready to take the matter up with you."

February 1, 1918, Kroonen sent Freeman a statement of the amount due him under the contract and stated:

"Mr. Flagler could, if he desired to, put off the payment of the original payment until June, but I do not think that he will take advantage of this."

Feb. 12, 1918, Freeman forwarded Kroonen's letter and statement of amount due him to plaintiff and wrote:

"Kindly advise what you wish to be done in the matter. Mr. Kroonen has spoken to me several times in regard to this matter, and he has been in hopes you would come to California and take this matter up personally. I just learned yesterday that the Los Angeles Pressed Brick Company had a ten-year lease on the Elsinore clay beds, and that these clay beds were playing out, and that they were hard pressed to get the proper kind of clay. * * * I am of the opinion that eventually the Kroonen clay beds will be the principal clay beds in Southern California as both to quantity and quality."

February 19, 1918, plaintiff wrote Freeman:

"In yours of the 12th inst. regarding Kroonen claim, I mentioned to you some time since when in California in regard to Mr. Kroonen's delay and failing to produce proper and clear title that I didn't propose to go any further in connection with this subject with Mr. Kroonen, * * * and I had supposed that you had mentioned the matter more or less to him long ere this. I recognize what you say with reference to the Elsinore clay beds. If this is true as alleged it would seem to me, by approaching these people in connection with the Kroonen bed, that something may be made of it, wherein I would get back my $5,000 that I advanced to Mr. Kroonen. When I visit California I will confer further with you on the subject-matter."

February 26, 1918, Freeman wrote plaintiff:

"I note what you say about the Kroonen matter. Mr. Kroonen has spoken to me several times as to what you proposed to do in regard to the matter. I always told him that you would not do anything until the title was perfected as per agreement. As soon as patent was received he began to urge the closing of the deal as per contract. I told him I had no authority to act in the matter for you as to what you would do in regard to the matter. He then sent to me the statement and the letter which I sent you on the 12th of February."

Thereafter, on May 7th, Kroonen sent Freeman a statement of the amount which would be due June 16th and requested that the same be paid promptly when due. July 30th and again on October 23d Kroonen sent plaintiff similar statements and demands for payment. In November, 1917, plaintiff paid Kroonen $1,100, for services rendered in preparing plans and specifications for a chemical plant, without any suggestion that Kroonen was indebted to plaintiff. Had plaintiff then considered the contract sued on at an end and that Kroonen was indebted to him in the sum of $5,000, he naturally would have made such claim. With full knowledge of the foregoing facts and knowing that Kroonen believed that the contract was in full force as to both parties, the plaintiff maintained silence until November 29, 1918, when, for the first time, he denied liability under the contract and claimed the right to recover the purchase money which had been paid. The only fair inference from the plaintiff's conduct is that he was endeavoring to maintain a position which would enable him to complete the purchase or take advantage of Kroonen's alleged default as might finally appear to be most advantageous.

[1, 2] Giving due consideration to all of the terms of the contract, and viewing it in the light of the known circumstances under which it was executed, it cannot be held that the parties intended to make time of the essence thereof. The contract shows on its face that the parties contemplated that more than a year might be required to perfect the title, for the plaintiff was given the option to extend the time of payment if the title was not perfected within that time. Plaintiff's own attorney conducted the proceedings to secure the patent, and failure to issue it at an earlier time seems to have been due to delays in the land office department, over which the defendants had no control. Plaintiff relied for recovery upon the fourth quoted paragraph of the contract, providing for a recovery of the amounts paid by plaintiff "in the event of the failure of the said first parties to perfect title as above stated." The contract was drafted by an experienced attorney, and, in view of the other provisions thereof, if the parties intended to make time of its essence, it is strange that they did not expressly so declare or make

plaintiff's right of recovery dependent upon defendants' failure to perfect title within the "time" stated in the contract instead of "as above stated," since the latter term is equally applicable to more than one provision.

> "We do not think it is necessary, in order to make time of the essence of the obligation, that it should be declared to be so in the words of the statute; but the intent to make it of the essence of the contract must be clearly, unequivocally, and unmistakably shown." Miller v. Cox, 96 Cal. 339, 344, 31 Pac. 161, 163.

[3] If it be conceded that the defendants were obligated to perfect the title within a year, under penalty of losing their bargain, their default did not ipso facto terminate the contract, but they continued bound by its terms, at the option of the plaintiff, until he declared his intention to take advantage of the default. The plaintiff could not indefinitely so hold the defendants bound without waiving his right to rely upon the default. Knowing that Kroonen was refusing to negotiate with other persons for the sale of the property, in the belief that he was bound by the contract and that plaintiff intended to take the property, the plaintiff, by his conduct and the reasons given by his attorney to Kroonen for not completing the transaction at the times requested, confirmed the latter's belief that plaintiff would complete the purchase. Under such circumstances it would be inequitable to permit plaintiff to take advantage of the alleged default, but he must be held to have waived it by the course of conduct he pursued.

[4] Plaintiff's cause of action is based upon the theory that defendants made default in the performance of the contract, and that, by reason of such breach, the plaintiff had the right to treat the agreement of sale as abandoned and to sue on the other terms of the contract for recovery of the moneys paid thereon. There is no pretense that plaintiff ever demanded or that defendants refused performance or that title was not perfected by the 10th of December, 1917, at the latest. All defects in the title had been cleared up at some time prior to September 22, 1917, the exact time not appearing from the record, and nothing remained to be done thereafter, but the mere formality of issuing the patent. Plaintiff, however, was himself first in default and continuously so thereafter. He defaulted in payment of the interest falling due December 16, 1916, although Kroonen demanded payment of the interest on the $2,000 installment when that installment was paid, which was long before defendants' alleged default. No offer of payment was made by plaintiff in his complaint or otherwise, and the judgment does not require such payment to be made. Being himself so in default, plaintiff was not in a position to maintain an action based on the alleged subsequent default of the defendants. Rosenthal v. Silveira, 42 Cal. App. 637, 184 Pac. 58.

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

61 Cal. App. 333

HOWATT et al. v. HUMBOLDT MILLING CO. et al. (Civ. 4476.)

(District Court of Appeal, First District, Division 2, California. March 12, 1923. Rehearing Denied April 10, 1923. Hearing Denied by Supreme Court, May 7, 1923.)

1. Boundaries 🔑37(3)—Court's finding as to location of boundary between adjoining lands sustained.

Evidence *held* sufficient to support the court's finding as to the location of a boundary line between adjoining lands.

2. Boundaries 🔑37(5)—Evidence sufficient to sustain finding that parties agreeing on boundary line were uncertain as to true location.

Evidence *held* sufficient to sustain court's finding that the parties' predecessors in interest were uncertain as to the location of the boundary line between their properties, and agreed on the line claimed by plaintiffs.

3. Boundaries 🔑46(3)—Rule stated as to when line agreed on becomes true line by acquiescence, regardless of accuracy.

When landowners, being uncertain as to the true boundary between their lands, agree on its location, mark it on the ground, build up to it, occupy on each side up to the place fixed, and acquiesce in such location for a period equal to that prescribed by the statute of limitations or under such circumstances that substantial loss would be caused by changing its position, such line becomes the true line called for by the respective descriptions, regardless of its accuracy as shown by subsequent measurements.

4. Boundaries 🔑46(1)—Actual dispute as to location of boundary line not necessary to invoke agreed boundary rule.

To invoke the agreed boundary rule, it is not necessary that there be an actual dispute as to the location of the true line, it being sufficient that the line is doubtful or uncertain.

5. Adverse possession 🔑114(1)—Finding quieting title by adverse possession sustained.

Evidence *held* sufficient to support a finding quieting title on the ground of adverse possession.

6. Boundaries 🔑46(3)—Proof of agreed boundary and occupation in accordance therewith renders proof of title by adverse possession unnecessary.

In an action to quiet title, proof that the parties' predecessors in interest had agreed to and defined the boundary line between their respective properties and occupied the premises in accordance, renders pleading and proof of title by adverse possession unnecessary; the description in their respective patents carrying title up to the agreed line, regardless of its accuracy.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Suit by Una Logan Howatt and others against the Humboldt Milling Company and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Irwin T. Quinn, Puter & Quinn, and A. J. Monroe, all of Eureka, for appellants.

Mahan & Mahan, H. C. Nelson, and L. M. Burnell, all of Eureka, for respondents.

NOURSE, J. Plaintiff sued to quiet title to the south half of the southeast quarter of section 34, township 2 south, range 3 east, Humboldt meridian, and to recover damages from the defendants caused by their cutting and removing trees, timber, and bark therefrom. The complaint was framed in three separate causes of action, the first alleging that the plaintiffs were the owners in fee and entitled to the possession of the premises; the second alleging that the predecessors in interest of the parties plaintiff and defendant, who were the owners respectively of the south half of the southeast quarter of section 34, township 2, and of the north half of the northeast quarter of section 3, township 3, were uncertain as to the location of the true line between their said properties, and with intent to establish such line agreed upon a line commencing at the section corner common to sections 34 and 35 of township 2 and to sections 2 and 3 of township 3 as established, marked, and designated on the ground by John M. Ingalls in the year 1872, and running thence west a distance of 2,960 feet in a straight line which, if extended, would intersect the section corner common to sections 33 and 34 of township 2 and sections 3 and 4 of township 3, as established by S. W. Foreman in the year 1875. It was also alleged that, in accord with said agreement, the respective parties hereto, and their predecessors in interest, continuously acquiesced in and abided by said line as the true line between their respective properties for a period of more than 30 years prior to the 1st of April, 1920, and occupied, used, and erected improvements upon their respective lands up to the common boundary line which was then established; the third alleging that between the 1st day of April, 1920, to the commencement of the action the defendants, without the consent of the plaintiffs, entered upon a portion of the land claimed by plaintiffs and cut and removed therefrom trees, timber, and bark growing thereon to plaintiffs' damage in the sum of $10,000. The answer to the first cause of action was a general denial based upon a want of information and belief. To the second cause of action the defendants interposed a defense that the boundary line, as claimed by the plaintiffs, is not the true line established by the United States government; that the survey made by Ingalls in 1872 was merely for the purpose of establishing the exterior lines of township 2 and that said survey was not approved by the United States Surveyor General until after a survey by S. W. Foreman covering both township and section lines had been made, filed and approved; that the true boundary line between the properties of the respective parties is the line established by said Foreman in 1874, in accordance with the survey made by him, in which the corner common to sections 34, 35, 2, and 3 is different from the corner known as the Ingalls corner; that the boundary line claimed by the plaintiffs ran some 400 feet south of the township line surveyed and established by said Foreman. The answer also denied that the predecessors of the parties at any time agreed upon the common boundary line or that they acquiesced in the line claimed by the plaintiffs. The defendants did not deny the allegation relating to entry upon the premises and the cutting and removing of timber therefrom, but did deny that the plaintiffs were damaged by any act of theirs.

On the issues so joined, the trial court found that all the allegations contained in plaintiffs' complaint were true, except as to the amount of damages sustained by plaintiffs and that the amount of damages was $4,692.85. Special findings were made to the effect that the subdivisional survey of township 2 south of range 3 east, Humboldt meridian, and the official plan of said township, approved January 11, 1876, and filed in the local land office at Eureka, Cal., January 18, 1876, and by reference to which the land in said township was sold, were based on the survey of the south line of said township made by Ingalls in 1872, and that said survey was the last approved and accepted survey of the south line of said township. It was also found that at all times mentioned in the complaint plaintiffs and their predecessors in interest were the owners in fee and entitled to the possession of the lands described in the complaint, and that the true line or boundary between the premises of the respective parties is the township line established by Ingalls in 1872, commencing at the corner of sections 34, 35, 2, and 3, and running in a straight line westerly, which, if continued, would intersect the section corner common to sections 33, 34, 3, and 4 as established by Foreman in 1874, as shown upon plaintiffs' exhibits 1, 3, and 4. Judgment followed in favor of plaintiffs, quieting their title to the lands described in their complaint and awarding them damages in the sum of $4,692.85. From this judgment the defendants appeal on a bill of exceptions.

On this appeal appellants attack the judgment upon the ground that the findings of fact made by the trial court were not supported by the evidence. The grounds presented on the appeal may be stated as follows: (1) That the evidence is insufficient to support the finding as to the true location of the township or boundary line dividing the lands of the respective parties, (2) that the evidence is insufficient to show an agreement between the parties establishing such boundary line, and (3) that the evidence is insufficient to show that the respondents acquired title to the land in dispute by adverse possession.

[1] The controversy arises over a strip of land approximately seven chains in width and a quarter section in length. The dividing line claimed by respondents is the southern line of section 34 of township 2, and also the southern line of said township. This section line commences at a fir tree common to sections 34, 35, 2, and 3 and runs directly west to a post which is a common section corner of 33, 34, 3, and 4. The fir tree is the corner marked by Ingalls in his survey of 1872 and lies 6.87 chains south of the point which appellants claim to be the true corner post. The post on the west at 33, 34, 3, and 4 is the common corner accepted by both Ingalls and Foreman and extends 6.93 chains south of the point from which a straight line would pass if extended west from the post at 34, 35, 2, and 3, as claimed by appellants. A diagram is attached to page 5 of appellants' brief, but it is full of inaccuracies and is of little assistance. The case depends upon the evidence in the record, and from an examination of this we conclude that it is sufficient to support the finding of the trial court that the township and section line is the line commencing at the so-called Ingalls fir tree corner, running thence westerly to the agreed Foreman corner, and being approximately 7 chains south of the line for which the appellants contend. It is true that there is some conflict in the evidence, but the witnesses A. J. Logan, French, Shaw, and Sanford all accepted the Ingalls corner, and the field notes of both Ingalls and Foreman went to prove that the line actually laid out upon the ground by these surveys was the line which the trial court found to be the true line of division. Though it appeared from Foreman's field notes that he failed to find the Ingalls fir tree corner because it had "probably been destroyed by recent fires," the notes do show that he found all the other points of identification along the southern line of section 34, including the quarter section post and the meander posts on each side of the river. Ingalls surveyed from west to east, while Foreman, with the expressed intention of retracing Ingalls' old line, surveyed from east to west. It was impossible for him to pass through these points of identification along the southern line of section 34 unless he accepted the corners established by Ingalls. The claim that he did not accept the Ingalls' corner of 34, 35, 2, and 3 is based mainly upon the fact that this corner is out of line with the common corner of 35, 36, 1, and 2 to the east. One witness testifying for the appellants stated that he found a corner which appellants claim to be the true corner of 34, 35, 2, and 3, and that he saw scribe marks on a fir tree which he believed to be something like 40 years old. From this testimony it is argued that this witness did in fact discover the so-called Foreman corner at a point 6.87 chains north of the so-called Ingalls corner, but it was later shown by the same witness, as well as by others, that the marks which he discovered were not those of Foreman but of a surveyor by the name of Shaw, who surveyed the land some 24 or 25 years later than Foreman's survey.

Upon the issue of an agreement as to the boundary line, the evidence shows that a Mrs. Wilds and J. W. Logan, predecessors in interest of the parties in this action, were uncertain as to the true boundary line between their premises, and that some time about 1875 or 1876 they had talked the matter over and had agreed upon the same line which respondents now insist is the true boundary line; that in accordance with this agreement they built a fence along a portion of the line, a part by each, running from the river to the timber line; that they thereafter farmed the land, which was tillable up to the line, as agreed upon and lived together in this agreement for a period of several years; that Mrs. Wilds' successor in interest sold her lands to one of the appellants herein, and that they cut the timber up to the line which had theretofore been agreed upon; that this was done in the year 1898; that by reason of this cutting of the timber, the erection of the fence, the farming of the lowland, and blazed marks through the timber, the line between the two parties' properties was clearly discernible and was accepted by all parties as the true dividing line for a period of more than 40 years; that it was recognized and commonly referred to as the "Ingalls line"; that in fact it was not questioned until 1920, when one of the appellants entered upon the land which had theretofore been held and claimed by respondents and their predecessors and cut and removed timber therefrom. It also appeared that, during all this time, the so-called Ingalls' corner was a well-known and recognized corner, an "important corner," and was known to be the point from which the dividing line should start. It further appears that the fences which were erected by Mrs. Wilds and Logan were destroyed by water from the river and that they were subsequently repaired with the knowledge and consent of all parties.

[2, 3] Appellants insist that the element of uncertainty as to the true boundary which is

necessary to invoke the rule of an "agreed boundary" is lacking, but it appears in the evidence that in the early days Mrs. Wilds, predecessor in interest of the appellants, and Logan, predecessor in interest of the respondents, had several conversations concerning the location of this line; that Logan at first was unable to locate the corner and asked Mrs. Wilds if she knew where it was to be found; that in response thereto she sent her son, Nathan Sanford, a witness in this case, to the Ingalls corner, with directions to him to point out such corner to Logan; that Mrs. Wilds and Logan had several conversations concerning the location of the line, some of which occurred down on the line near the river bar, and that, as a result of said conversations, they determined that a fence which Logan had erected was below the line, and they thereupon agreed to and did move the fence and put it upon the line between them; that Mrs. Wilds, being doubtful as to the location of a spring, had a special survey made in order to determine whether the spring was within the line of her property. There is sufficient here to sustain the finding of the trial court that the predecessors in interest of the parties hereto were uncertain as to the location of the true line between their properties and that, with the intent to establish such line, they agreed with each other that the boundary line between their respective properties should be the line commencing at the Ingalls corner and running west to the Foreman corner, as claimed by the respondents in this action. The "agreed" boundary rule is correctly stated in Young v. Blakeman, 153 Cal. 477, 481, 95 Pac. 888, 889, from which we quote:

> "When such owners, being uncertain of the true position of the boundary so described, agree upon its true location, mark it upon the ground, or build up to it, occupy on each side up to the place thus fixed and acquiesce in such location for a period equal to the statute of limitations, or under such circumstances that substantial loss would be caused by a change of its position, such line becomes, in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location, as it may appear by subsequent measurements."

See, also, Loustalot v. McKeel, 157 Cal. 634, 640, 108 Pac. 707.

[4] It will be seen from the foregoing that the rule may be invoked where the true boundary line is "doubtful or uncertain." It is not necessary that there should be an actual dispute between the parties as to the location of the true line. This was held in Price v. De Reyes, 161 Cal. 484, 489, 119 Pac. 893. In that case it was argued that the rule does not apply where the location of the boundary was merely uncertain, but that it must have been absolutely unascertainable, and that there must have been an actual dispute between the parties as to its true location. But the Supreme Court held that the rule was not subject to such qualification. In the first place, that it was only where the true location was subseqently ascertained that actions of this nature arose which required the application of the rule, and that obviously the rule could not apply if the location was unascertainable. As to the second point, it was held that all the authorities agree that it was sufficient if the true location was uncertain, and that it was not necessary that there should have been a dispute as to the boundary prior to the agreement as to the location.

[5, 6] From what has been said it follows that, if it were necessary for respondents to rely on their rights by adverse possession, sufficient evidence was received to support a finding quieting respondents' title upon that ground. It was shown that the true boundary line was marked upon the ground; that the parties built up to it and occupied the lands on each side; that the portion inclosed by the fence was farmed by the respective parties, and that the portion thereof which was covered by timber was occupied and used for the ordinary use and in the ordinary way; that the respondents and their predecessors in interest had paid all taxes against said land from 1875 to the date of the judgment; and that appellants and their predecessors in interest, as owners of the land immediately adjoining on the south, never exercised any ownership and never asserted any claim of right to the portion of the land north of the so-called Ingalls line at any time during the period from 1878 to 1920. But it was not necessary for the respondents to plead or prove title by adverse possession. Having shown that their predecessors in interest had agreed to and defined the boundary line between their respective properties and had occupied the premises in accordance with the agreement, the description in their respective patents carries title up to the agreed line, regardless of its accuracy.

> "The division line, when thus established, attaches itself to the deeds of the respective parties, and simply defines, not adds to the lands described in each deed, in accordance with the understanding of the parties, who are presumed to know best their lands." Sneed v. Osborn, 25 Cal. 619, 630; Price v. DeReyes, 161 Cal. 484, 487, 119 Pac. 893.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

61 Cal. App. 399

LINCOLN et ux. v. CHAMBERLAIN.
(Civ. 4065.)

(District Court of Appeal, Second District, Division 1, California. March 15, 1923. Hearing Denied by Supreme Court May 14, 1923.)

1. Trusts 🔑77—Payment to be made at or before conveyance to create resulting trust.

For a resulting trust to arise in favor of one because of his payment of the consideration for purchase of land conveyed to another, his payment must be made at or before the conveyance; so where D. advanced to defendant money to purchase land, and defendant gave to D. his note secured on the land which had been conveyed to him, no resulting trust arose in plaintiff's favor from his afterwards paying the note, though before the purchase it had been orally understood between plaintiff and defendant that he was merely to permit the use of his name in the matter for plaintiff's benefit.

2. Trusts 🔑99—No constructive trust under facts.

Though defendant purchased land, taking title thereto in his name and giving his note, secured on the property, for the money he borrowed for the purchase, with an oral understanding with plaintiff that he was merely to permit the use of his name for plaintiff's benefit, and thereafter without objection saw plaintiff make payments on the note and improvements on the property, no constructive trust arose in plaintiff's favor.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by E. L. Lincoln and wife against Frank I. Chamberlain. Judgment for plaintiffs, and defendant appeals. Reversed.

William Ellis Lady, of Los Angeles, for appellant.

Cooper, Collings & Shreve, of Los Angeles, for respondents.

HOUSER, J. The principal facts in this case are as follows: The plaintiffs, E. L. Lincoln and his wife, Anna M. Lincoln, were on very friendly and confidential terms with defendant, Chamberlain. All of them were living in the city of Los Angeles, and defendant, Chamberlain, desired to take a position in Cuba. He had a daughter whom he wished to leave with plaintiffs. At that time plaintiffs were living in a three-room apartment and had no accommodations for the daughter of defendant, and none of the parties was possessed of any means wherewith to purchase a house. The defendant, however, stated to the plaintiffs that he had a friend by the name of Duncanson who would buy a place for him, but that he feared Duncanson would not do so for plaintiffs. The matter was finally arranged by Duncanson advancing the money for the purchase of the property. The title to the purchased property was taken in the name of defendant, and defendant gave back to Duncanson a promissory note and a trust deed for the property, which provided, among other things, for payments thereon to be made to Duncanson at the rate of $35 per month. Before the purchase was consummated the plan as heretofore outlined was agreed to as between plaintiffs and defendant, and it was further agreed between them only that plaintiffs would pay the $35 per month to Duncanson, and that defendant would leave a power of attorney with his daughter so that she could transfer the title to the property to the plaintiffs whenever they wished to have that done. On the same day that the trust deed was executed defendant executed the power of attorney as agreed upon and delivered the same to his daughter. The sum of $35 per month was thereafter paid each month by plaintiffs to Duncanson through a bank, but Duncanson had no knowledge of the arrangement as between plaintiffs and defendant. Defendant went to Cuba, where he remained one month, and then returned to Los Angeles, living thereafter for several months with plaintiffs. Plaintiffs paid the taxes, insurance, for the certificate of title, the water bill, installing new electric fixtures, repairing foundation of house, redecorating the interior, remodeling the house, installing new drainboard, the building of a garage and rear porch, new steps, a shingle roof, hot-water heater, plumbing, awnings, screen doors, hardware furnishings, lumber and wire for gates and fence, a total of $1,368.71, which, together with the amounts paid by them on account of the purchase price of the property up to the time of the trial, made a total of $2,018.71—a considerable portion of which was paid after defendant repudiated the agreement. Defendant never objected to any improvements being made on the property. The plaintiffs had judgment, and defendant appeals.

[1] The theory of plaintiffs' case is that a resulting trust was established by the acts of the parties. It is a general rule that, where a conveyance of land is made to one person, and the consideration for the transfer of title is paid by another person, a resulting trust is created in favor of that person who has paid the consideration (Brown v. Spencer, 163 Cal. 589, 126 Pac. 493); but it must be shown that the party setting up the trust paid the money either at or before the execution of the conveyance and as a part of the original transaction of purchase (Pomeroy's Eq. Juris. § 1037; Case v. Codding, 38 Cal. 191; Roberts v. Ware, 40 Cal. 634; Woodside v. Hewel, 109 Cal. 481, 42 Pac. 152). After the conveyance is actually made, parol agreement that the

purchase shall stand for the benefit of another will not be effectual for the purpose of creating a resulting trust. Hunt v. Friedman, 63 Cal. 510. In the instant case, although the evidence clearly shows that it was the intention of the defendant to merely permit the use of his name in the transaction for the benefit of the plaintiffs, and that he had no expectation at the time the purchase was made of ever claiming any interest in the property because of the fact that he was to furnish none of the consideration, yet the record discloses that it was his credit that was pledged. It was to him that the deed to the property was executed, and it was he who gave back the trust deed and the promissory note and who made the various promises and assumed the several obligations therein contained. Plaintiffs furnished no part of the consideration looking to that particular part of the transaction. So far as either the grantor or Duncanson was then aware, plaintiffs had nothing whatever to do with the matter, and while in reality the plaintiffs were as much, if not more, concerned than was defendant, their legal connection is first indicated by the oral agreement entered into after the purchase of the property was made to pay the consideration for the property for which defendant had already obligated himself to Duncanson, who advanced the money for defendant, as evidenced by the promissory note and the trust deed which had already been executed. The legal consideration for the property in the form of the promissory note and the trust deed by defendant had passed to Duncanson before plaintiffs' oral contract with defendant to discharge same by monthly payments took effect. They merely had defendant's word that he would transfer title to them. Plaintiffs' contract with defendant in legal contemplation, if it could ever be said to be effective, began where defendant's contract with Duncanson left off. It is said in Woodside v. Hewel, 109 Cal. 481, 42 Pac. 152:

> "It is essential that one who would claim an interest in real property by reason of having paid the consideration for its purchase must show that such payment was made at or prior to the time the purchase was made, and for the purpose of making the purchase. * * * After a party has made a purchase with his own moneys or credit, a subsequent tender or even reimbursement may be evidence of some other contract, or the ground for some other relief; but it cannot by any retrospective effect, produce the trust of which we are speaking. There never was an instance of such a trust so created, and there never ought to be, for it would destroy all the certainty and security of conveyances of real estate. The resulting trust, not within the statute of frauds, and which may be shown without writing, is when the purchase is made with the proper moneys of the cestui que trust, and the deed not taken in his name."

In Strong v. Messinger, 148 Ill. 431, 36 N. E. 617, the following language occurs:

> "A resulting trust arises, if at all, the instant the deed is taken and the legal title vests. No payment made will create a resulting trust, unless, at the moment the title passes, the trust results from the transaction itself."

And in 39 Cyc. at page 106 we find the following:

> "Since a resulting trust cannot rest on an express agreement, no parol agreement between the parties, made before or after the conveyance of property can give rise to a resulting trust therein."

[2] By neither the pleadings nor the argument on the part of plaintiffs can it be said that plaintiffs are seeking to establish a constructive trust. From the facts herein it is too plain to admit of argument that as between man and man, viewed from a standpoint of natural justice, plaintiffs ought to have judgment. Defendant stood by and saw plaintiffs expending their own money for improvements, to say nothing of the monthly payments made by plaintiffs on account of their supposed contract of purchase, and now seeks to reap the harvest to which in good conscience he is in no wise entitled. In common with the increase in value of other real estate in the city of Los Angeles, it is not unlikely that, in addition to the various improvements placed upon the property by plaintiffs, there has been a substantial advance in the value of the lot upon which the house stands. Defendant's moral obligation is apparently of no consequence to him. The statute of frauds does not permit the enforcement of the oral contract by which defendant solemnly bound himself to plaintiffs regarding the sale of the lot here in question. The decisions not only of the Supreme and of the appellate courts of this state, but by almost unanimous adjudication of the courts of sister states, are to the effect that in circumstances similar to those before us no resulting trust is brought into being by which the unrighteous acts of persons situated as was this defendant with relation to plaintiffs may be corrected. Unfortunately the decisions are likewise compelling as against plaintiffs' natural rights in connection with the doctrine of constructive trusts. There are many general statements enunciated by learned authors, as well as by eminent jurists, which, without regard to the particular facts of the case involved, would seem broad enough to cover the facts of this case, but an examination of such expressions, taken in conjunction with other definite and well-grounded principles, leaves this court no alternative other than a declaration that the doctrine of constructive trust has no application, even were the pleadings here such as to warrant the remedy thereby afforded. Plaintiffs must seek other relief.

There was no evidence to support the finding by the court to the effect that plaintiffs purchased the property in question. Defendant's motion for nonsuit, made at the close of plaintiffs' case, should have been granted.

The judgment is reversed.

CONREY, P. J., and JAMES, J. We concur in the judgment. For the reasons stated in the foregoing opinion, it seems clear that the plaintiffs are not entitled to recover on the basis of a resulting trust.

Also we think that the facts found by the court, which in that respect go no further than the allegations of the complaint, are not sufficient to establish a constructive trust. If it were pleaded and proved not only that the plaintiffs have expended substantial sums of money in the improvement, maintenance, and repair of the property, but also that those expenditures were made with the knowledge and acquiescence of the defendant and in reliance upon his promise to convey, the plaintiffs might have a better standing in court. The plaintiffs should have that opportunity, if they so desire. It has been said that "as a general rule, to enable a court of equity to exclude a verbal contract for the sale of an interest in land from the operation of said statute, there must be a collateral circumstance constituting an independent equity, imposing an obligation in conscience." 25 R. C. L. p. 700. But the facts found by the court below in this case do not come up to that standard.

---

61 Cal. App. 304

AL G. BARNES SHOWS CO. v. TAIT.
(Civ. 4394.)

(District Court of Appeal, First District, Division 1, California. March 9, 1923. Hearing Denied by Supreme Court May 7, 1923.)

1. Appeal and error 🔑1040(12)—Order overruling demurrer to counterclaim held not error where no evidence was admitted thereon, and no finding made.

It was not error to overrule a demurrer to a counterclaim, where no evidence was permitted to be introduced under the counterclaim, and no finding was made respecting it.

2. Replevin 🔑72—Evidence held to show that animals procured by defendant in company with show agent was property of defendant.

Evidence in claim and delivery to recover animals *held* to show that the animals procured by defendant in company with plaintiff's show agent were the property of defendant.

3. Appeal and error 🔑1011(1)—Finding based on conflicting evidence may not be disturbed.

Finding of trial court based on conflicting evidence cannot be disturbed on appeal.

4. Master and servant 🔑61—Statute providing property acquired by employee belongs to employer held inapplicable.

Civ. Code, § 1985, providing everything which an employee acquires in his employment belongs to his employer, whether acquired lawfully or unlawfully, *held* not to apply to an arrangement between plaintiff's agent and defendant in procuring wild animals in foreign lands with a view of resale to plaintiff, where such arrangement was a proper one, and no fraud was practiced upon plaintiff.

5. Replevin 🔑103(2)—Return of animals taken to defendant held proper regardless of disclaimer of one with qualified interest therein.

Where in claim and delivery the court found that the real possession of animals procured by defendant in company with plaintiff's show agent was that of defendant, with but a qualified possession in a steamship company, the return of the animals to defendant was proper regardless of the disclaimer of the steamship company.

6. Replevin 🔑103(4)—Return of property or its value if return cannot be had held proper judgment.

A judgment for defendant for a return of property or for its value where return cannot be had is a proper judgment in replevin.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by the Al G. Barnes Shows Company against Stewart Tait and others. Judgment for defendant Tait, and plaintiff appeals. Affirmed.

Wm. M. Abbott, Wm. M. Cannon, and Kingsley Cannon, all of San Francisco (Enid Childs, of San Francisco, of counsel), for appellant.

McCutchen, Olney, Willard, Mannon & Greene, of San Francisco, for respondent.

ST. SURE, J. This action was brought by Al G. Barnes Shows Company, a corporation, against the Toyo Kisen Kaisha Oriental Steamship Company, D. W. Callahan, and Stewart Tait for 3 elephants, one tiger, 25 monkeys, one dog, and one king cobra snake, then in possession of the steamship company. Defendants Callahan and Tait were joined as defendants because they claimed an interest in the animals. All of the animals were delivered to plaintiff under claim and delivery proceedings, and used in its circus. Defendant Callahan did not answer, the steamship company filed a disclaimer, and defendant Stewart Tait filed an answer and counterclaim, and later a supplemental answer, which was amended. His answers denied all the allegations of plaintiff's complaint. In his counterclaim he set up ownership in himself of the elephants and monkeys, and asked for their restoration, or, if that were impossible, for $5,175, their reasonable value; also for $5,000 exemplary damages, and for costs of suit. The supplemental answer alleges the withholding and use by plaintiff of the animals since seizure, and the death, since the commencement of the suit, of all of them but one elephant. After demurrer to the answer and counterclaim had been overruled, the case went to trial on the complaint, answer, and amended supplemental answer. No evidence was permitted under the counterclaim. Judgment was for defendant Tait for $2,620.11, the value of 2 elephants and 25 monkeys, and for the return of the surviving elephant or $1,122.55, its value, with interest from the commencement of the action and costs of suit. Plaintiff's motion for a new trial was denied, and it appealed from the judgment.

The evidence shows that in 1915 D. W. Callahan and Al G. Barnes Shows Company entered into a contract under which Callahan went to the Philippines for the purpose of bringing out Igorrotes, and with the further object of securing freaks or wild animals at the direction of the Shows Company. Callahan was supplied with $350 and a round-trip ticket to Manila. The Shows Company made advances to the steamship company to cover the return fare of 10 Igorrotes that Callahan contemplated securing and bringing back to the United States. He arrived at Manila about January 20, 1916, and remained in the Philippines until about the 1st of April, endeavoring to find the Igorrotes for his employer, but without success. Callahan collected from the steamship company about $500, being the advances made for the fares of the savages to the United States. At this time he was conducting cable negotiations for 2 tigers and an elephant he had heard were to be had at Singapore. He also cabled to the Shows Company and received some $900 to pay for these animals. A few days before he was to leave for Singapore he had a talk with defendant Tait, whom he had met on a previous trip to Manila, and who had lived there eight years. Tait intended visiting the United States, and Callahan suggested that there was good money to be made in buying wild animals, and that, if Tait wished to accompany him, he would show him what to buy and the prices to be paid, provided he might have the first option for Mr. Barnes of the Shows Company on all animals bought by Tait. Mr. Barnes, Callahan said, would purchase the animals immediately on their arrival in San Francisco. Tait agreed to go with Callahan, and they left Manila for Singapore. At Hongkong Callahan notified the steamship agent, Mr. Sheppard, that he would have an elephant and 2 tigers for shipment, and the latter said he would get in communication with Mr. Barnes and arrange the transportation. While at Hongkong Callahan, learning that the elephant he hoped to get at Singapore had been sold, decided to go to Saigon in an effort to replace it. He and Tait went to Saigon, and thence inland to Phnom Penh in Cambodia. There they heard of an elephant owned by the royal family. An audience was had with the king. After much haggling in four languages, carried on through interpreters, an elephant was purchased for $375. There is a direct conflict in the testimony as to the purchase of this elephant, Callahan insisting that he was buying it for Barnes, and Tait just as strongly claiming that he bought it for himself. It is undisputed, however, that on leaving for Singapore the next day Callahan asked Tait to pay for the elephant and see that it was transported to Hongkong, where they intended to embark for the United States. Tait paid for the elephant and took a bill of sale for it in his own name. He also arranged for its care and for its shipment to Saigon and thence to Hongkong. After Callahan's departure Tait purchased and paid for 2 elephants, bought from another prince, took bills of sale for both in his own name, and on these, as on the first, paid export duties from Phnom Penh to Saigon and again at Saigon for Hongkong. He arranged with Mr. Sheppard for transportation of the elephants to the United States, not knowing at the time that the freight had been guaranteed by the Shows Company. Here, a few days later, he was joined by Callahan, who brought a tiger and some 40 monkeys. With some difficulty additional space was arranged for to take these animals on the same boat, and Tait's testimony is that he made arrangements for transportation of these also prior to knowledge of any freight guaranty by the Shows Company, though he did know of it before they sailed. Callahan's story is that together they visited the various offices, and that before sailing Barnes of the Shows Company had guaranteed the freight, but that on account of his sickness during part of this time he does not know whether the final consent to take all the animals was given to both or to Tait alone. Callahan was sick on the voyage, so that supervision of the care of the animals and reconstruction of their shelter on the deck of the boat fell to Tait. On arrival in San Francisco a Mr. Hill, representative of the Shows Company, met the boat and talked with Tait about the animals. Tait telling him that he would hold the animals for the Shows Company until the next day at prices which he then quoted him of $1,500 each for two of the 3 elephants, and on the third (the first one bought) the actual cost to him, and $15 apiece for the 25 monkeys. Hill stated that he would wire Br. Barnes of the Shows Company and let Tait know the next day. Plaintiff then instituted claim and delivery proceedings, and the animals were delivered to it. The trial court found Tait to be the owner of the 3 elephants and 25 monkeys to the exclusion of any claims of plaintiff as to ownership, right of possession, or damages claimed as money spent in pursuit of the animals. The court also found the value of each of the elephants to be $1,122.55, and the value of the monkeys as $15 each. The findings as to value are not questioned.

[1] Plaintiff makes seven contentions on appeal. The first of these is that the trial court erred in overruling plaintiff's demurrer to the counterclaim of defendant Tait praying the return of the animals in question to him, and seeking exemplary damages occasioned by his delay in San Francisco, due to the litigation. There is no merit in this contention. Although the court overruled plaintiff's demurrer to the counterclaim, it refused to permit any evidence to be introduced under it, and upon the subject made the following statement in the findings of fact:

> "That this court makes no findings whatsoever with respect to the counterclaim set forth by said defendant Stewart Tait in the answer filed by him in this action for the reason that this court refused to receive any evidence whatsoever with reference thereto."

This statement is supported by the consistent rulings of the trial judge sustaining plaintiff's objections to every question put to defendant Tait by his attorney in an attempt to prove the allegations of damage in the counterclaim.

[2, 3] The second contention is that the trial court committed error in finding against the plaintiff on the ownership of the animals. The undisputed evidence is that defendant Tait bought 2 elephants for the purpose of taking them to the United States and selling them as his own property. Defendant Callahan, the Shows Company representative, admits this. As to the third elephant, the evidence shows, as we have heretofore pointed out, a conflict in this: Tait insisted that he bought the animal for himself, while Callahan claimed it was bought for the Shows Company, but in this connection is the undisputed illuminating fact that Tait paid for the elephant, took a bill of sale for it in his own name, arranged for care and transportation, and paid duty upon it. As to the ownership of the 25 monkeys, defendant Tait testified that he furnished Callahan money with which to purchase these animals, and in this regard he is corroborated by Callahan himself. A reading of the entire record convinces us that there is abundant evidence to support the findings of the trial court. And in the instance where a conflict appears as to the ownership of one elephant the finding of the trial court cannot be disturbed by us under a rule so ancient and familiar that citation of authority is unnecessary.

[4] The contention that, as Callahan was the representative of the Shows Company, the question of agency enters into the case, that there was a joint venture between Tait and Callahan, and that under the principle enunciated in section 1985, Civil Code, everything acquired by an employee by virtue of his employment, except his compensation, belongs to his employer, is of no force whatever. There was no fraud practiced upon the Shows Company. The arrangement between Tait and Callahan, as the evidence shows, was in every way a proper one.

The findings of the court upon the question of ownership disposes of the third contention of plaintiff's cotenancy, the fourth, claiming an adventurer's lien, and the fifth, urging that the relief granted Tait was improper because the steamship company filed a disclaimer.

[5] The sixth contention is without merit. The return of the animals to Tait was proper regardless of the disclaimer of the steamship company in the proceedings, since the court found that the real possession was that of Tait, with but a qualified possession in the steamship company.

[6] The seventh contention that error was committed in giving alternative judgment for the value of the animals falls with the sixth. A judgment for defendant for a return of property, or for its value where return cannot be had, is a proper judgment in replevin.

The judgment is affirmed.

We concur: TYLER, P. J.; RICHARDS, J

---

61 Cal. App. 394

HARDER v. LANG REALTY CO. et al.

(Civ. 4386.)

(District Court of Appeal. First District, Division 1, California. March 15, 1923. Hearing Denied by Supreme Court May 14, 1923.)

1. Vendor and purchaser ⊶165—Vendee need not complete contract if quantity of land bargained for is not given.

A purchaser is entitled to the quantity of land for which he has bargained, and, if vendor is unwilling or unable to give it, is under no obligation to complete the contract.

2. Vendor and purchaser ⊶37(2)—Vendee inspecting premises not precluded from complaining of defect in quantity.

That vendee viewed and inspected the premises, and had the boundaries pointed out to him, does not preclude him from complaining of a defect in quantity, as one dealing with an owner of land, the dimensions of which can be accurately ascertained only by scientific measurement, may assume that the owner knows the true boundaries, and rely on his representations to such extent.

3. Vendor and purchaser 🔑130(9), 165—One-foot deficiency in frontage and encroachment of adjoining building held defects in title.

A one-foot deficiency in the represented frontage of a city lot, and encroachment of an adjoining building thereon, *held* defects in the title, justifying vendee in refusing to accept the conveyance.

4. Specific performance 🔑30—Provision as to payment of cash above mortgage held unenforceable as indefinite in respect to amount and party to procure it.

A provision in a contract for the sale of a lot, reciting "cash above a first bank mortgage to be raised of about $3,500," *held* unenforceable as indefinite in respect to the amount and the party who was to procure it.

5. Vendor and purchaser 🔑187—Objection to sufficiency of offer to pay on removal of defects in title held waived.

Objection to the sufficiency of vendee's offer to pay on removal of defects in the title is waived by failure to object at the time or make any effort to remedy the defects.

6. Vendor and purchaser 🔑341(5)—Vendee's expenses in examining title and preparing papers proper charges against vendor.

Expenses properly incurred by vendee in examining the title to property and preparing the necessary papers are proper charges against vendor.

7. Action 🔑45(4)—Counts for recovery by vendee of purchase money paid held not improperly joined.

A complaint containing a count in assumpsit for money had and received and a count setting forth facts on which plaintiff relied for recovery of money paid on the purchase price of a lot, of which he refused to accept a conveyance because of defects in the title, *held* not insufficient on demurrer as misjoining a cause of action predicated on a rescission with an action to establish a purchaser's lien, to which plaintiff was entitled under either count.

8. Jury 🔑28(11)—Plaintiff's waiver of lien in action to rescind contract and recover deposit held not to have changed character of action, so as to deprive defendant of trial by jury.

That plaintiff, during the trial of an action to rescind his contract to purchase a lot because of defects in the title, and to recover money paid, waived his lien on the land, did not change the character of the action so as to deprive him of a trial by jury.

9. Appeal and error 🔑843(2)—Whether plaintiff's waiver of lien in action to rescind contract and recover deposit deprived defendant of trial by jury need not be considered where defendant expressly waived such right.

Where defendant, in an action to rescind a contract to purchase realty and recover a deposit, expressly waived his right to a trial by jury, the question whether plaintiff, by waiving his lien during the trial, changed the character of the action so as to deprive defendant of a trial by jury, need not be considered.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Frank H. Harder against the Lang Realty Company, Clifford S. Allred, and others. Judgment for plaintiff, and defendant Allred appeals. Affirmed.

I. M. Peckham, of San Francisco, for appellant.

S. Joseph Theisen, of San Francisco, for respondent.

TYLER, P. J. Action to rescind a contract for the purchase of certain real estate, and to recover money paid as a deposit in part payment thereon.

The complaint is in two counts. The first is one in assumpsit for money had and received. The second sets forth at length the facts upon which the alleged obligation arose.

From the evidence it appears that plaintiff paid to defendants under a written contract the sum of $500 as deposit and part payment upon certain real property, consisting of a lot of land, together with a dwelling house situated thereon, located at the northeast corner of Forty-Fourth avenue and Geary street, San Francisco. The full consideration was the sum of $7,750. As to the terms of payment, the agreement recited that "cash above a first bank mortgage to be raised of about $3,500." The usual customary provisions allowing 30 days to examine title and consummate sale and further time to cure any defects, and if not so cured deposit to be returned, were incorporated in the agreement.

Upon the execution of the contract plaintiff ordered a search of the title and a survey of the property, at an expense of $50 for the search and $25 for the survey. The report upon these matters disclosed that the lot was incumbered by a deed of trust, and also that the house and lot were only 24 feet in width, instead of 25, as the contract called for, and that an adjoining house overlapped on the 25-foot frontage about 12 inches for a length of some 38 feet. Within the time provided for in the contract respondent caused to be served upon defendants written notice specifying these objections, but they failed to cure the defects or remove the incumbrance. Plaintiff thereupon tendered in writing the payment of the remainder of the contract price, and demanded a conveyance of the property free from all defects. Upon failure of appellant to comply therewith respondent demanded the return of his deposit and expenses, and thereafter brought this action to recover the same. Judgment went in his favor for the sum of $575, the amount of his deposit and cost of the search and survey.

The main ground relied upon for reversal is that the evidence fails to support the findings of the trial court to the effect that the title to the property was defective by reason of a lack of proper dimensions of the lot and the overlapping of the contiguous building. In this respect it is claimed that the evidence clearly shows that the block within which the property is situated had been subdivided by the construction of houses and division fences, and that the house and lot as shown to plaintiff was a 24-foot lot; that he was taken upon the premises and was told that the line of the adjoining house was the line of his lot. From these circumstances it is contended that, plaintiff having inspected the property purchased, and having had the boundaries pointed out to him, he could not be heard to object to a defect in quantity.

[1] We see no merit in this contention. The contract called for a lot with a frontage of 25 feet, and plaintiff was not bound to accept one of smaller dimensions. A purchaser is entitled to the quantity of land for which he has bargained, and, if the vendor is unwilling or unable to give it to him, he is under no obligation to complete the contract. 2 Warvelle on Vendors, § 832. This rule is somewhat qualified with reference to a sale of urban property under certain circumstances, when such property is described as containing an estimated number of acres. No such question, however, is here involved, and a discussion of it is not necessary. In the case of a city lot a deficiency in quantity of even a few inches has been held to be material, and to be a sufficient reason for the vendee to reject the title. Klim v. Sachs, 102 App. Div. 44, 92 N. Y. Supp. 107; Floeting v. Horwitz, 120 App. Div. 492, 104 N. Y. Supp. 1037; Sears v. Stinson, 3 Wash. 615, 29 Pac. 205; Siebel v. Cohen, 54 N. Y. Super. Ct. 436.

[2] Nor does the fact, as claimed, that the plaintiff viewed and inspected the premises, and had the lot pointed out to him, preclude him from complaining of a defect in quantity. A vendor cannot escape responsibility by showing that the purchaser might have ascertained that such representations were untrue. Morris v. Courtney, 120 Cal. 63, 52 Pac. 129; Taber v. Piedmont Heights Building Co., 25 Cal. App. 222, 230, 143 Pac. 319. Dimensions of land cannot be seen with the eye at a glance, and can only be ascertained with accuracy by scientific measurement. Quarg v. Scher, 136 Cal. 406, 69 Pac. 96; Eichelberger v. Mills Land Co., 9 Cal. App. 629, 100 Pac. 117. One dealing with an owner of real property may therefore assume that the owner knows the true boundaries, and he may rely upon representations to that extent. Del Grande v. Castelhun (Cal. App.) 205 Pac. 18.

[3] Here the record discloses the fact that the appellant's agent and respondent both testified that there was nothing about the appearance of the house by which its exact dimensions could be ascertained.

Upon this subject, therefore, we conclude that the defect in quantity of the land and the encroachment thereon were defects in the title which justified the plaintiff in refusing to accept the conveyance.

[4, 5] Appellant further contends that the finding that plaintiff offered to perform all conditions on his part to be performed, including a tender, is against the evidence. There is evidence to show that the plaintiff offered to pay the sum of $3,750, said sum being the amount of cash over and above the first mortgage of $3,500, upon the removal of the deed of trust which incumbered the property and the overlapping of the adjoining building. The provision in the contract which recites "cash above a first bank mortgage to be raised of about $3,500" is indefinite both in respect to the amount and as to the party who is to procure it. It cannot, therefore, be enforced. Buckmaster v. Bertram, 186 Cal. 673, 200 Pac. 610. In addition thereto defendant made no objection to the sufficiency of the tender, nor did he make any effort to remedy the defects in the title. Under these conditions objection is waived. Kerr v. Reed, 187 Cal. 409, 202 Pac. 142; Kofoed v. Gordon, 122 Cal. 314, 54 Pac. 1115.

[6] Complaint is also made of the action of the court in allowing a recovery of the costs incurred in making an examination of the title, it being claimed that these items were not moneys received by defendant or expended for his benefit for which a recovery might be had. Expenses properly incurred in examining the title to property and in the preparation of the necessary papers are proper charges. Turner v. Reynolds, 81 Cal. 214, 22 Pac. 546.

[7] And, finally, it is claimed that the trial court erred in overruling the demurrer to the complaint interposed by defendant Allred. In this connection it is urged that there was a misjoinder of causes of action for the reason that the first count was predicated upon a rescission, which was united with an action under the second count to establish a purchaser's lien.

[8, 9] We see no merit in this contention. The cause of action declared upon in both counts is the same. The first is one in assumpsit for money had and received, and the other sets forth the facts upon which plaintiff relies for a recovery. Under either count plaintiff was entitled to a lien upon the land as security for the repayment of what he had paid in performance of the contract. Montgomery v. Meyerstein, 186 Cal. 464, 199 Pac. 800. In this connection it may be stated that the mere fact that during the trial the lien was waived by plaintiff in no manner affected the situation or changed the char-

acter of the action so as to deprive him of a trial by jury. Aside from the fact that this point is raised for the first time upon appeal, defendant expressly waived his right to a trial by jury.

From what we have said it follows that the trial court rightfully concluded that the plaintiff was entitled to a return of his deposit and a refund for his expenses in searching the title, defendant having failed to comply with the terms of his contract.

The judgment is affirmed.

We concur: ST. SURE, J.; RICHARDS, J.

---

61 Cal. App. 457

SILVIUS v. SCHOLES. (Civ. 3775.)

(District Court of Appeal, Second District, Division 2, California. March 19, 1923. Hearing Denied by Supreme Court May 17, 1923.)

1. Landlord and tenant ⚷290(1)—Relation held existent supporting unlawful detainer.

Where part of the purchase money of certain realty was advanced to the purchaser by another with the understanding that such person would occupy the premises purchased until the amount advanced by her should be applied as rent at the rate of a certain amount per month, *held*, where she continued in possession after the amount of her advance was exhausted pursuant to the understanding, the relation of landlord and tenant existed, supporting action of unlawful detainer.

2. Pleading ⚷106(2)—Plea of another action pending held not good as plea in abatement.

A plea of another action pending *held* not good as a plea in abatement, where it showed on its face that such other action had already gone to judgment, which judgment had become final by the lapse of 71 days; 60 days being the time within which an appeal might have been taken, under Code Civ. Proc. § 939.

Appeal from Superior Court, Los Angeles County; Percy S. King, Judge.

Action by F. D. Silvius against Grace M. Scholes. Judgment for plaintiff, and defendant appeals. Affirmed.

Leon R. Yankwich and Edward H. Allen, both of Los Angeles, for appellant.

James F. McBryde and W. Claire Anspach, both of Glendale, and Oliver O. Clark, of Los Angeles, for respondent.

WORKS, J. This is an action of unlawful detainer. Plaintiff had judgment, and defendant appeals.

[1] Appellant's first contention is that a finding of the trial court that the relation of landlord and tenant existed between the parties is not supported by the evidence. Although the evidence was not without contradiction, there was testimony tending to show the following facts: The property which is the subject of the action was purchased by respondent with the aid of appellant, who advanced for the purpose a certain sum of money. It was understood that upon the acquisition of the place appellant might occupy it until the amount advanced by her should be applied in toto as rent at the rate of a certain amount per month. She did occupy the premises until the amount of her advance was exhausted pursuant to the understanding. This action was commenced thereafter. Under these circumstances, we cannot avoid the conclusion that appellant was a tenant of respondent, at least after the expiration of the period during which she was to occupy the property under her advance. Her status after that time had run is well described by the usual definitions of the word "tenant," even in its most restricted sense. 38 Cyc. p. 123; 16 R. C. L. tit. Landlord and Tenant, par. 2. The finding had ample support in the evidence.

[2] Appellant insists that the trial court erred in refusing to admit certain evidence under a part of appellant's answer which she characterizes as a plea in abatement, and this is the sole remaining point made. To be more specific, she contends that her pleading set up the plea of former action pending. The part of the answer which is now in question presented the claim of appellant that the real arrangement between her and respondent was that she was to have an undivided one-half interest in the property in suit after its acquisition, instead of a mere leasehold interest to use up the amount advanced by her to aid in completing the purchase, and that respondent fraudulently took title in severalty to the premises in his own name. The pleading then alleged that appellant had instituted an action for the purpose of establishing her one-half interest in the property, that respondent had answered her complaint therein, and that a trial of the cause had been had. The pleading then averred:

> "That judgment was rendered in favor of this defendant, and that thereafter, to wit, on the 2d day of February, 1921, there was filed and docketed in the above-entitled court a judgment in favor of this defendant, adjudging her to be the owner of an undivided one-half interest in the property described in * * * plaintiff's complaint."

It is especially to be noted that this pleading was filed April 14, 1921, 71 days after the entry of the judgment pleaded. As the statute allows but 60 days within which to appeal from a final judgment (Code Civ. Proc. § 939), the judgment in this instance had become final. Therefore the plea certainly was not a plea in abatement. Accordingly, evidence could not have been received under it as a plea of that kind. If appellant had alleged that a motion for a new trial was pending and undetermined in the action or that an appeal from the judgment was pending therein, the nature of the plea would have been entirely different.

It is to be remarked that the facts disclosed by the record are in such condition that the plea as made could not have been availed of by appellant as a plea in bar, if for the moment we assume, although we do not decide, that it may be viewed as a plea of that nature.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

61 Cal. App. 368

PEOPLE v. LAKENAN. (Cr. 1088.)

(District Court of Appeal, First District, Division 2, California. March 14, 1923.)

1. Criminal law 🔑938(1)—New trial granted for newly discovered cumulative evidence, rendering different result probable.

If newly discovered evidence, though cumulative, is so overwhelming as to render a different result certain or probable, a new trial should be granted.

2. Criminal law 🔑1156(3)—Whether newly discovered cumulative evidence renders different result probable is for the discretion of the trial judge.

Whether newly discovered cumulative evidence is so overwhelming as to render a different result certain or probable, so as to justify a new trial, is not a question of law, but a question of fact for the trial judge, whose discretion will not be interfered with on appeal, unless manifestly abused.

3. Criminal law 🔑938(1)—Newly discovered cumulative evidence held not so overwhelming as to require new trial.

Newly discovered cumulative evidence *held* not so overwhelming as to render a different result certain or probable, so as to require that a new trial be granted.

4. False pretenses 🔑49(1)—Evidence held sufficient to sustain conviction of grand larceny.

Evidence *held* sufficient to sustain a conviction of grand larceny by means of the confidence game.

5. Criminal law 🔑97(1)—Conviction based on confidence game held proper, though money was passed in another state.

A conviction of grand larceny by means of the confidence game *held* not contrary to law, because the money was passed in another state, in view of Pen. Code, § 27.

6. Criminal law 🔑779—Instruction as to acts and declarations of coconspirators held proper.

In a prosecution for grand larceny by means of the confidence game, an instruction regarding the acts and declarations of coconspirators *held* proper, as directly pertinent to the prosecution's theory.

Appeal from Superior Court, Alameda County; George Samuels, Judge.

John Lakenan was convicted of grand larceny, and he appeals. Affirmed.

Frank M. Carr and Harry C. Morrison, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and Ezra W. Decoto, Dist. Atty., and Charles Wade Snook, Deputy Dist. Atty., both of Oakland, for the People.

STURTEVANT, J. Under an information filed by the district attorney, the defendant was accused of grand larceny. The jury returned a verdict finding the defendant guilty as charged in the information. The defendant moved for a new trial, the motion was denied, and the defendant has appealed.

The fifth point made by the appellant is the one which he stresses in his brief and in his argument. In that point he claims that the trial court erred in denying his motion for a new trial, in the face of the fact that he presented two affidavits which tended to establish his defense, an alibi. The correctness or incorrectness of the ruling of the trial court depends upon a consideration of the contents of the affidavits in connection with other facts contained in the record.

On the morning of the 3d day of October, 1921, the prosecuting witness, W. G. Woolfrey, arrived in San Francisco from Moose Jaw, Canada. After he had had his breakfast he stood in front of the Ferry building in San Francisco, and a man approached him and passed the time of day, and finally suggested to Mr. Woolfrey that he take a trip to Golden Gate Park, and at the same time pointed out the street car which Woolfrey should take. After Woolfrey got on the car he was approached by a man who introduced himself as L. H. Sterling. Sterling and Woolfrey spent the day in Golden Gate Park, and later went to the Sunset Hotel on Market street. The next morning Sterling and Woolfrey had breakfast together and then they crossed the bay for the ostensible purpose of seeing the wild ducks on Lake Merritt. After they had arrived in Oakland, and, as they were passing the Hotel Oakland, they saw a man standing in the doorway, and Sterling remarked: "Oh, by the way, there is some one over there I know; some one from Rochester." That man was subsequently introduced as Chetwell. Thereafter such proceedings were had that Woolfrey was led to believe that he could make a large sum of money through the instrumentality of his new acquaintances by investing on the stock exchange. Chetwell claimed to be possessed of inside information and took charge of placing the orders. Two papers, or vouchers, were made out, one in Sterling's name and one in Woolfrey's name, and Chetwell pretended to present the same to the exchange in Oakland. From time to time during the proceedings Chetwell would desist from saying something, or doing something, remarking at the time, "There is my auditor, and he must not know anything about it." Who the auditor was the record does not show. As a part of the general scheme it was claimed that Chetwell had been transferred to Reno, and it thereupon became necessary for Sterling and Woolfrey also to go to Reno. On October 25th, pursuant to previous arrangement, Chetwell, Sterling, and Woolfrey were at Reno for the purpose of finishing the business. A disagreement arose as to who should take the moneys to the exchange and draw down the winnings. Presently it was agreed that Sterling should go to the exchange and bring a man from the exchange to verify the fact that the individuals who had made the stock purchases were responsible financially. He went out and in a short time returned with a man purporting to come from the exchange. It was claimed by Woolfrey that the individual who returned with Sterling was the defendant, John Lakenan. Whoever the individual was, when he came into the room he had the two vouchers in his possession which Sterling and Woolfrey had signed in Oakland when they made their bid on the stock. To that man Sterling and Woolfrey exhibited their moneys and later delivered to him their moneys, which he took away with him, saying: "You come over in about twenty minutes and it will all be refunded to you with the winnings."

The money was not seen again. The representative of the exchange was not seen again in Reno, and the other actors dispersed. Woolfrey went from Reno to Portland, where he reported the matter to the police. The police sent him to Oakland, where he reported the matter to the Oakland police, and the Oakland police commenced their investigation. In the meantime Woolfrey remained in Oakland. Toward the end of November, while he stood at the railroad station at Fourteenth and Franklin, he was approached by Victor A. Dunn, who introduced himself as an attorney, and stated that he would undertake to recover Woolfrey's moneys on a contract which he wrote out and which provided that the attorney should receive 50 per cent. of the moneys recovered as his compensation. After Mr. Dunn had obtained his contract, and a short time before the 21st day of November, 1921, he asked the complaining witness to go with him to Fabiola Hospital to see a man that was there and to see if the man could be identified as one of the alleged conspirators. When they went to the hospital Woolfrey went into room 18. Mr. Dunn's stenographer, a young lady, remained outside of the door, and Mr. Dunn several yards away from the door down the hallway. When Woolfrey went into the room there was a man in bed propped up with pillows. Woolfrey said to him, "How are you?" the patient remarked, "I think you have made a mistake," whereupon Woolfrey replied, "Probably I have," and left the room. On the trial he testified that he was positive that the man in the bed was the man he had seen in Reno and the man who had obtained his money. He also testified that on the preliminary examination he had been asked the question and had answered, "You weren't sure the first time; weren't sure the second time? A. Not positive." He further testified that on the first visit to Fabiola Hospital he thought the man he saw in room 18 was the man he had seen in Reno, but he did not want to make a mistake; he wanted to be sure. He was not positive. On the afternoon of the same day the witness again went to the hospital with Detective Edward O'Donnell. The detective held a warrant for the arrest of the defendant upon his identification. Regarding that visit the witness testified that he and the officer went into the room where the defendant was in bed and that afterwards he told the officer he was almost positive that the defendant was the man. The officer testified that during that same evening Woolfrey told him he thought the defendant was the man. On the following day the witness and Officer Flynn went to the hospital. On that occasion the witness identified the defendant as the man who had received the witness' money at Reno, and the defendant was placed under arrest. The witness testified further that it was not until the time of the preliminary examination that the witness recalled to his own mind that the defendant was not only the man who had taken his money at Reno, but was also the man who had approached him at the ferry depot and had suggested to the witness that the witness visit Golden Gate Park. One of the main defenses which the defendant presented at the trial was an alibi. In support of his alibi he took the stand and testified in his own behalf. He also produced his wife and daughter, supporting his statement that he was in Oakland on the 25th day of October, 1921, the date that the prosecution claimed that Woolfrey had delivered his money into the hand of the defendant at Reno. In support of his motion for a new trial, the defendant read the affidavit of Ralph Lee. In that affidavit the affiant averred:

> "That on the 25th day of October, 1921, affiant was engaged in business at the town of Hayward in the said county of Alameda, state of California. That on the evening of said 25th day of October, 1921, your affiant saw and personally talked with the above-named defendant, John Lakenan, at affiant's place of

business in the town of Hayward, county of Alameda, state of California."

The affidavit does not contain any further facts tending to fix and identify the date of that meeting. The defendant also tendered the affidavit of T. R. Rogers, his son-in-law, who was in Mendocino county at the time of the trial. In that affidavit the affiant avers:

> That the affiant and "the above-named Lakenan, during the months of October and November, 1921, resided at No. 25 Monte Vista avenue, Oakland, Cal.; that affiant saw and talked to the said John Lakenan practically every day during the month of October, 1921, and particularly on the 25th day of October, 1921, affiant saw and talked to the above-named defendant, John Lakenan, in the city of Oakland, county of Alameda, state of California."

Neither does that affidavit contain any additional facts fixing and identifying the particular date.

The motion for a new trial was denied. On the hearing of the motion the trial judge pointed out that the above affidavits were cumulative. The respondent urges the same point at this time. In reply the appellant contends that merely because the evidence was cumulative was not a sufficient ground for denying him a new trial. People v. Lapique, 136 Cal. 503, 69 Pac. 226.

[1, 2] It may be conceded that simply because newly discovered evidence is cumulative is not at all times, in and of itself, a sufficient reason for denying a motion for a new trial. For it is evident that new evidence, although cumulative, might be of such overwhelming character as to render a different result certain or probable, and in such case a new trial should be granted. But whether the evidence is of this character is not a question of law, but for the judgment of the trial judge, whose discretion will not be interfered with by an appellate court except in cases of manifest abuse. Oberlander v. Fixen & Co., 129 Cal. 690, 692, 62 Pac. 254. In People v. Buckley, 143 Cal. 375, at page 392, 77 Pac. 169 at page 176, concerning this point, the court said:

> "A new trial should not, however, be granted upon the ground of newly discovered evidence unless the showing as to such newly discovered evidence is sufficiently strong to render a different result probable. The question as to whether such a showing is made is one that is addressed to the sound legal discretion of the trial court, and the action of that tribunal in regard thereto will not be disturbed, except in cases of manifest abuse."

In People v. Sing Yow, 145 Cal. 1, at page 4, 78 Pac. 235, at page 236, the court said:

> "The question as to the effect upon the case of the newly discovered evidence is from its nature peculiarly one that is addressed to the discretion of the trial court, and, of course, should be determined by that court with a full realization of the responsibility involved, and the motion should undoubtedly be granted where the showing is such as to make it apparent to the trial court that the defendant has, without fault on his part, not had a fair trial on the merits, and that by reason of the newly discovered evidence the result would probably be, or should be, different on a retrial. But, unless the appellate court can plainly see that this discretion has been abused, that the showing made was of such a character as to make it manifest that the case would or should result differently on a new trial, in view of the newly discovered evidence, the order of the trial court refusing a new trial will not be disturbed. Oberlander v. Fixen & Co., 129 Cal. 690, 692."

[3] Turning back to the affidavits of Ralph Lee and T. R. Rogers and looking at them separately, or considering them together in the light of the rest of the record, this court cannot say that the contents are of such overwhelming character as to render a different result certain or probable, or that the showing made was of such a character as to make it manifest that the case would result differently on a new trial. Under these circumstances we cannot say the trial court erred in denying the appellant's motion for a new trial.

[4] The appellant makes the point that the verdict is contrary to the evidence. It suffices to state that we have read the transcript from cover to cover. The prosecution introduced evidence which, if the jury believed it, covered each and every element of the offense alleged against the defendant.

[5] Because the money was passed at Reno in the state of Nevada a point is made that the verdict is contrary to law. The point is without merit. Pen. Code, § 27; People v. Chapman (Cal. App.) 203 Pac. 127.

The appellant complains of certain rulings of the trial court arising during the course of the trial. We find not a scintilla of error in this connection. Such rulings were wholly impartial, and, with the assistance of counsel for the plaintiff and counsel for the defendant, the case was fully presented by each side.

[6] The court instructed the jury regarding the acts and declarations of coconspirators. The appellant contends that the instruction was not only erroneous and had no application to the defense on which the defendant was on trial, but was calculated to confuse and mislead the jury in considering the testimony. It is not necessary for us to go further than to state that the instruction was directly pertinent to the theory of the case as stated by the prosecution, and there is nothing in the instruction tending in the least to mislead the jury, or to cause the members to give consideration to collateral matters.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

61 Cal. App. 352

WILLIAMS v. FLINN & TREACY et al.
(Civ. 4475.)

(District Court of Appeal, First District, Division 2, California. March 13, 1923.)

1. Appeal and error 🔑911(3)—That record does not show authority of succeeding judge settling statement does not prevent its consideration.

The fact that the record does not recite the conditions as provided by Code Civ. Proc. § 653, under which a succeeding judge was authorized to settle a statement, does not prevent consideration of points urged therein; it being presumed, under section 1963, subd. 16, that a court or judge acting as such acts in the lawful exercise of his jurisdiction.

2. Exceptions, bill of 🔑41(1) — Bills held properly before court.

Where the time to present a bill of exceptions was extended to October 6, and on September 27 it was served, and on November 7 appellants presented a second bill and amendments thereto, all of which were referred to a referee to settle matters referred to in the bills which occurred before the referee, and after denial of motion for new trial on November 23, appellant's time to serve a bill after the denial of the motion was extended to December 20, and on December 19 appellants served a third bill, and on December 24 appellees served amendments thereto, all of which were referred to the referee for settlement and after settlement by the referee the trial judge settled and allowed the combined bill, which was presented on appeal with the certificate of the referee as to the portion relating to proceedings before him, the method adopted was a substantial compliance with Code provisions and properly presents the bills for appeal.

3. Interest 🔑18(2)—Allowed only from date of judgment, where damage not certain by calculation.

In action for an accounting, which included items claimed on express contract as well as on quantum meruit, and recovery was had for an amount arrived at after days of investigation, and the amounts found to be due plaintiff varied greatly from the amount asked for, and the damages were not certain nor capable of being made certain by calculation, interest prior to date of judgment was not proper (Civ. Code, § 3287).

4. Pleading 🔑237(3)—Refusal of amendment to defendant's pleadings to conform to proof before referee held an abuse of discretion.

Where an amendment to pleadings was necessary to entitle defendants to judgment in accordance with facts found by a referee, and to enable them to secure benefit of evidence introduced in their defense, refusing leave to amend their pleadings was an abuse of discretion.

5. Account, action on 🔑6(5)—Under general and special denial, defendants' right to contest items not limited to items specifically denied.

In action on an account, where plaintiff attached, as an exhibit to his complaint, an itemized statement showing the balance due, and defendant answered with general and specific denial that the exhibit attached was a full and complete statement of the account, under the specific denial defendants could contest each item of account, and their right was not limited by the individual items specifically denied in the answer.

6. Appeal and error 🔑1017—Referee's finding of fact has same weight as special verdict.

In view of Code Civ. Proc., §§ 644, 645, a referee's finding of fact is entitled to the same weight as a special verdict, and should be sustained, unless plainly not warranted by any reasonable view of the evidence.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by William H. Williams, Jr., against Flinn & Treacy, a copartnership, and another. Judgment for plaintiff, and defendants appeal. Reversed.

Fabius T. Finch and Paul F. Fratessa, both of San Francisco, for appellants.

I. M. Peckham, of San Francisco, for respondent.

LANGDON, P. J. This action was brought by plaintiff to recover commissions alleged to have been due to him from defendants, who were contractors for street work, as compensation for soliciting from owners of real property contracts to do street work. Plaintiff recovered judgment for $1,583.18 and the defendants have appealed.

[1] The first problem to be met has reference to the sufficiency of the record presented by the appellants; respondent vigorously objecting to a consideration of the points urged by appellants, upon the ground that said points are not presented by properly authenticated bills of exceptions. The record contains two bills of exceptions, with orders settling and allowing the same. However, several peculiarities distinguish the procedure followed by the appellants in preparing the record upon appeal. The action was tried in the superior court of the state, in and for the city and county of San Francisco, before Judge Hunt. It involved an accounting between the parties, which necessitated an investigation into transactions occurring during a long period of years. The trial judge appointed a referee "to take the evidence and report to the court his conclusion of fact thereupon." The referee proceeded with the hearing, which continued for several days. During this hearing the defendants discovered evidence which they contended entitled them to numerous credits against the plaintiff, which had not been set up in their answer, and they accordingly asked the referee for permission to amend the answer to include such credits. The referee announced that he

would not postpone the hearing nor permit an amendment at that time, but would hear all the evidence that could be offered by either side, and when it was all before him he would permit amendments accordingly. After the hearing before the referee was completed, it became apparent to the parties that the referee, under the order appointing him, had no power to permit amendments to the pleadings. Defendants then asked the trial judge for permission to amend their answer to conform to the proof submitted by the parties and received by the referee, and upon which the referee had based his findings, in effect, that the defendants were indebted to the plaintiff in the sum of $698.11. Permission to amend was refused, and defendants prepared a bill of exceptions directed to the order of Judge Hunt denying their motion to amend their answer and cross-complaint. In the meantime Judge Hunt had been succeeded in office by Judge Griffin, who sustained plaintiff's exceptions to the referee's report as to all credits allowed by said referee which were not specified in defendants' original answer, and settled said bill of exceptions directed to the ruling refusing leave to amend without any objection to said settlement having been made by the plaintiff. Plaintiff and respondent now objects to the consideration of said bill by this court upon the ground that it does not affirmatively appear therefrom that Judge Griffin was qualified to settle and allow the same.

It is contended that the bill should affirmatively show the existence of some one of the facts enumerated by section 653, Code of Civil Procedure, so as to bring the case within the rule of the Supreme Court permitting settlement by the successor of Judge Hunt. While the better practice, undoubtedly, would be as contended for by the respondent, and while the language of one or two of the earlier cases would seem to sustain his technical position, nevertheless, we think the later and better rule is that announced in the case of Lincoln v. Sibeck, 27 Cal. App. 61, 148 Pac. 967. That case was a stronger one for the respondent than is the instant case, because objection was made there to the settlement of the bill, while in the present case no objection was made. Nevertheless, in the case of Lincoln v. Sibeck, supra, it was said:

> "But the facts which might have justified the exception do not appear. If Judge Price had refused to settle the statement, or if any other condition described in section 653 of the Code of Civil Procedure, and in rule XXVII of the Supreme Court, * * * had come into existence which would authorize another judge to act, then it would have been better practice to show such condition by proper recitals in the record, instead of relying upon the 'presumption of regularity' attending official acts of courts and their judges. In this instance, however, it seems that the presumption of law is sufficient to support the act of the judge in settling the statement, since there is a possibility that for some reason Judge Price had refused to settle the statement after request duly made. Under section 1963, subdivision 16, of the Code of Civil Procedure, it is presumed 'that a court or judge, acting as such, whether in this state or any other state or country, was acting in the lawful exercise of his jurisdiction.'"

[2] Judgment was rendered and entered by the court on August 29, 1921, and the defendants' time to prepare, serve, and present their bill of exceptions was extended by order of court to October 6, 1921. On September 27, 1921, defendants served such bill of exceptions, and on November 7, 1921, defendants presented said second bill and amendments thereto to the clerk of said court. Thereupon the court made and entered a minute order referring said bill of exceptions and amendments to the referee, to settle the same as to all matters referred to in said second bill which occurred before said referee. Defendants' motion for a new trial came on for hearing before said court, and was denied on November 23, 1921. Defendants' time to prepare and serve a bill of exceptions after the denial of said motion for the new trial was extended by order of court to December 20, 1921. On December 19, 1921, defendants served a third bill of exceptions, and on December 24, 1921, plaintiff served his amendments, and on December 28, 1921, said third bill of exceptions and amendments were presented by defendants to the clerk of said court, and the court thereupon made and entered a minute order referring said bill of exceptions and amendments to said referee for settlement as to all matters referred to in said bill and occurring before said referee.

The referee fixed January 11, 1922, at 2 o'clock p. m., at his office, as the time and place for the settlement of both said second and third bills of exceptions, and at said time the attorneys for both plaintiff and defendants appeared before said referee. Both said second and third bills of exception are substantially the same, so far as they refer to matters occurring before said referee, and said bills were settled as one bill; the referee certifying that they contained a full, true, and correct statement of all matters and proceedings had and taken before him in regard to such reference, and settling and allowing the same over the objections of plaintiff. On February 14, 1922, the trial judge also settled and allowed this combined bill of exceptions, which thus comes to us with the certification of the referee as to the portion thereof relating to proceedings before him and with the certificate of the trial judge as to the correctness of its statement of proceedings before the court.

This extended statement of the facts surrounding the settlement of the bills of exception presented in the record seemed necessary, in view of the many technical objections to the same raised by the respondent. We think the method adopted by the appellants substantially complies with the Code provisions governing the same and that the bills are properly before us.

[3] It is contended that the trial court erred in allowing plaintiff interest from February 1, 1918, and that interest should have been computed only from the date of the judgment. In this contention, we think the appellants are correct. Recovery was had for an amount arrived at after days of investigation by the referee. It was a case of an accounting, which included items claimed upon express contract as well as upon quantum meruit. The amounts found by the referee and the court to be due to the plaintiff varied greatly from the amount which he asked for in his complaint and which he had previously demanded from the defendants. We think this is a case where the damages are not "certain nor capable of being made certain by calculation," and therefore plaintiff is not entitled to interest thereon prior to the date of judgment. Section 3287, Civ. Code; Cox v. McLaughlin, 76 Cal. 67, 18 Pac. 100, 9 Am. St. Rep. 164; Haun v. Rosenmayer, 46 Cal. App. 353, 189 Pac. 117; Keyes v. Nims, 43 Cal. App. 1, 19, 184 Pac. 695.

[4] As to the action of the trial court in refusing leave to the defendants to amend their pleadings to conform to the proof introduced before the referee, were we of the opinion that such amendment was necessary in order to entitle defendants to a judgment in accordance with the facts found by the referee, and to enable them to secure the benefit of all the evidence which they had introduced in their defense, we should unhesitatingly say that the trial court abused its discretion in this ruling. It is true that it is only in exceptional cases that the action of the trial court upon a matter of this kind will be disturbed upon appeal, but we think this is such an exceptional case. It is the aim and aspiration of our system of law and the policy of our courts to afford substantial justice to litigants, and to that end liberal amendments are expressly permitted by our Code, and encouraged by our courts. In a case like this one, when a party has presented evidence such as would be sufficient upon which to base a finding in his favor as to his right to certain credits, and this evidence is presented during the course of a comprehensive investigation into the facts and figures, and at a time when the rights of the opposing party can be fully protected by the allowance of a continuance to enable him to meet such proof if he so desires, we can see neither reason nor justice in refusing permission to amend to conform to the proof. Indeed, to allow the plaintiff to recover a large amount in an accounting suit which the evidence has disclosed is not due him, merely because through inadvertence or other excusable neglect the defendant failed to set out in his answer all the credits to which he was entitled would be to settle a controversy without regard to the merits.

[5] However, in the present case, the plaintiff attached as an exhibit to his complaint a long, itemized statement of account, showing a balance due him of over $4,000. The defendants answered with general and specific denials of statements of fact and conclusions of law, and among the intricacies of that pleading we find a denial that "Exhibit A attached to plaintiff's complaint herein is a full or complete statement of any account between plaintiff and defendants." We think that under this denial the defendants were at liberty to contest each and every item of plaintiff's alleged account and that their right was not limited by the individual items of said account specifically denied in the answer. The evidence received by the referee contesting each item of said alleged account was, therefore, properly received under the general denial in defendants' answer; no amendment to the pleadings was necessary to entitle the defendants to the benefit of such evidence. The action of the trial court in sustaining plaintiff's objections to the findings of the referee in so far as they were based upon evidence contradicting certain items in plaintiff's account which had not been specifically denied in the answer was erroneous. That objection to the referee's report was not a good objection, and the said report should have been accepted without the change necessitated by the court's ruling in sustaining the exceptions of the plaintiff.

[6] A referee's finding on a question of fact is entitled to the same weight as a special verdict of a jury where the evidence was produced before and heard by him, or, as otherwise stated, must be given the same dignity on appeal as is required by the established practice as to any conclusion of fact made by a trial court. Section 644, Code Civ. Proc.; 23 R. C. L. 299. It should be sustained, unless plainly not warranted by any reasonable view of the evidence. Section 645, Code Civ. Proc. The trial court should have accepted the findings of the referee and given judgment in accordance therewith, allowing interest only from the date of judgment.

The judgment appealed from is reversed, with instructions to the trial court to accept and confirm the report of the referee and give judgment for the plaintiff in accordance therewith.

We concur: STURTEVANT, J; NOURSE, J.

61 Cal. App. 405

PEOPLE v. PICKENS. (Cr. 926.)

(District Court of Appeal, Second District, Division 2, California. March 15, 1923.)

1. Criminal law 🔑29—Assault with deadly weapon and robbery held not parts of same offense.

Where the prime purpose of a conspiracy in assaulting prosecuting witness was not to rob him, but to drive him from the community, and robbing him was an afterthought, the robbery was not part of the same offense as the assault.

2. Assault and battery 🔑92—Robbery 🔑24(1)—Evidence held to sustain conviction of robbery and of assault with deadly weapon.

Evidence *held* to support a conviction of robbery and of assault with a deadly weapon.

3. Witnesses 🔑370(1)—Permissible on cross-examination to prove relationship between witness and party to affect credibility.

The jury are entitled to know a witness' bias to weigh his evidence, and it is permissible upon cross-examination to show the fact of relationship, fraternal or otherwise, existing between the witness and the party in whose interest he is called, as tending to affect his credibility.

4. Witnesses 🔑363(1) — Extrinsic evidence showing personal prejudice of witness admissible to determine credibility.

Extrinsic evidence may be introduced of any circumstances suggestive of probable personal prejudice of a witness, because the existence of such emotions renders a witness untrustworthy.

5. Witnesses 🔑370(1)—Testimony that witness' superior officer was member of Ku Klux Klan held irrelevant in absence of showing witness knew the fact.

Where in a prosecution for a felony it was in evidence accused was a member of the Ku Klux Klan, and accused's witness, a subordinate officer of the chief of police, testified that the reputation of the prosecuting witness was bad, rebuttal testimony that the chief of police was a member of the Ku Klux Klan *held* irrelevant in absence of showing that witness knew his superior officer was a member of the Ku Klux Klan.

6. Witnesses 🔑370(1)—Person to be affected as a witness by relationship or peculiar circumstances must have knowledge thereof.

In order that one, such as a witness, may be influenced by an emotion due to some circumstance such as relationship, the person thus affected must have a knowledge of the fact, and hence where in a felony prosecution it was in evidence accused was a member of the Ku Klux Klan, and his witnesses, who were subordinate officers of the chief of police, testified as to the bad reputation of prosecuting witness, evidence in rebuttal that the chief of police was a member of the Ku Klux Klan could not have biased witnesses where they did not know that their superior officer was a member of the Ku Klux Klan.

7. Criminal law 🔑1169(1)—Admission of evidence that witnesses' superior officer was member of the Ku Klux Klan held not prejudicial error.

In a felony prosecution admission of rebutting testimony that witness' superior officer, the chief of police, was a member of the Ku Klux Klan, though erroneous, because of absence of showing that witnesses knew their superior officer was a member of the order, *held* not prejudicial where the purpose of the evidence was to discredit witness' testimony, and the jury's verdict would have been the same even if the court had excluded the rebutting testimony.

8. Criminal law 🔑1173(2)—Refusal to instruct that accused might be convicted of lessor offense held not error when verdict would have been same if instruction were given.

In a prosecution for assault with a deadly weapon and for robbery, failure to instruct the jury that they might return a verdict of assault *held* not error where the only defense interposed was the attack upon the reputation of prosecuting witness, and the verdict, because of the evidence, would have been the same if the court had given the instructions requested.

9. Criminal law 🔑1186(4)—Judgment not reversed for technical errors not resulting in miscarriage of justice.

A judgment will not be reversed for technical errors in the admission of evidence and in misdirecting a jury, where such errors do not result in a miscarriage of justice within Const. art. 6, § 4½.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

W. M. Pickens was convicted of robbery and of assault with a deadly weapon, and appeals. Affirmed.

Thomas Scott, Jr., of Bakersfield, and Charles Barnhart, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

CRAIG, J. The appellant was convicted of two crimes charged in separate counts of an indictment. He was found guilty of robbery and of assault with a deadly weapon.

[1, 2] The following constitute the material facts: After making an appointment by telephone to meet them at a certain place, defendant and several confederates attacked one Clyde Richey, the complaining witness, when he alighted from a taxicab driven by him. One of his assailants attempted to put a black cloth over his head. Richey resisted, and during the struggle was beaten over the head by pistols or revolvers. At some time before the affray ended $350 was taken from his pocket. The approach of the witnesses Schultz and Hendricks caused the attackers to desist. They entered an automobile standing near by, which was identified as that of Pickens, and fled. Richey pursued

them in his taxicab, and, after seeing appellant's machine swerve into a ditch and stick there, went for aid. He soon returned with a police officer and friends and found Pickens attempting to extricate his machine. The officer arrested Pickens and searched his car, in which was found, among other articles, a can of tar, a can opener, and a paint brush. It appears that Pickens was a rival of Richey's in the taxicab business, and evidence was introduced to show that the appellant had suggested the attack at a committee meeting of the Ku Klux Klan of which he was a member. To be more specific, his statement was, "that Richey's conduct was such that it would be good riddance to take him out of the city or give him a flogging." It is apparent that these facts permit the construction that the prime purpose of the conspiracy in assaulting Richey was not to rob him, but rather to drive him from the community, and that the robbery was an afterthought of one or some of the conspirators who took advantage of the opportunity presented to enrich themselves by appropriating Richey's money. Viewed in this light, the robbery was not a part of the same offense as the assault, and the case is substantially identical with People v. Bentley, 77 Cal. 7, 18 Pac. 799, 11 Am. St. Rep. 225. In that instance a conviction of robbery was sustained, although the defendant had been found guilty of having committed an assault with a deadly weapon upon the same occasion. In deciding the appeal the Supreme Court said:

> "The offense of which the defendant was first convicted was an effort to injure the person of the prosecutor with a deadly weapon; that of which he was last convicted was an attempt to take away the goods of the prosecutor from his person by intimidation or violence. The essential elements of the two offenses are not the same."

Tested by the rule announced for cases of this character in People v. Ciulla, 44 Cal. App. 727, 187 Pac. 49—that is, whether the evidence necessary to sustain a conviction of one offense would justify a conviction of the other—it seems clear that this judgment must be upheld. If robbery was not the purpose of the assault upon Richey, much of the evidence necessary to sustain the verdict of assault with a deadly weapon was not essential to establish the robbery, and that testimony which showed that a robbery was committed, and that Pickens was a party to it is capable of separation from that proving the assault with a deadly weapon. The essential elements of this robbery and of the particular assault of which appellant was convicted are not the same, although in general terms violence is involved in crimes of the class to which both belong.

[3] Appellant's second point is that the court erred in admitting evidence showing that Charles H. Stone, the chief of police, was a member of the Klu Klux Klan. Stone was not a witness, but Assistant Chief of Police Taylor had testified for the defendant that the general reputation of Clyde Richey for truth, honesty, and integrity was bad. The witnesses Cornwall, Hudson, and Lawson, all officers under Chief of Police Stone, had testified to the same effect. It was established that the defendant Pickens was a member of the same lodge of the order as the chief of police, and there was evidence to the effect that the offense had been suggested by Pickens at a committee meeting of the same lodge.

> "It is elementary law, supported by all authority, that the state of mind of a witness as to his bias or prejudice, his interests involved, his hostility or friendship toward the parties, are always proper matters for investigation, in order that truth may prevail and falsehood find its proper level. If the inner workings of a witness' mind are actuating his testimony, and the workings of that mind are brought forth to the light and held up in full view before the jury, results will be obtained much more in accord with truth and justice than though the witness' testimony is weighed and measured by his words alone." People v. Thomson, 92 Cal. 506, 28 Pac. 589.

For the purpose of fully weighing the evidence of any witness, the jury are entitled to know his bias or feelings in the case, if any there be. People v. Wong Chuey, 117 Cal. 626, 49 Pac. 833. It is permissible upon cross-examination to show the fact of relationship, fraternal or otherwise, existing between the witness and the party in whose interest he is called, as tending to affect his credibility. People v. Cowan, 1 Cal. App. 411, 82 Pac. 339.

> "No reason for holding that the witness must first be examined as to his hostility, and that then, and not till then, witnesses may be called to contradict him, because it is not a case where the party against whom the witness is called is seeking to discredit him by contradicting him. He is simply seeking to discredit him by showing his hostility and malice; and, as that may be proved by any competent evidence, we see no reason for holding that he must first be examined as to his hostility. And such, we think, is the drift of the decisions in this state and elsewhere." People v. Brooks, 131 N. Y. 321, 30 N. E. 189.

[4, 5] However, the fact of Stone's membership in the Klu Klux Klan without any proof that the witnesses whom it was sought to show were biased thereby had any knowledge of his being a member was clearly irrelevant to the issue. The evidence to which objection is made was offered in rebuttal. Its only purpose was to discredit the officers' testimony concerning Richey's reputation. Extrinsic evidence may be introduced of any circumstance suggestive of probable personal prejudice of a witness. The range of external circumstances from which probable bias

may reasonably be inferred is too great for legal limitation, but the reason for admitting evidence of bias and interest is that the existence of such emotions renders the witness untrustworthy.

[6] It is self-evident, in order that one may be influenced by an emotion due to some circumstance such as relationship, the person thus affected must have a knowledge of the fact. It is inconceivable that the membership in the Ku Klux Klan of the chief of police could bias his subordinate officers, unless they were aware of his connection with the order, and no evidence appears in the record from which even an inference may be drawn that they possessed such knowledge.

[7] But, although the court committed error in overruling the defendant's objection to this testimony, we are convinced that no substantial prejudice resulted. As before stated, the only purpose of the evidence was an attempt to discredit the officers' testimony. If the court had sustained the objections and the jury had accepted as true the defense witnesses' assertions that the reputation of Richey for truth, honesty, and integrity in the community was bad, it is highly improbable that the jury's verdict would have been affected in the least. The essentials of Richey's story were fully corroborated by the uncontradicted testimony of others. The facts of the assault, as to time and place, the injuries received by the victim, the number of the assailants, their robes and revolvers, their conduct, manner, and direction of flight, the general description of their machine, and similar details were established by witnesses other than Richey. Then we find uncontested evidence of the pursuit by him of an automobile similar to that in which those who made the attack left the scene, and also to that of Pickens, to which, imbedded in a ditch by the road, Richey conducted witnesses. Again the record shows that Pickens' machine contained articles suggestive of a connection with the assault. The prosecution proved the existence of a motive upon the part of the appellant to injure the complaining witness and his efforts to induce others to join in unlawful conduct against him. These facts and others of a like character were established without dispute and by witnesses who were in no way impeached, and, considering them alone, we are satisfied that to reverse the judgment would indeed work a miscarriage of justice because of mere technical error.

[8] Certain instructions asked by the defendant were refused. These were as follows:

> "The court instructs the jury that, if you believe from the evidence beyond a reasonable doubt that the defendant committed an assault upon the person of Clyde Richey as charged in the indictment, but do not find from the evidence that such assault was made with a deadly weapon or with intent to kill and murder the said Clyde Richey, then you should find the defendant guilty of an assault."

And also this instruction:

> "The jury are instructed that, under the indictment charging the defendant with the crime of robbery, you may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged, and you are therefore instructed that, under said indictment charging robbery, you may convict the defendant of a simple assault."

It is true that assault is an offense included within the charge of assault with intent to commit murder, and also that of robbery, but the evidence showed beyond question that Richey was attacked with deadly weapons and was robbed of $350. The failure to inform the jury that they might return a verdict of assault as an offense included in those charged in the indictment cannot be said to have been prejudicial error. The only defense interposed was the attack upon the reputation of the prosecuting witness for truth, honesty, and integrity. Had the court instructed the jurors as requested and informed them that they might convict the defendant of assault under the second count of the indictment, it is inconceivable that the verdict would have been otherwise than as it was rendered. Surely, if the uncontradicted story detailed by the people's witness is accepted as the truth, the conclusions reached by the jury were unavoidable.

[9] We have carefully studied the entire record, including the transcript of the evidence, and are convinced that no miscarriage of justice resulted from the errors in misdirecting the jury and in improperly receiving evidence. Under such circumstances a judgment will not be reversed. Section 4½, art. 6, Cal. Constitution; People v. Wong Hing, 28 Cal. App. 230, 151 Pac. 1159; People v. Fealy, 33 Cal. App. 605, 165 Pac. 1034.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

61 Cal. App. 377

CURTIN v. STATE. (Civ. 2613.)

(District Court of Appeal, Third District, California. March 14, 1923.)

1. Officers 🔑1—Service required by acts authorizing appointment of tax expert to sit with legislative committee on taxation held not to involve duties of "office."

St. 1909, p. 779, which by reference made act of 1905 (St. 1905, p. 390), a part, authorized the Governor to enter into an agreement with a tax expert to perform services required by the acts of 1905 and 1909, in investigating matters pertaining to the system of revenue and taxation and report measures deemed necessary to its revision and reform. *Held* that the services did not involve the performance of duties belonging to an office, the most essential characteristic of which is that the incumbent be clothed with some part of the sovereignty and that the duties be of continuous character.

2. Officers 🔑1—Test of "public office" is whether duties involve exercise of part of sovereign power.

The test as to whether a position created by statute is a public office is whether the duties of such position or employment involves the exercise of any part of the sovereign power of the state.

3. Officers 🔑30—Appointment of senator as tax expert to sit with legislative committee not violative of Constitution.

The duties of a state senator appointed under St. 1909, p. 779, as a tax expert, involving only a contract of employment, and not duties belonging to an office, did not violate Const. art. 4, § 19, as it read prior to amendment of 1916, that no senator during his term shall be appointed to any civil office of profit.

4. Interest 🔑19(1)—Interest not allowed in action against state on amount claimed under quantum meruit.

In an action against the state, authorized by St. 1921, p. 1592, on a contract of employment created under St. 1909, p. 779, where no definite sum was provided for compensation, and the action was on a quantum meruit, interest was allowable only from the date of judgment.

5. States 🔑215—No costs awarded against state in action authorized by statute.

In an action against the state, authorized by St. 1921, p. 1592, plaintiff, though victorious under its express provisions, cannot be allowed costs.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by J. B. Curtin against the State. Judgment for plaintiff, and defendant appeals. Affirmed as modified.

U. S. Webb, Atty. Gen., and R. T. McKisick, Deputy Atty. Gen., for the State.

Devlin & Devlin, of Sacramento, for respondent.

HART, J. The plaintiff brought this action to recover against the state of California the aggregate sum of $11,947 for services rendered and moneys expended for and in behalf of said state. The authority for the maintenance of such an action against the state is to be found in an act of the Legislature of 1921, entitled:

> "An act to authorize suits against the state for services rendered to the state or for moneys expended in connection with such services, and regulating the procedure therein." Stats. 1921, p. 1592.

The plaintiff, from and including the year 1909, to and including the year 1913, which covered the period during which the services for which he herein sues were rendered, was a member of the Legislature of the state of California, representing in the senate the Twelfth senatorial district. The brief of respondent correctly states the facts and the history of the legislation by and under the authority of which the plaintiff performed the services and expended the moneys for which he here seeks reimbursement against the state as follows:

> "On March 10, 1905, Assembly Concurrent Resolution No. 21 was adopted by the Legislature. Statutes 1905, p. 1067. It provided for the appointment of a joint committee of the Senate and Assembly, consisting of four members, two to be appointed by the president of the Senate and two by the speaker of the Assembly, 'to examine into and report upon all matters connected with or in any way appertaining to the system of revenue and taxation in this state, and to further report such constitutional and legislative measures as may be deemed necessary to the revision and reform of said system of revenue and taxation.' Power and authority was given to the commission so that the investigation would be full and complete, with authority to employ all necessary clerical and expert assistants, to send for persons and papers, and to take all necessary means to procure the attendance of witnesses and testimony. It was further provided 'that, in the event provision is made by law for the existence of a commission for the revision and reform of revenue and taxation in force in this state of which the aforementioned committee is to be a constituent part, then and in that event the joint committee aforesaid and the members thereof are authorized to act as, and be an integral part and portion of, said commission.'
>
> "On March 20, 1905 (Statutes 1905, p. 390) an act which authorized the Governor to appoint an expert in taxation and public finance to sit with the joint committee authorized by Assembly Concurrent Resolution No. 21 when appointed, was passed. The Governor was made an ex officio member of said commission. In section 4 of the act, there is, in effect, a repetition of the powers given to the joint committee as contained in the concurrent resolution. Section 5 of the act provided that the members of said commission, other than the Governor,

as chairman thereof, and the expert, should be paid for their services the sum of $10 per diem and their necessary expenses while actually engaged in the performance of their duties as prescribed in the act. By section 6 an appropriation of $10,000 was made. It is thus recognized by the Legislature that the two senators and the two assemblymen who were appointed on the commission were to be paid $10 per diem while engaged in the performance of their duties, and in addition thereto their necessary expenses. The act did not provide that any member of the committee should take an oath of office or give a bond. There was no term fixed. There was no time fixed for the making of the report. There was specified work required to be done, to wit, 'to investigate the system of revenue and taxation in force in this state and to recommend a plan for the revision and reform thereof.' When this investigation of the specific matter was completed, and report made, the work directed would be finished. The Governor was authorized to appoint the expert in taxation and public finance to sit with the committee and to be a member thereof. If there was a vacancy caused by any reason in the personnel of either of the senators or either of the assemblymen, there was no power of appointment given. If the work was not completed during the term of office of either of the two senators or of the assemblymen, it was, nevertheless, to be continued by the committee so appointed by the Legislature until the investigation had been fully made and the recommendations filed.

* * *

"There is no evidence that any oath of office was taken by the plaintiff under the act of March 20, 1905. Plaintiff was one of the senators appointed by the president of the Senate."

It is readily to be seen that the object of the act of 1905 was to facilitate an investigation of the tax system then in vogue in California by persons who had had special experience in the fiscal affairs of the state, and to that end acquire information and data and to report the same to the Legislature, so that the law-making body could have an intelligent basis upon which to reform or correct the defects in the system as it existed at the time of the enactment of the act of 1905. The report of the commission of the Legislature of 1907 of its investigations of the matters submitted to it in pursuance of the provisions of the act of 1905 embraced a proposed constitutional amendment, which was subsequently adopted by the Legislature of 1907 and submitted to the vote of the electors at the ensuing general election. That proposed constitutional amendment, although supposed to involve the correction or the reformation of the then existing system of taxation and the improvement of said system, was, nevertheless, upon consideration by the people, regarded as wholly inefficient for the purposes for which it was designed, and was consequently rejected at the general election in November, 1908. The Legislature of 1909, still sensible of the deficiencies in the then existing tax system, and for that reason desiring that the investigation authorized by the act of 1905 should be further pressed, and something more practicable evolved and formulated than the scheme contained in the proposed but rejected constitutional amendment, passed the act of 1909 (Stats. 1909, p. 779). The act of 1909 by reference makes the act of 1905 a part thereof, particularly in so far as are concerned the purposes designed to be accomplished by said acts.

The act of 1909 "authorized the Governor of the state to appoint 'one person versed in matters relating to taxation, and a secretary, who shall be an expert on the science of finance and taxation, to carry on the work' provided for in the act of March 20, 1905, and the persons so appointed were to carry on the work mentioned. J. B. Curtin, the plaintiff, was appointed by the Governor as the 'one person versed in matters relating to taxation,' but no oath of office was required of him or of the Secretary, who was to be an expert on the science of finance and taxation, and no term was fixed, but it was contemplated that the work should be done by the two. There was an appropriation of $5,000 to be used for the purpose of carrying on the work mentioned, and to pay the necessary expenses of the members of the commission while engaged in the performance of their duties and the salary of the expert mentioned, and for all necessary clerical, printing, and other expenses connected with the work of carrying out the provisions of the act. While in the act of March 20, 1905, each member of the commission was to receive a per diem of $10 while actually engaged in the performance of his duty, the act of March 25, 1909, omitted such provision, but contemplated that the claims for each should be subject to approval by the board of control—board of examiners (?)—thus leaving the question of the compensation of the person 'versed in matters relating to taxation' to be fixed from time to time, based upon the reasonable value of his services. The expert, who was to act as secretary, was to have a salary, but the amount thereof was not mentioned in the act of March 25, 1909.

* * *"

The complaint alleges and the answer admits, that the plaintiff was on the 8th day of June, 1909, appointed or employed by the Governor of the state as "the person versed in matters relating to taxation," to carry on, in conjunction with the secretary, who was likewise appointed by the Governor, the work provided for in the acts of the Legislature of 1905 and 1909. The complaint further alleges that the plaintiff, continuously during the period from June 8, 1909, to and including June 8, 1913, acted as a member of the Commission mentioned in the act of 1909, and performed services for the state of California as such member of said commission and "that the reasonable value of such services as such member of said commission was and is the sum of $208.25 per month, during the said period hereinbefore mentioned, and that no part of said sum has been paid." It is alleged that the labor and services rendered by the plaintiff as a member of said commission, and which were accepted by the Governor of the state and by the Legislature of the state of California, were of great value to the state of California, and "as a result of said labor many millions of dollars of additional revenue not otherwise obtainable as taxes was thereby derived." The complaint then sets forth specifically the amount reasonably due the plaintiff for said services for each of the months from June 8, 1909, to and including June 8, 1913, said amount for each of said months being $208.25, totaling the sum of $10,000. It is further alleged that the appropriation provided for by the act of 1909 proved to be insufficient to carry on the said work, labor, and services called for by said act, "and no part of said money appropriated by said act of March 25, 1909, was ever paid to plaintiff, and that, in order to complete the said work, labor, and services, said plaintiff advanced from his own funds the sum of $1,947." The prayer is for judgment for the sum of $10,000 for the services performed and $1,947 for moneys expended, with legal interest on each sum from June 8, 1913, until the rendition of judgment.

The answer, of course, admits the passage of the above-mentioned resolution and acts of the Legislature relating to the matter of investigating the tax and fiscal system of the state and the provisions of said resolution and acts as to the appointment of a commission and the duties thereof. It also admits the appointment by the Governor of the plaintiff as a person versed in matters relating to taxation, as alleged in the complaint. On information and belief it denies that the plaintiff performed the services which he alleges in his complaint he rendered in behalf of the state, and that said services were of value to the state, and that the plaintiff expended the sum of $1,947 for necessary clerical, printing, traveling, and other expenses connected with the work as a member of said commission. It then alleges that, during all times mentioned in the complaint, the plaintiff was the duly elected, qualified, and acting senator of the state of California from the Twelfth senatorial district thereof; that the appointment of the plaintiff to the position mentioned "was and is in contravention of the provisions of section 19 of article 4 of the Constitution of the state of California, as said section read prior to November 7, A. D. 1916, and was wholly void and ineffectual."

The court found that during all the times mentioned in the complaint the plaintiff was a senator of the state of California, and upon the other issues found in favor of the plaintiff, and awarded him judgment for the aggregate amount for which he sues, together with interest at the rate of 7 per cent. per annum and costs of suit. The appeal is from said judgment.

The plaintiff testified that he was compensated by the Legislature for the services rendered by him pursuant to the act of 1905. The claim here is, as above stated, entirely for services alleged to have been rendered by plaintiff under the act of 1909 for the period of time stated in the complaint. As to the last-mentioned services, there is no dispute that the same were performed or rendered as alleged in the complaint and above explained.

It should be stated that the plaintiff testified that, although the statute of 1909 does not require that the appointee of the Governor under said act as "a person versed in matters relating to taxation" shall take or execute an oath of office he (the plaintiff), nevertheless did take and execute such an oath prior to entering upon the discharge of his duties. Explaining this circumstance, the plaintiff stated that a prepared oath was forwarded to him at his office, and that he paid no attention thereto for several days, but finally signed and returned it to the secretary of state.

[1] The primary and all-important question involved herein is whether the duties imposed upon the plaintiff by the act of 1909 under his appointment by the Governor involved the exercise of the duties of an office or whether the plaintiff was merely employed to perform certain services for the state which have no reference to the sovereign powers of the state. In other words, did the statute of 1909 by providing for the appointment or employment of "a person versed in matters relating to taxation," create an office to which was annexed the exercise of a part of the sovereign power of the state, or does the provision that the Governor may make such appointment merely vest in the executive the authority to enter into a contract of employment with such a person to render for the state services which do not involve the exercise of a part of the state's sovereign power?

The theory of the plaintiff is that the act, in pursuance of whose provisions the services for which he here seeks compensation were rendered, did not create an office, but merely authorized the Governor to employ "a person versed in matters relating to taxation" for the purpose of gathering data and information upon which the Legislature, in the exercise of so much of the sovereign power of the state as the people through their Constitution have vested in it, might formulate a system of taxation; and, since the statute does not expressly provide for the compensation of the person versed in matters relating to taxation who might be appointed by the Governor under the act, the plaintiff has proceeded upon a quantum meruit upon the theory that his contract with the state was one of employment without any express understanding as to what his compensation should be, precisely as would be the case where a contract had been entered into between individuals for the rendition of services by one with no express agreement as to the compensation to be paid the latter for such services, in such case the person performing the services being entitled, obviously, to the reasonable value thereof.

The contention of the state is that the position to which the plaintiff was appointed by the Governor under the act of 1909 was and is an office, and that, under the terms of section 19 of article 4 of the Constitution, as that section read prior to its amendment in the year 1916 (see Stats. 1917 and Extra Session 1916, p. 54), the appointment of the plaintiff was absolutely void for the reason that he was at the time of said appointment a member of the Legislature of the state. Said section as it then read provides:

> "No senator or member of the assembly shall, during the term for which he shall have been elected, be appointed to any civil office of profit under this state which shall have been created, or the emoluments of which have been increased, during such term, except such offices as may be filled by election by the people."

We are of the opinion that the statute of 1909 merely authorized the Governor to enter into an agreement with any person versed in matters relating to taxation to perform the services required by the acts of 1905 and 1909, and that the services so required to be rendered do not appertain to or involve the performance of duties belonging to an office within the true meaning of that term.

> "The most essential characteristic [of an office] is * * * 'that the incumbent, in his independent capacity, is clothed with some part of the sovereignty of the state, to be exercised in the interest of the public, and required by law,' and that the duties are of a continuous character, as opposed to a mere temporary employment." Barker v. State, 69 Ohio St. 68, 72, 68 N. E. 575, 576, citing State v. Brennan, 49 Ohio St. 33, 29 N. E. 593; State ex rel. Armstrong v. Halliday, 61 Ohio St. 171, 55 N. E. 175.

In Robertson v. Ellis County, 38 Tex. Civ. App. 146, 84 S. W. 1097, the action was by an official stenographer of the district court of said county to recover a sum of money alleged to be due him for services rendered as such stenographer. The important question in the case was whether the position of stenographer for said court as created by an act of the Legislature of the state of Texas was an office. The Texas Court of Appeals held that the position was not an office within the meaning of the word "office" as used in a certain section of the Constitution of that state, and as it is commonly used in all the Constitutions throughout the United States. The reasoning of the court in that case is so pertinent to the situation here that we quote from the opinion therein in extenso as follows:

> "The definition of the term 'office,' as given by Mr. Mechem in his work on Public Officers, is quoted with approval by our Supreme Court in the case of Kimbrough v. Barnett, 93 Tex. 301, 55 S. W. 120, and is as follows: 'A public office is the right, authority, and duty created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.' The act authorizing the appointment of official stenographers provides for their appointment by the judges of the district courts, and declares that they shall be sworn officers of the court, and shall hold their office during the pleasure of the court, and further declares that the purpose of such appointment is to preserve the record in all cases for the information of the court, jury, and parties, and, to that end, 'it shall be the duty of the official stenographer to attend all sessions of the court; to take full stenographic notes of the oral evidence in every case tried in said court, together with all objections to the admissibility of testimony, the rulings of the court thereon, and all exceptions to such rulings; to preserve all official notes taken in said court for future use or reference and to furnish to any person a transcript of all or any part of said evidence or other proceedings upon the payment to him of the compensation,' etc. Does the act confer upon the stenographer any sovereign function of government? We think not. There is quite a material difference between a public office and a public employment. As said by Chief Justice Marshall, 'Although an office is an employment, it does not follow that every employment is an office.' Mr. Mechem, in his work on Public Officers, says: 'The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer.' Now, while the fact that the position of stenographer is designated in the act providing for its creation as an office, and that it declares that the person who may be called to perform its duties 'shall be a sworn officer of the court,' affords some reason for determining it to be such, still it is believed the place possesses none of those sovereign functions of the judicial department of the government to which it relates, to distinguish it from a mere employment to perform a species of service, under public authority, for the assistance and convenience of the court and parties litigant therein, in which no judicial discretion or

judgment is involved. The creation of the position, as shown by the very terms of the act, was designed for no other purpose than to provide some one by whom the oral evidence offered, and other proceedings involving objections made to admissibility of testimony, the ruling of the court, and exceptions thereto, might be taken in shorthand, as a method of preserving those matters as they occurred, without delaying trials, to be afterwards transcribed and furnished the court and parties to the suit, to aid them in an accurate and prompt preparation of the record. The report or transcript of the proceedings by the stenographer is not binding, however, upon the court, and may be adopted or rejected at his discretion. No act which he is authorized to do is independent of the control of others, or vested in him as a supreme power to be exercised as a right or prerogative of a judicial office. We conclude that while the position of a stenographer, under the statute in this state, may be, in a sense, an office, and the term thereof may continue for a longer period than two years, yet there is no such sovereign function of government embraced in the powers conferred upon the individual performing its duties as brings it within the meaning of the word 'office' as used in the section of the Constitution quoted."

See, also, Commonwealth v. Bush, 131 Ky. 384, 115 S. W. 249, 251, 252, and cases therein cited; Commonwealth v. Gamble, 62 Pa. 343, 1 Am. Rep. 422; Eliason v. Colman, 86 N. C. 235, and cases therein cited; McDaniel v. Yuba Co., 14 Cal. 444; White v. Alameda, 124 Cal. 95, 56 Pac. 795.

In the case of Mulnix v. Elliott, 62 Colo. 46, 156 Pac. 216, the proceeding was for a writ of mandate to compel the auditor of the state to issue to him a warrant for expenses incurred as a member of a joint committee appointed by the two houses of the Legislature on the authority of an act of the Legislature to make a thorough survey and study of all institutions, boards, bureaus, departments, commissions, and other subdivisions of the government, and ascertain facts concerning the organization, functions, activities, methods, efficiency of employees, and "such other facts as may be necessary or desirable to enable it (the committee) to make recommendations for the purpose of securing greater economy and efficiency in the state government." It was claimed by the Attorney General in that case, among other things, that the appointment of the members of the Legislature as members of the committee so created was void under a section of the Constitution of the state of Colorado (art. 5, § 8) providing that "no senator or representative shall during the time for which he shall have been elected be appointed to any civil office under this state," the members of said committee being at the time members of the Legislature which passed the act authorizing the appointment of the committee. It was held that the act did not contravene the said provision of the Constitution, the court saying:

"It [said committee] cannot put any of its recommendations into effect, nor does the act purport to confer upon the committee any executive authority whatever, and hence, from the premise upon which the argument of counsel for plaintiff in error is based, does not violate either of the constitutional provisions invoked."

It may be added that in the Colorado case the committee appointed under the act and referred to was authorized, as is true in the case at bar, to subpœna witnesses and to compel the production of such books, papers, and documents as it might conceive necessary for the proper discharge of its duties. See, also, U. S. v. Germaine, 99 U. S. 508, 25 L. Ed. 482; Bunn v. People, 45 Ill. 397; Rhoden v. Johnston, 121 Ark. 317, 181 S. W. 128; Hall v. State of Wisconsin, 103 U. S. 5, 26 L. Ed. 302, which involves an extended discussion of the distinction between an office and a contract of employment.

The foregoing authorities are, it is clear, determinative of the question now in hand against the contention of the Attorney General. It is perfectly plain that the act of 1909 does not delegate either to the commission created by the act of 1905 or the expert in the science of finance and taxation or the "person versed in matters relating to taxation" any part of the sovereign power of the state. As stated, there were no duties committed to the plaintiff except such as were involved in services he was to render in securing certain desired information upon which the Legislature could form some intelligent judgment with regard to the correction of the recognized defects in the then existing tax system of the state. There was no definite tenure fixed for the position to which the plaintiff was appointed. The services to be performed were not of a continuing or permanent nature, but were of an intermittent character, to be rendered at such times and on such occasions as his convenience or the exigencies of the purpose for which he was appointed might require. The moment that he completed his investigation his services were at an end, or to be discontinued. He might have completed his labors within 60 days or within a year, or, as was true in this case, it might have required three or four years. As is declared in the brief of counsel for the respondent, "he was required to keep no place of business for the public use, and he gave no bond," and, it may be added, was required to give none. He was not required to execute an oath of office, and here we may state that the mere fact that he did do so could not and did not have the effect of changing the legal character or status of the services which he was required to render by the act under which he was appointed. His report or that of the commission of which he was a member by virtue of the provisions of the acts in question involved no definitive action, or action which was binding upon the Legislature or upon the state. Such report could be adopted or rejected at the will or in the discretion of the Legislature. In fact, the services which he was required to perform under his appointment or employment by the Governor merely involved work which may well be said to be analogous to the work of an architect with whom the state had entered into a contract for the furnishing of plans for a state building or a person employed to superintend the construction of a state building or similar in character to the letting of contracts by the state for the printing or publication of books or other documents required for the state's use in the administration of the affairs of the government. No one would say that a contract for the construction of a public building between the state and a contractor or a contract for the publication of books issued under the authority of the state would involve the delegation to the contractor in such cases of any part of the sovereign power of the state. And we repeat in a different form of language that there can be no distinction discernible between the arrangement made by the Governor with the plaintiff in this case under the acts in question and any other contract the state might make within the scope of its authority with a contractor for services rendered either in erecting a building for the state or in printing necessary public documents or in investigating various departments of the state with a view of formulating a plan for the correction of any abuse which might exist therein or for managing them more efficiently and economically than they might have been administered.

[2, 3] In brief, while the definitions given by the adjudicated cases of a public office are generally or substantially the same, and are governed by the facts and circumstances of each particular case, the principal test as to whether a position created by statute is or is not a public office is whether the duties of such position or employment involve the exercise of any part of the sovereign power of the state; and it is clear, as the authorities above referred to point out, and as seems to be plain upon the very face of the proposition as it is presented upon the facts in this case, that the position to which the plaintiff was appointed under the act in question was not only lacking in permanency of tenure and the conclusiveness of the work imposed by said position, which are some of the characteristics of a public office, but that it did not commit to the plaintiff the exercise of any portion of the sovereign power of the state. It follows, therefore, that his appointment involved a contract of employment, and did not violate section 19 of article 4 of the Constitution.

The conclusions announced in the California cases cited by the Attorney General are not, in our opinion, at cross purposes with the conclusion to which we think the facts of this case irresistibly lead. See Patton v. Board of Health, etc., 127 Cal. 388, 59 Pac. 702, 78 Am. St. Rep. 66; Wall v. Board of Directors, etc., 145 Cal. 468, 78 Pac. 951; Coulter v. Pool, 187 Cal. 181, 201 Pac. 120.

The Patton Case appears to be more particularly relied upon than the other cases cited. In that case it was held that a health inspector appointed as such by the board of health of the city of San Francisco by authority of section 3009 of the Political Code was a public officer within the meaning of section 16 of article 20 of the Constitution. But, as is pointed out in that case, the board of health of the city of San Francisco, being clothed with large and extensive powers and duties, having by virtue of section 3012 of the Political Code "general supervision of all matters appertaining to the sanitary condition of the city and county," was authorized by the statute "to devolve upon the health inspectors such portion of its powers and duties as the board may deem best for the good of the public service. So far as the evidence shows," proceeds the court in that case, "the duties thus delegated to the inspectors are not extensive, but they cannot be said to be unimportant or purely ministerial, or *lacking in the requirements of judgment and discretion*." The court further said in the Patton Case:

> "It seems to be reasonably well settled that where the Legislature creates the position, prescribes the duties, and fixes the compensation, and these duties pertain to the public and *are continuing and permanent, not occasional or temporary*, such position or employment is an office and he who occupies it is an officer. In such a case, there is an unmistakable declaration by the Legislature that some portion, great or small, of the *sovereign functions* of government are to be exercised for the benefit of the public," etc.

(The italics in the foregoing quotations are ours.)

Thus it is to be observed that the court in the Patton Case finds that the office of health inspector of the city of San Francisco possessed all the characteristics of a public office as the same is defined by the authorities first hereinabove referred to. Moreover, the court in the Patton Case referred approvingly to the distinction drawn by Bunn v. People, 45 Ill. 397, between an employment and a public office, it being held in said case that the commissioners appointed under an act of the Legislature to superintend the construction of the state house were not officers within the meaning of the Constitution, but were agents or employees for a single and special purpose, "whose functions ceased upon the completion of the work." Further referring to the Bunn Case the court said in the Patton Case:

> "The question was subsequently regarded in that state [Illinois] of sufficient importance to call for a constitutional definition, and hence in 1870 the Constitution ordained the following: 'An office is a public position created by the Constitution or law, continuing during the pleasure of the appointing power or for a fixed term, with a successor elected or appointed. An employment is an agency for a temporary purpose, which ceases when that purpose is accomplished'"—citing Const. Ill. 1870, art. 5, § 24.

The foregoing definition of an employment is in effect approved by the court in the Patton Case, and, as we have above shown and as must be obvious upon the slightest reflection, the employment by the plaintiff in this case under the act of 1909 comes within the definition given of "an employment" by the Illinois Constitution just quoted herein, since the employment was for a temporary purpose, and was to cease and did cease upon the accomplishment of the purpose of the employment or agency.

The other cases cited by the Attorney General come no nearer supporting his contention here than the case of Patton v. Board of Health, supra. It is not necessary to review those cases herein.

[4] Another question arising in this case is whether the plaintiff was entitled to interest upon the indebtedness due him from the state. Section 5 of the act of 1921, authorizing suits against the state for services rendered to the state, etc., provides:

> "In case judgment be rendered for the plaintiff in any such suit, it shall be for the amount actually due from the state to the plaintiff, with legal interest thereon from the time the obligation accrued, and without costs."

Undoubtedly, under that provision of said statute, if the contract between the Governor and the plaintiff had fixed a definite or determinate amount to be paid the latter for his services, he would be entitled to interest upon any amount due him from the state for the services so rendered. In this case, however, there was no definite or any sum provided in the statute of 1909 for the compensation of the plaintiff, and the action is upon a quantum meruit, which means, of course, that the exact amount, if any, to which the plaintiff would be entitled for his services was uncertain until the same had been determined by the court upon the presentation of evidence showing the amount, character, and value of the services rendered. In such case it has been held that interest is not allowable, upon the theory "that the person liable does not know what sum he owes, and therefore can be in no default for not paying." Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164. See, also, Brady v. Wilcoxson, 44 Cal. 239; Coburn v. Goodall, 72 Cal. 498, 14 Pac. 190, 1 Am. St. Rep. 75; Heald v. Hendy, 89 Cal. 632, 27 Pac. 67; Easterbrook v. Farquharson, 110 Cal. 317, 42 Pac. 811; Erickson v. Stockton & Tuolumne Co. R. R. Co., 148 Cal. 206, 82 Pac. 961; American-Hawaiian, etc., Co. v. Butler, 17 Cal. App. 764, 121 Pac. 709; Robinson v. American Fish, etc., Co., 17 Cal. App. 212, 119 Pac. 388; Courteney v. Standard Box Co., 16 Cal. App. 600, 117 Pac. 778; Keyes v. Nims, 43 Cal. App. 1, 15, 184 Pac. 695; Haun v. Rosenmayer, 46 Cal. App. 353, 189 Pac. 117; Civ. Code, § 1917. It follows that interest must be disallowed, and a modification of the judgment ordered accordingly.

[5] The court below erroneously awarded plaintiff costs of suit. The statute of 1921, supra, expressly provides that, in an action against the state in pursuance of its provisions, the plaintiff shall not, if victorious in the action, be allowed his costs.

The judgment is hereby modified by striking out the sum of $8,757.10, being interest erroneously allowed on the amount recovered by the plaintiff, and also by striking out the costs awarded plaintiff, and as so modified the judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

CALIFORNIA REPORTER

215 PACIFIC REPORTER

191 Cal. 96

NEW YORK LUBRICATING OIL CO. v. UNITED RAILROADS OF SAN FRANCISCO. (S. F. 10274.)

(Supreme Court of California. May 3, 1923. Rehearing Denied May 31, 1923.)

1. Railroads 🔑333(1) — Automobile truck driver crossing in front of electric car guilty of contributory negligence.

Where the driver of an auto truck, although fully aware of the approach of an electric car, closed his eyes to the danger necessarily involved in any attempt to cross the track, and blindly drove his truck into the path of the oncoming car, he was guilty of contributory negligence as a matter of law.

2. Railroads 🔑327(7)—Duty of traveler to stop.

It is duty of automobile truck driver, approaching an electric railway crossing, to give way to an approaching car, if necessary, to avoid a collision.

3. Railroads 🔑330(4)—Traveler not justified in assuming operation at ordinary speed.

A traveler in approaching a railroad track is not justified in relying upon the assumption that the motorman would not in any way be negligent in the operation of his car, and therefore is not warranted in believing that the car was being operated at the usual and ordinary rate of speed.

4. Railroads 🔑324(1)—Care required in crossing tracks of electric railway.

As much care is required of a person crossing the tracks of an electric railway upon a private right of way in the open country as is required of a person crossing the tracks of a steam railway.

5. Railroads 🔑333(1)—Traveler crossing near approaching car negligent.

It is the duty of a traveler to note the speed at which an electric car is approaching, and if, when he last looks at the approaching car, it is within such a distance and going at such an apparent rate of speed as to cause a reasonable apprehension of danger, it is negligence to attempt to make the crossing.

6. Railroads 🔑333(1)—Traveler crossing immediately in front of approaching train, guilty of contributory negligence.

Where the physical facts shown by the undisputed evidence raise the inevitable inference that a person approaching a railroad crossing did not look or listen, or that, having looked and listened, he endeavored to cross immediately in front of a rapidly approaching train which was plainly open to his view, he is as a matter of law guilty of contributory negligence.

7. Railroads 🔑338—Finding of last clear chance essential to judgment.

In an action for damages resulting from a collision on a crossing, if the judgment for plaintiff can be sustained only on the theory of the doctrine of the last clear chance, it is essential that the court find that defendant had the last chance to avoid the collision.

8. Railroads 🔑338—Doctrine of last clear chance held inapplicable.

Where the driver of a truck, which could have been stopped within a distance of three feet was, although aware of the approach of an electric car, going 30 miles an hour, closed his eyes to the danger, and drove his truck into the path of the oncoming car and the motorman, while he was yet some distance from the point of collision, was likewise aware of the approach of the truck, *held* that there was no room for the application of the rule of the last clear chance doctrine.

9. Negligence 🔑83—Last clear chance doctrine stated.

The doctrine of the last clear chance is only applicable to a defendant who actually perceived the predicament and danger of a plaintiff in time to have avoided the accident by the exercise of due diligence, and defendant cannot be held liable on the theory that he would have discovered the peril of the other but for remissness on his part.

In Bank.

Appeal from Superior Court, City and County of San Franciso; E. P. Shortall, Judge.

Action by the New York Lubricating Oil Company against the United Railroads of San Franciso. From a judgment for plaintiff, defendant appeals. Reversed.

Wm. M. Abbott and K. W. Cannon, both of San Francisco (Enid Childs, of San Francisco, of counsel), for appellant.

Barry J. Colding and Theodore Hale, both of San Francisco (J. E. Pemberton, of San Francisco, of counsel), for respondent.

LENNON, J. The plaintiff in this action recovered judgment against the defendant for damages to its auto truck resulting from a collision between the truck, operated by an agent of the plaintiff, and a suburban electric car, which was operated by the defendant upon a private right of way running parallel with Sloat boulevard, in the city and county of San Francisco. The case was tried without a jury. The defense of the defendant rested in part upon the plea of contributory negligence. The trial court found, among other things, that the defendant was guilty of negligence which proximately contributed to the damage complained of and that the plaintiff was free from contributory negligence.

It seems to be conceded, and properly so, that the motorman was guilty of negligence in his operation of the street car prior to the time of the collision. It is contended, however, in support of the appeal from the judgment rendered in favor of the plaintiff, that the evidence shows affirmatively, and without contradiction, that the driver of the truck was, as a matter of law, likewise guilty of negligence which proximately contributed to the accident.

This contention, we think, must be sustained.

The evidence adduced upon the entire case tends to show the following facts: the collision occurred about 10 o'clock in the morning of a clear day in an outlying district of San Francisco. The crossing at which the accident happened was not a regular stop for cars. There was a sign overhead, "Cars Stop Here," but cars stopped at that point only on signal. On the north side of the car tracks was an aviation field and on the south side was practically open country. The car prior to and at the time of the collision, was moving toward the crossing at a speed of from 30 to 35 miles an hour. Until the car approached within 50 feet of the crossing the motorman did not give his entire attention to the track ahead of him. When the motorman ultimately discovered that a collision between the car and the truck was imminent and inevitable he jumped back into the car, and, after it had proceeded 300 or 400 feet beyond the point of collision, went forward and stopped the car.

The evidence is uncontradicted to the effect that the truck was approaching the crossing at the rate of 5 miles per hour and that the driver of the truck, some little time prior to the collision, looked and saw the car approaching the crossing, but continued driving the truck on in its course at the same rate of speed in an attempt to make the crossing. The evidence is also uncontradicted to the effect that, going at the rate of speed of 5 miles per hour, the truck could have been stopped within a distance of 3 feet; that the driver of the truck had, at all times, as he approached within 40 feet of the railroad crossing, an unobstructed view of the tracks for a distance of 700 feet; that from Nineteenth avenue, which is approximately 1,000 feet east of the point of collision, there is a descending grade of 2¾ per cent. on the defendant's private right of way, and down this grade the electric car was coasting; that the driver first saw the car approaching when he was 40 feet distant from the track and that at that time the car was 700 feet away; that he watched the approach of the car from that time until he reached a point 25 feet from the track, at which time the car was 500 feet away, and that he made no attempt to slow up, stop, or accelerate the speed of the truck. It is also an uncontradicted fact in the case that the driver of the truck did not at any time prior to the collision note or attempt to observe the speed at which the car was approaching the crossing.

[1] There is no escape from the conclusion, it seems to us, from the uncontradicted evidence as above outlined, that the driver of the truck, although fully aware of the approach of the car, closed his eyes to the danger necessarily involved in any attempt to cross the track, and blindly drove his truck into the path of the oncoming car, and was, therefore, guilty of contributory negligence as a matter of law. Martz v. Pacific Electric Ry. Co., 31 Cal. App. 592, 161 Pac. 16.

[2, 3] Admittedly the driver of the truck, not only could see, but actually did see, the car as it came down the descent at an excessive rate of speed. And if he could, as the evidence shows without contradiction, have stopped his truck at any time prior to the collision within a distance of 3 feet, then surely his failure to do so under the shown circumstances of an obvious and imminent danger was a failure to exercise that ordinary care which a reasonably prudent man is required by the law to exercise in such a situation. The failure of the driver of the truck to come to a stop upon the approach of the car is attempted to be justified by the admitted fact that he did not note the speed of the car, but relied upon the assumption that the car was going at its "regular rate of speed," and that therefore he had time to safely cross. It was the duty of the driver of the truck upon approaching the crossing to give way to the car, if necessary, to avoid a collision. Arnold v. San Francisco-Oakland Terminal Rys., 175 Cal. 1, 5, 164 Pac. 798. There is no showing as to what was the regular rate of speed of the electric cars in the vicinity of the collision, nor was there any showing that the driver of the truck knew the regular speed of the cars in that vicinity or elsewhere. The driver of the truck was not justified in relying upon the assumption that the motorman would not in any way be negligent in the operation of his car, and therefore the driver was not warranted in believing that the car was being operated at the usual and ordinary rate of speed. Hutson v. Southern California Ry. Co., 150 Cal. 701, 703, 89 Pac. 1093; Alloggi v. Southern Pacific Co., 37 Cal. App. 72, 173 Pac. 1117.

[4] The rule with reference to the duty of a person approaching a railroad track is equally applicable to electric railroads which are being operated under conditions similar to those under which steam railroads are ordinarily operated. That is to say, as much care and caution is required of a person crossing the tracks of an electric railway

upon a private right of way in the open country as is required of a person crossing the tracks of a steam railway. Martz v. Pacific Electric Railway Co., supra; Heitman v. Pacific Electric Ry. Co., 10 Cal. App. 397, 102 Pac. 15; Simoneau v. Pacific Electric Ry. Co., 159 Cal. 494, 115 Pac. 320; Phillips v. Washington, etc., Ry. Co., 104 Md. 455, 65 Atl. 422, 10 Ann. Cas. 334.

[5] It was the duty of the driver of the truck to note the speed at which the electric car was approaching the crossing, and if, when the driver of the truck last looked at the approaching car, it was within such a distance and going at such an apparent rate of speed as to cause a reasonable apprehension of danger, it was undoubtedly negligence on the part of the driver to attempt to make the crossing. Martz v. Pacific Electric Ry. Co., supra.

[6] It is the rule in this state that, where the physical facts shown by the undisputed evidence raise the inevitable inference that a person approaching a railroad crossing did not look or listen, or that, having looked and listened, he endeavored to cross immediately in front of a rapidly approaching train which was plainly open to his view, he is, as a matter of law, guilty of contributory negligence. Martz v. Pacific Electric Ry. Co., supra; Jones v. Southern Pacific Co., 34 Cal. App. 629, 168 Pac. 586.

[7] It has been suggested in support of the judgment that the trial court may have resorted to and applied the doctrine of last clear chance. It will be noted in this behalf that the trial court did not find that, under all of the circumstances preceding and attending the approach of the truck and the car, the defendant had the last clear chance to avoid the collision, and if the judgment in favor of the plaintiff could be sustained only upon the theory of the doctrine of last clear chance, then it was essential that the court find that the defendant had the last clear chance to avoid the collision. Stein v. United Railroads, 159 Cal. 368, 113 Pac. 663; Tucker v. United Railroads, 171 Cal. 702, 154 Pac. 835.

[8, 9] But even if the findings of the trial court could be construed to cover the doctrine of last clear chance, we are satisfied that there is no room for its application to the facts of the instant case as presented in the record before us. It is a well-settled rule in this state that this doctrine is only applicable to a defendant who actually perceived the predicament and danger of a plaintiff in time to have avoided the accident by the exercise of due diligence. A defendant cannot be held liable upon the theory that he would have discovered the peril of the other but for remissness on his part. Herbert v. Southern Pacific Co., 121 Cal. 227, 53 Pac. 651; Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85; Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 Pac. 709; Tucker v. United Railroads, supra. Conceding, however, that the motorman, while he was yet some distance from the point of collision, was aware of the approach of the truck, nevertheless it is an undisputed fact that the driver of the truck was likewise aware of the approach of the car, and that he could have brought the truck to a standstill within a distance of three feet. There was a concurrent duty, as a matter of law, upon the part of the driver of the truck to stop, if possible, before the actual collision occurred. Obviously the truck proceeding at the slow rate of speed mentioned, and with the ability to stop within the short distance of three feet, had the greater opportunity to avoid the collision. And so long as the negligence of the driver of the truck in continuing on in his course to the point of crossing the tracks of the defendant was contemporaneous and concurrent with that of the defendant's motorman, plaintiff cannot rightfully rest its case upon the doctrine of last clear chance. Young v. Southern Pacific Co. (Cal. Sup.) 210 Pac. 259.

Judgment appealed from is reversed.

We concur: WILBUR, C. J.; WASTE, J.; MYERS, J.; KERRIGAN, J.; SEAWELL, J.

---

191 Cal. 109

PEOPLE v. BERRY. (Cr. 2451.)

(Supreme Court of California. May 3, 1923. Rehearing Denied and Opinion Modified June 1, 1923.)

1. Larceny 🔑65—Evidence held to show defendant's participation with confidence operators.

In a prosecution for a grand larceny, evidence *held* to show existence of a conspiracy of which defendant was an active member, and his complicity with confidence operators to the extent of participating in the fruits of their unlawful operations.

2. Criminal law 🔑372(5)—Evidence of all transactions held admissible under similar offense rule as tending to prove a conspiracy.

In a prosecution for grand larceny under two indictments one of which charged grand larceny and an attempt to commit, and the other charged grand larceny, in several counts, from different individuals, and the verdict was acquittal on all charges except one wherein defendant was found guilty, evidence of each and all of the enumerated transactions was admissible under the similar offense law, as tending to prove a conspiracy, and hence acquittal on all but one of the crimes of the consolidated indictment did not make the evidence of the other offenses inadmissible to show defendant to have been a member of the general conspiracy.

In Bank.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Otis B. Berry was convicted of grand larceny, and he appeals. Affirmed.

Paul W. Schenck and Richard Kittrelle, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

KERRIGAN, J. Two indictments, one numbered 15595 and the other numbered 15932, were returned by the grand jury of Los Angeles county. That numbered 15595 contained five counts, in four of which defendant, with William Metler (alias Dorchester), Abner B. Thompson, Fred Williams, Joe Stanley, J. Carter, George Carter, John Doe Hathaway, J. W. Davis, and Fred Mayen, was charged with the crime of grand larceny; in the other count the same persons were charged with an attempt to commit the crime. Indictment numbered 15932 contained two counts, in each of which defendant, with Joe Quigley and John Doe Hathaway, was charged with the commission of the crime of grand larceny. In count No. 1 of indictment No. 15595 the subject of the larceny was $43,000 in cash and a check for $1,176.45, obtained from one Thomas Donahue. Count No. 2 was a different statement of the offense alleged in count No. 1. In count No. 3 the charge was that of obtaining from John F. Herr certain certificates of corporate stock, bonds, and a book of traveler's checks, in all alleged to be of the value of $17,120. In count No. 4 the subject of the larceny alleged was $24,000 in cash, obtained from John Bassler. Count No. 5 charged an attempt to commit grand larceny from Simon Weiss. In indictment No. 15932, count No. 1 charged the commission of grand larceny of certain United States bonds of the value of $2,255, from Albert Hageman, and count No. 2 thereof was a different statement of the offense charged in count No. 1.

These indictments were consolidated, and defendant, severing from his codefendants, was tried thereon, the result of which was a verdict of acquittal upon all the charges save and except that presented by count No. 3 of indictment No. 15595, wherein he was found guilty, as therein charged, of the larceny of the property described therein as belonging to John F. Herr. Judgment followed, from which defendant has appealed.

Appellant's chief contention is that the verdict is not justified by the evidence. The record on appeal is voluminous, consisting of some 3,200 pages.

It appears that prior to February 3, 1920, defendant was assistant cashier of the Citizens' Trust & Savings Bank at Los Angeles, which bank, upon said date, upon opening a branch bank at Hollywood, placed him in charge thereof as manager. It also appears that in 1919 and in the early part of 1920 a band of crooks, commonly known as bunkomen, were operating a scheme whereby, due to their cupidity and gullibility, a number of persons possessing means were illegally divested of their property. The modus operandi of these conspirators is specifically stated by appellant, with some slight variations, as follows:

For at least several months prior to April, 1920, Los Angeles and vicinity was infested either with one general band of "crooks" or several and distinct bands of "crooks." Whether it was one general band or several bands working independently need not be discussed. Suffice it to state that, in the general outline, their nefarious schemes of defrauding were the same. About that time some 200 "crooks" were in and around Los Angeles, working this game; that there were several different headquarters; that some of the gangs belonged to a "trust" and some did not; that some $100,000 to $200,000 per week had been taken out of Los Angeles for months by these gangs.

The defrauding scheme is what is known in police parlance as the "pay-off game"; and when reduced to its brutal last analysis consists in making some "honest" tourist to the beautiful shores of California believe that he can make a hugh fortune by "playing" Wall street through some local "brokerage house," and, in any event, he can escape liability for loss, if he loses, by the use of fictitious or "phony" checks or "credit slips." He "wins" anywhere from $10,000 to a quarter of a million dollars; some trouble arises with the "brokerage house" in the matter of paying the "winnings," and this trouble is usually over the "credit slips," in that the money "won" cannot be paid until "credit is established" in order that the "brokerage house" may know that the "victim" could have paid his loses if he had lost; the victim usually goes hurriedly back to his home town and there converts everything available into current funds; more hurriedly he returns here to collect his "winnings"; another "play" is made; some "mistake" is made therein and all is "lost"; he is then sent to some far off city to wait the arrival of his associates and all will be regained by "playing" Wall street again on the money to be furnished by his associates—who never come.

Needless to say the "brokerage house," the "play," the "winnings," and all else are pure fake. Readily to be apprehended is the fact that the securities—cashiers' checks, drafts, certificates of deposit, stocks, bonds, or what not—which the victim brings back from the East, must be converted into cash as speedily as possible and at the same time in a manner not to arouse suspicion.

The larceny for participation in which the defendant was convicted was one of several with which he was connected, evidence as to which was received at the trial. It is not necessary to detail it at great length, it being sufficient to refer to that part of it implicating the defendant. It may be premised that if each transaction stood alone, being conceived and conducted independently of the others and by different individuals, the defendant's contention that the evidence is insufficient to justify his conviction might have some force; but it clearly appears from the evidence that the offense of which the defendant stands convicted was but one of a series in all of which he was personally active, cooperating with different actors; and while in some cases his participation might appear to be innocent if it had been confined to each of them respectively, his connection with all of them gives special significance to acts which might otherwise not suggest criminality.

Walter Evans was defrauded by Fred Mayen of $3,000, the two being engaged in a fictitious transaction ostensibly of a dubious character. Evans having a draft for this amount, drawn on the Citizens' National Bank of Los Angeles, was induced by Mayen to cash it at the Citizens' Trust & Savings Bank, of which the defendant was an officer, upon the representation that if presented to the Citizens' National Bank the nature of their transaction might be discovered. The defendant personally assisted in cashing the draft.

One Falligan became poorer by $20.000 through acquaintanceship made casually with Hathaway and Franklin. They persuaded him to open a small account at the Citizens' Trust & Savings Bank. He thereupon drew a check for $10,000 upon his home bank in Denver, Colo., and deposited it at the first-named bank for collection. In due course he received from this bank a cashier's check for this amount, payable to himself, which he indorsed and handed to Hathaway on February 3, 1920. On this day the Citizens' Trust & Savings Bank opened a branch in Hollywood and placed the defendant in charge thereof, and on the same day the defendant presented this check to the First National Bank of Hollywood, bearing no indorsement from Hathaway, from whom he received it, and collected the amount thereof in cash. A second check for a similar amount, being a cashier's check issued by a bank in Colorado, was received by Falligan, who desired to cash it at the main office of the Citizens' Trust & Savings Bank, but was persuaded by Hathaway to take it to the Hollywood branch and to see the defendant personally about converting it into cash. Hathaway accompanied Falligan to the bank, but stood outside during the transaction.

John Gunther was swindled out of the sum of $15,000 by Stensland and Hathaway. Gunther had received from an eastern bank drafts aggregating that amount, which that bank directed him to present to the Continental National Bank of Los Angeles. He there deposited them for collection. He was then told by Stensland and Hathaway that he must transfer his account to the Hollywood branch of the Citizens' Trust & Savings Bank and do business only with the defendant. He accordingly drew a check for this amount in favor of the Citizens' Trust & Savings Bank and handed it to the defendant for collection, who informed him that the money would probably be available the next day, February 25th. On that day Stensland, at the suggestion of Hathaway, took Gunther to Santa Barbara, where, on February 28th, they received a telegram from Hathaway telling them to return to Los Angeles, which they did, arriving there the next day, when Hathaway informed Gunther that his money had come. Gunther remarked, "We can do nothing to-day for it is after 3 o'clock, and the bank will be closed," to which Hathaway replied that the side door would be open. They all three went to the bank, Hathaway and Stensland remaining outside, and Gunther saw the defendant and withdrew the $15,000 in currency. In collecting this check the defendant did not send it through the clearing house, but personally presented it to the Continental National Bank; he demurred to receiving a cashier's check for it, contrary to the usual courtesy between banks, and demanded cash. Gunther had not notified the defendant that he would require cash. It is also significant that Hathaway appeared to know when the money became available at the defendant's bank.

William Scheider lost, by the machinations of Anderson, Harris, and Mayen, $8.200. He desired to do his business with a certain Los Angeles bank, but Harris insisted that he should do it at his bank, and took him to the Citizens' Trust & Savings Bank (where, in fact, he had no account) and introduced him to the defendant. Later, in the course of a fictitious transaction, Harris and Mayen took Scheider to the defendant's bank to draw therefrom the above-named amount; they remaining outside. The money was handed to him by the defendant in a bundle inclosed in an envelope. Upon his emerging from the bank Harris remarked, "I will get my money, too," entered the bank, and in a few minutes returned carrying a package identical in appearance with that of Scheider. As we have seen, Harris had no account with this bank or any business with it.

Basler was defrauded of $24.000 by Rogers and Sellers in a spurious stock transaction. They persuaded him to go to the bank of the defendant at Hollywood, saying that it was not advisable to deal with the big banks of Los Angeles, but they knew a bank in the country where they could deal safely. He followed this advice, and in the course of their dealings went to the defendant's bank for the purpose of withdrawing $24,000, going there in Sellers' automobile, accompanied by Sellers and Rogers. These two remained outside in the machine at a point whence they could see through the glass side and front of the bank what occurred in the defendant's office. Basler asked for his money. The defendant appeared to be very nervous and excited and took Basler down into the unfurnished basement of the bank and showed him a copy of a newspaper, "The Pink Record," of the previous day. Basler not having his glasses, the defendant read to him an article consisting of an expose of the methods of a criminal band of swindlers, telling Basler not to say a word or he (the defendant) might have his head blown off or his throat cut. Basler, who was somewhat deaf, had not heard all that was read, and asked the defendant what he meant, to which he replied, "Go outside and tell those men your money has not come." But Basler insisting, the defendant led him upstairs and paid him $14,000, and promised to at once telegraph to a bank in Texas, upon which the remaining $10,000 had been drawn, and if that draft had been honored he would pay Basler the amount on receipt of the answer. He requested him to return at about 4 o'clock that day (Saturday), and promised that he would remain at the bank and keep enough money out of the vault to pay the draft. Basler returned at the appointed time, was admitted by the defendant through a side door, and received from him the remaining $10,000.

Hageman was another visitor to Los Angeles whose stay there was marred by the loss of the proceeds of the sale of $2,700 of Liberty bonds as the result of his acquaintance with two confidence operators, Quigley and Hathaway, already named. At their instance he opened a small account at the bank of the defendant at Hollywood. Quigley introduced him to the defendant, and requested him to write a letter to a bank in Nebraska, instructing that bank to forward Hageman's bonds. The letter was dictated by Quigley, typewritten by defendant, and signed by Hageman. A couple of days later Hageman called again at the bank and stated to the defendant that he was afraid he was in bad hands and would lose his bonds, saying, "I don't trust those fellows," to which the defendant replied, "If you are as careful as you are now, they can't beat you out of them." The bonds arrived in due course, and at Hathaway's suggestion Hageman requested the defendant to buy them, which the defendant said he could not do, since they were registered bonds, but that if Hageman would indorse them he would sell them for him. It was accordingly arranged that the defendant would sell them in Los Angeles and meet Hageman and Quigley on a street corner there and turn over the money in an hour. Defendant took the bonds to the Citizens' National Bank and sold them for $2,470. He then met Hageman and Quigley at the appointed place, took them into the lobby of a nearby hotel, and, according to Hageman's version, turned over to him $2,235, according to his own account the full amount. The defendant took no receipt or other evidence of payment.

Donohue parted with over $42,000 through the intermediary of defendant's friend Dorchester and the latter's confederate Thomson. Complying with Dorchester's suggestion that he sell his securities, to the value of the above-named sum, he accompanied Dorchester to the Citizens' Trust & Savings Bank. He there, following the directions of Dorchester, who remained outside, saw the defendant, to whom he stated his business and that he had been recommended by Dorchester. The defendant replied that Dorchester was a friend of his and that he had known him for a couple of years. The defendant undertook to sell Donohue's securities through a stockbroker, A. W. Coote. Donohue and Thomson then left the city for a few days, and being at Riverside they received a telephone message from Dorchester to come back to the city; that the money was available. The next morning Donohue, accompanied by Dorchester, went to the defendant's bank. He was then in possession of a check which, added to the money to be received for his securities, amounted to $42,032. Dorchester again remained outside the bank. Defendant at this time, having received from Donohue the before-mentioned check, handed to him the balance over and above $42,000, and told him to return a little later. He did so, again accompanied by Dorchester, who, as before, did not enter the bank, and was now told by defendant that his money was in town but that he (Berry) did not have it in the bank, but to sit down while he went out to get it. The defendant at that time had a check from Coote, the broker, drawn against his own bank, which he had procured personally from Coote's office. In leaving the bank the defendant passed close to Dorchester, but Donohue could not tell if any conversation occurred between them. The defendant then went to the Farmers' & Merchants' Bank and cashed the first of the above-mentioned checks. He had had issued by his own bank a draft for $40,000 against the Coote check. He personally carried this draft to the Citizens' National Bank and received on it $40,000 in large bills. He added to this amount about $1,400, the balance of the Coote check. When he returned to the waiting Donohue, he had a bundle wrapped in a peculiar colored glazed paper, which he unwrapped, disclosing three smaller packages, each wrapped in the same kind of paper. The defendant stated the different amounts of money in each package, aggregating $42,000, without, however, exposing the same to view. He then wrapped the three packages in one bundle, and told Donohue that he was in a hurry and that Donohue could count the money later. As Donohue was leaving the bank the defendant remarked to him, "Remember, I am not your guardian," whereupon Donohue stopped and said, "Why, isn't Dorchester all right?" to which the defendant answered, "Yes, Dorchester is all right," adding that he had been a customer at the bank for a couple of years. The defendant then stepped out of the bank in advance of Donohue and passed close to Dorchester, standing in a crowd. Donohue and Dorchester then went to the office of Hutton & Co., where Donohue received a check for $1,176, which Dorchester suggested to him that he take to the defendant's bank and cash if the defendant were there. He went to the bank, but the defendant not being there he rejoined Dorchester, who was with Thomson at the Hotel Hayward. The three went to a room together, where Donohue placed his package of money on a dressing table by the side of another package, wrapped in the same peculiar kind of paper as Donohue's and supposed to contain money belonging to Thomson. Thomson then went out to see about getting the profits from a fictitious stock deal which had formed the pretext for the conversion of Donohue's securities and checks into ready cash, and also to file a selling order given by Dorchester. Donohue, at Dorchester's suggestion, placed the $1,176 check upon his bundle of money. His attention was then engaged in decoding some telegrams and he failed to notice the disappearance of his package and check. Thomson returned in a few minutes with a tale of woe to the effect that he had made another stock transaction in which he had lost all. Then occurred a pretended fight between Dorchester and Thomson. Donohue was induced by the bunkomen to leave for New Orleans upon their promise to be there and meet him at a hotel. On the following day we find the defendant in possession of the $1,176 check, which he had received from Dorchester, and which he cashed at the Farmers' & Merchants' National Bank upon which it was drawn. In receiving it from Dorchester he had not required his indorsement. Two or three days thereafter Donohue, realizing that he had been swindled, returned to Los Angeles, went to the defendant's bank with a detective, and informed the defendant that he had been robbed by Dorchester, to which the defendant replied that if he ever saw Dorchester again he would hold him for the authorities. Nevertheless, we shall see that a few days thereafter he was again dealing with his friend Dorchester, but under the name of Albert Johnson, buying from him stolen securities and checks, utterly forgetful of his virtuous intention to bring his activities to the attention of the police, the record furnishing abundant evidence of the single identity of Dorchester and Johnson.

Mr. Herr made the acquaintance of Fred Williams in a city park in Los Angeles. They soon thereafter visited another of the city's recreation grounds, namely, Westlake Park, where they had the misfortune (for Herr) to meet Dorchester. We have already had some inkling of Dorchester's pursuits, which, the sequel shows, were shared by Williams. Herr was induced by these worthies to enter into a fictitious stock transaction, during the course of which he intrusted to Williams, duly indorsed, 60 shares of Pennsylvania Railroad stock, 1,000 shares Guaranty Trust Company stock, a bank certificate for $500, $620 in travelers' checks, together with $12,000 of Liberty bonds. All these valuables were by Williams "lost" in the same manner as Donohue's securities, and Herr was hurried off to New Orleans, where his recently found friends were to join him and together they were to retrieve their ill fortune. Shortly thereafter he returned to Los Angeles, having received a letter from the bank which had issued the $500 certificate that it had been collected through the Hollywood branch of the Citizens' Trust & Savings Bank. He thereupon called at said branch bank, his visit occurring some three weeks after the time of the surrender of his securities to Williams, and there for the first time met its manager, the defendant, to whom he exhibited the letter above mentioned, which stated that the certificate appeared to have been indorsed to Albert Johnson. On this visit Herr was nervous and broken down physically, and the defendant advised him to go up the street and get a cup of coffee and stay away half an hour. On his return he informed the defendant of the loss of his railroad stock, the transfer of which he was trying to prevent. The defendant told him that he had known Johnson for two years, and understood he was in the moving picture business, and that upon Johnson's inquiry as to a bond house through which he could sell securities he had recommended him to Aronson & Co. of Los Angeles. He also suggested to Herr that he employ a detective, and on the evening of that day met him at a hotel, at which time he told Herr that the detective he had in mind insisted upon receiving a retainer. The defendant met Herr again on the following evening and introduced him to two city detectives. Aronson & Co. had sold some of the stock and requested Herr to cancel his order to the corporation issuing the stock to stop its transfer. Herr testified that the defendant advised him in this connection that since he had indorsed the stock nothing could be done, and advised him to sign a waiver, as requested by Aronson & Co., which he did in consideration of $200 paid by that concern. While not disclosing the fact to

Herr, the defendant had also received $640 in travelers' checks stolen at the same time as Herr's other securities.

Simon Weiss arrived in Los Angeles on January 28, 1920, and early fell into the clutches of Preston and George James, who were also known by the names of Conley and Fred Mayen, respectively. In a pretended stock deal with these men Weiss drew two drafts on North Dakota banks, which he took to the Hollywood branch of the Citizens' Trust & Savings Bank; Mayen having informed him that he must do business at that bank. Upon entering the bank he approached the assistant manager, observing which the defendant intervened and personally attended to the business of Weiss. The defendant, in sending the aforementioned drafts to a North Dakota bank, instructed the bank to hold them for a few days in order to give the daughter of Weiss, who had custody of certain certificates of deposit belonging to him, an opportunity to bring them in. The bank replied to this letter, inquiring what the defendant knew of the transaction in which Weiss was engaged which required the transfer of the money represented by the drafts, and stated that the writer had known Weiss and his family for many years and that for the past four or five years Weiss had not been responsible for his acts. In answer to this inquiry the defendant wrote that he would use his best efforts in every way to protect Weiss, and that as far as he could see he thought Weiss was in a legitimate deal. This statement of the defendant was based upon no information or knowledge whatsoever. In due time there were received by the defendant's bank for account of Weiss $1,950 and certificates of deposit aggregating $9,000, which information was conveyed to Weiss through Mayen, and Mayen transported Weiss in company with Conley to a place near defendant's bank. There he told Weiss to go to the bank and sell the certificates of deposit. Weiss went in, met the defendant, and told him he desired to cash said certificates. The defendant was not authorized to buy securities, but was required to submit such transactions to the president of the bank, Mr. Monette, at its main establishment. He thereupon went there with Weiss, and in presenting the transaction showed the president a letter, received from the North Dakota bank which had issued the certificates, saying that they would be paid upon maturity. He did not show to the president the other letter of the bank stating that Mr. Weiss had for some years not been responsible for his actions. In passing it should be mentioned that the defendant had already suggested to the president the purchase of the certificates two weeks before Mr. Weiss had requested the defendant to buy them. The president finally authorized their purchase, and intrusted the completion of the transaction to the defendant, who thereupon, in the main bank, issued a draft upon a San Francisco bank, and also prepared a signature identification for Mr. Weiss under the seal of the bank. This he gave to Weiss, telling him he could use it in San Francisco in cashing the before-mentioned draft and others given him by defendant in payment for other securities. Weiss testified that he at no time requested payment in San Francisco exchange and never asked for the identification card. Mayen and Conley then informed Weiss that they must all go to San Francisco, the consummation of the stock deal in which they were engaged having been transferred to that city. They started on their journey the next day and were arrested en route. A search of Mr. Mayen's residence disclosed a large stock of bunko paraphernalia, all of which was of the same kind and character as that used in all bunko cases of which evidence was offered at the trial of the defendant. In all cases the name of the fictitious stock exchange was the International Exchange. The alleged brokers, namely, Dorchester, Hathaway, Mayen, and Sellers, all claimed to represent Sherwood, Sheppard & Co., New York. There was no such firm in existence. All used printed matter, blank orders, etc., of these two fake organizations, all of which, from their appearance, were procured either from Mayen or from his source of supply.

It was further shown in evidence that Mayen had visited the defendant at the main bank before the establishment of the Hollywood branch, and also at the latter establishment, a number of times. When calling he talked to no one in the bank but the defendant, and he had no account or other business with the bank; that on one night, in company with a Mrs. W. H. Edgington, he drove in an automobile to the home of the defendant, whom he designated to her as his banker; that the defendant came out to the automobile, and Mayen handed to him what appeared to be a roll of money.

[1] We have set forth at length much of the testimony, and we think it requires no further statement of the evidence, or argument, to demonstrate, not only the existence of a conspiracy, but also that the defendant was an active and interested member thereof. The jury is the sole judge of all controverted questions of fact, and its verdict, if based upon evidence, is conclusive on the appellate courts. Disregarding the testimony of the defendant, and contradictions in that of some of the important witnesses for the people, and accepting, as did the jury, the state's view of the whole case, we are satisfied that the evidence, although circumstantial, shows, as above stated, criminal complicity of the defendant with the confidence operators, even to the extent, according to the testimony of Mrs. Edgington, of participating in the fruits of their unlawful operations.

[2] It cannot be successfully said that by

the acquittal of the defendant of all but one of the crimes of the consolidated indictment that the jury found the defendant was not a member of a general conspiracy, but of only one conspiracy, and hence the evidence of the other offenses was inadmissible, and for that reason the defendant did not have a fair and impartial trial. We have no doubt that evidence of each and all of the enumerated transactions, whether covered by the indictment or not, was admissible under the similar offense rule as tending to prove a conspiracy. The interlocking of the participants in the various frauds, their common use of the same fictitious entities, their uniform insistence that their banking needs in carrying out their numerous swindling operations should be intrusted solely to the defendant as assuring an element of safety, were facts justifying an inference that a general conspiracy existed, and the defendant's guilty connection therewith was abundantly shown.

The court fully and fairly instructed the jury on the law applicable to the facts of the case, and it did not commit error in ordering the indictments consolidated. Pen. Code, § 954.

Judgment affirmed.

We concur: WILBUR, C. J.; LAWLOR, J.; WASTE, J.; SEAWELL, J.; MYERS, J.; LENNON, J.

---

61 Cal. App. 505

PEOPLE v. CAIAZZA et al. (Cr. 1095.)

(District Court of Appeal, First District, Division 1, California. March 24, 1923. Hearing Denied by Supreme Court May 21, 1923.)

1. Criminal law 🔑37—Enticement and entrapment held no defense where crime originally conceived by defendants.

Where defendants conspired to burn insured property with intent to defraud the insurer and also the owner, and it appeared that the conception of the crime originated with defendants, it was no defense that law enforcement officers, having become cognizant of the purpose to commit the crime, allowed it to proceed, concealing themselves in order to obtain evidence to convict, and that they encouraged the perpetration of the criminal design.

2. Criminal law 🔑797—Statement by court that jury might make any recommendation it saw fit held not to mislead jury.

In a prosecution for conspiracy to burn insured property with intent to defraud, that the trial court, in reply to a question by the foreman of the jury, if it was in the power of its members to recommend leniency, stated that the jury might make any recommendation it saw fit, did not operate to mislead the jury.

3. Criminal law 🔑885—In absence of statute, jury may not accompany verdict with recommendation.

In the absence of statute, a jury has no right or authority to accompany a verdict with a recommendation; their province being solely to determine the guilt or innocence of accused.

4. Criminal law 🔑1173(1)—Refusal to instruct as to defendant's good character not error where crime admitted.

In a prosecution for conspiring to burn insured property with intent to defraud insurer and the owner thereof, it was not error to refuse to instruct concerning defendant's good character; the commission of the crime by defendant being admitted, and his character therefore, whether good or bad, not being involved.

5. Conspiracy 🔑47—Finding that defendant knew premises he attempted to burn were insured, sustained.

In a prosecution for conspiring to burn insured property with intent to defraud insurer and the owner thereof, evidence *held* to sustain a finding that defendant knew the premises he attempted to burn were insured.

6. Criminal law 🔑423(1)—Any act in furtherance of the object of the conspiracy is competent evidence against the other conspirators.

In a prosecution for conspiracy, any act of either confederate in pursuance of the object and purpose of the conspiracy is competent evidence against the others.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Pasquale Caiazza and Joe Giusto and another were convicted of conspiring to burn insured property with intent to defraud and injure the insurer and owner of the property, and the named defendants appeal. Affirmed.

M. F. McCormick and C. M. Ozias, both of Fresno, for appellant Caiazza.

Thomas F. Lopez, of Fresno, for appellant Giusto.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

TYLER, P. J. Appellants, together with one Diego Failla, were jointly indicted of the crime of conspiracy to burn certain insured property with intent to defraud and injure the insurer and also the owner thereof. Appellants were both convicted and Failla was acquitted. This is an appeal from the judgment and from an order denying the motion of said appellants for a new trial.

At the outset it may be stated that it is conceded that neither of the defendants is a man of integrity; that they had an evil purpose and entertained an unlawful and wicked design to join with the owner of the property in what they believed to be a plot to commit arson, a crime that is viewed by the law as a heinous and most aggravated offense for the reason that it endangers human life and the security of habitations and evidences moral recklessness and depravity in the perpetrator.

It is contended, however, that notwithstanding the admitted evil intent and purpose of the defendants, the judgment of conviction can only be upheld by the strong hand of power, and not by or under the law. In this connection it is urged that the verdict is against public policy, which should always estop the state from devising a scheme to encourage or aid one in the commission of a crime. The verdict is therefore assailed for the reason that the evidence is insufficient to convict defendants, it being claimed that it only shows that they were pliant and willing instruments who could be and were instigated and impelled to commit the crime in question by public officials and decoys employed by the state for such purpose, and that they never would have committed the crime with which they are charged but for such assistance and co-operation on the part of such officials. In other words, defendants invoke the defense of instigation and entrapment.

This subject has received full and careful consideration by the District Court of Appeal for the Third District in the very recent case of People v. Rodriguez, 214 Pac. 452. See, also, People v. Silbelo (Cal. App.) 214 Pac. 462, decided February 23, 1923. In the Rodriguez Case a collation of the authorities is made and the subject fully reviewed, and the conclusion in substance is there reached that if the criminal design charged originated with the perpetrators of the act they cannot escape conviction merely by reason of the fact that a trap was laid for them or that they were facilitated in the execution of their enterprise by officers of the law who acted for the purpose of detecting them in the perpetration of their unlawful act. The great weight of authority is in accordance with this view. See, also, 16 Corpus Juris, p. 88; People v. Barbera, 29 Cal. App. 604, 157 Pac. 532.

In support of the judgment of conviction it is claimed that the evidence in this case nowhere warrants the conclusion of appellants that they were the victims of official enticement or instigation, or that they were lured from the path of rectitude by any official or his agent, but that, on the contrary, it does show from the admissions made by them that they were professional arsonists, and that they originated the crime with which they are charged.

The record is voluminous, but briefly and in substance the evidence shows that one Holcomb was the owner of and resided with his family in the dwelling house in Fresno which defendants are accused of attempting to burn. Holcomb and his wife were not on friendly terms. She was afflicted with an incurable disease, and Holcomb was desirous of sending her to Germany in order that he might marry some one else, but was not possessed of sufficient funds to do so. A fire had occurred at his home, but it was extinguished before any substantial damage was done. There is evidence in the record which indicates that Holcomb started that fire for the purpose of collecting the insurance in order to carry out his plan of sending his wife abroad. Shortly thereafter Holcomb had a conversation with defendant Caiazza, whom he had known for some eight years, on which occasion this fire was discussed. Caiazza expressed to Holcomb the opinion that it was impossible "to get along without being crooked," and suggested to him that he again burn his home. Holcomb thereafter, according to the testimony of Caiazza, hunted him up and importuned him to procure someone to do the burning. The parties met at the home of Caiazza on Thanksgiving Day of 1921, when the matter of destroying Holcomb's property was discussed in a general way. According to the testimony of Holcomb, Caiazza explained how easy it was to accomplish the burning; that he knew of places which had been burned; and that he could procure a friend of his who made a profession of setting fire to property, to engage in the desired undertaking for the sum of $50. Holcomb thereafter discussed the matter with a friend, who advised him that he had better report the matter to the authorities. Holcomb thereupon informed the fire chief, who in turn took the matter up with other officials of the city of Fresno. A plan was thereupon arranged by the police and fire authorities to have Caiazza and Holcomb in the basement of a store where Holcomb was employed and discuss plans for the burning. Caiazza appeared there at Holcomb's request. A dictaphone had in the meantime been installed on the premises, and while the conference between Holcomb and Caiazza was being had the officers secreted themselves so as to hear what was said. The subject of the burning was again discussed by the parties, as was also the amount of insurance carried by Holcomb. Caiazza was of the opinion that the burning should be done by a professional, but that it should be deferred until such time as Holcomb could procure more insurance in a company represented by Caiazza; he being in the insurance business. Thereafter preparations were made to carry out the plan. Defendant Giusto was employed to do the actual burning. Holcomb agreed to pay the sum of $350 for the commission of the act. Part of this sum was paid to Caiazza in cash, the balance being made up of promissory notes signed by Holcomb. On the evening of April 19, 1922, Giusto, accompanied by Failla, went to the Holcomb home, and they in conjunction with

Holcomb prepared the place for burning. They poured gasoline over the premises, and spread pieces of sheet saturated therewith through the rooms and applied a lighted candle thereto. The officers, who were in hiding on the premises, extinguished the fire and the arrest of defendants followed.

[1] It thus conclusively appears from the evidence that the crime with which the defendants stand charged was originally conceived by Holcomb and Caiazza independent of any suggestion or aid from the officers. There is no question that after the scheme was thus formed Holcomb, for purposes of his own, betrayed Caiazza, and that defendants were thereafter encouraged in the perpetration of their criminal design by the officers. There is a distinction, however, between inducing a person to do an unlawful act, and setting a trap to catch him in the execution of a criminal plan of his own conception. This distinction is pointed out in the Rodriguez Case, supra. Where the doing of a particular act is a crime, regardless of the consent of any one, the courts are agreed that if the criminal intent originates in the mind of the accused and the criminal offense is completed the fact that an opportunity is furnished, or that the accused is aided in the commission of the crime in order to secure the evidence necessary to prosecute him therefor, constitutes no defense (Case and Comment, August, 1922).

Upon this subject, therefore, we conclude that the defense here interposed by appellants is without merit.

It is further claimed that the court erred in refusing to give certain instructions upon the subject of entrapment and participation. The case not being one of official instigation, as has been pointed out, the instructions were properly refused.

[2] Nor is there any merit in the further contention that the court misled the jury during its deliberations. In this connection it appears from the record that the trial judge was asked by the foreman of the jury if it was in the power of its members to recommend leniency. In reply thereto the jury was informed that it might make any recommendation it saw fit. It is contended that as the law does not authorize or permit any such recommendation the court by so advising the jury prejudicially misled it as to its authority, it being claimed that the remark of the court was in effect an invitation to the jury to do a thing not authorized by law which deceived the members thereof into bringing in the verdict that it did.

[3] The objection is without merit. In the absence of a statute it is the prevailing rule that a jury has no right or authority to accompany a verdict with a recommendation, their province being solely to determine the guilt or innocence of the accused. People v. Lee, 17 Cal. 76, 17 Am. L. R. 1156. If the court had led the jury erroneously to suppose that by incorporating in their verdict a recommendation of leniency the punishment would be reduced there might be some merit in the objection. As there was no such intimation on the part of the court of the effect of such recommendation, there could be no prejudice. People v. Lee, supra.

[4] It is further claimed on behalf of the defendant Giusto that the court committed error in refusing to give an instruction concerning his good character.

We see no merit in this claim. The nature of the charge and the evidence supporting it rendered such an instruction of little, if any, value to the defendant. The fact of the commission of the crime by him is admitted. His character, therefore, whether good or bad, was not involved, and it could in no manner operate as a factor in his favor. Under such circumstances, refusal to give the instruction did not affect his substantial rights.

[5] And, finally, it is claimed that there is no evidence in the record to show that the defendant Giusto knew that the premises he attempted to burn were insured.

[6] There is no merit in this contention. There is evidence to show that he was told by Holcomb to take such personal property as he desired from the premises, and that he did attempt to carry certain articles away with him after setting fire to the premises, which he discarded when the officers arrested him. This is a circumstance from which knowledge of the fact on his part might properly be inferred. The very offense here charged is a conspiracy to burn the property in question with intent to injure the owner and insurer. The evidence to establish the confederation or conspiracy was complete. Any act, therefore, of either confederate in furtherance of the object and purpose of the confederation, is competent evidence against the others. There is an abundance of evidence in the record to show that Caiazza knew the property was insured.

Under all these circumstances the jury was justified in finding that both defendants attempted the crime with which they are charged with intent to defraud the insurer. People v. Vasalo, 120 Cal. 168, 52 Pac. 305.

The judgments are affirmed.

We concur: ST. SURE, J.; RICHARDS, J.

61 Cal. App. 423

REDEMEYER v. CUNNINGHAM.
(Civ. 2529.)

(District Court of Appeal, Third District, California. March 17, 1923. Rehearing Denied April 16, 1923. Hearing Denied by Supreme Court May 14, 1923.)

1. Deeds ⚷40—Frauds, statute of ⚷100—Deed of part of block, not showing boundary line between blocks, held invalid.

Where plat of city addition did not show any division line between two blocks embraced in one tract, a deed of the south half of one of the blocks "according to the plat of said addition" was void for uncertainty in that it was impossible to determine from it the location of the boundary line between the blocks, as extrinsic evidence showing the location of such boundary line was inadmissible under the rule that conveyances must be written.

2. Deeds ⚷41—Description in deed referred to must be definite.

Although the parties to a deed may describe the property therein conveyed by a reference therein to another deed or map which contains a description, yet the deed and the instrument referred to, when taken together, must be as certain in respect to the description as a description contained in the deed itself.

3. Ejectment ⚷25(2)—Outstanding title in third person held a defense.

Outstanding title in a third person is a good defense, although defendant does not connect himself therewith.

4. Adverse possession ⚷43(6)—Decree of distribution held to convey interest in land by adverse possession.

In ejectment, where defendant had offered in evidence a decree of distribution in the estate of one who had occupied the lands adversely, distributing the land to defendant and his wife, evidence of defendant's adverse possession was improperly excluded.

5. Pleading ⚷93(2)—In ejectment defenses of prescription and public highway held inconsistent.

In ejectment the defenses that defendant had acquired title by prescription and also that the land was part of the highway, and hence not subject to action by owner of the record title, *held* inconsistent and irreconcilable defenses.

6. Ejectment ⚷73—Cross-complaint showing land a street held properly excluded.

In ejectment cross-complaint claiming that the land in question was a street and asking for recovery of possession of the street, and that obstructions thereon by plaintiff be removed, *held* properly excluded, as it showed both parties to be trespassers on the street, and since, if defendant could succeed in establishing his right to the possession of the disputed strip, the court might in its judgment protect him against interference with his use of it.

Appeal from Superior Court, Mendocino County; Edward I. Butler, Judge.

Action by Otis Redemeyer against John Cunningham. From judgment for plaintiff, defendant appeals. Reversed.

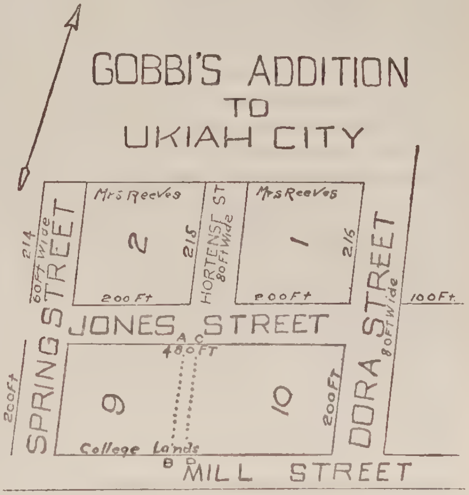
A. L. Wessels, of Ukiah, for appellant.

Mannon & Mannon and Charles Kasch, all of Ukiah, for respondent.

BURNETT, J. The action was in ejectment to recover the possession of a strip of land in the city of Ukiah, Mendocino county, described as follows:

> "Beginning at a point where the westerly line of Hortense street if extended southerly would intersect the southerly line of Jones street, and running thence southerly along the said westerly line of Hortense street if extended southerly to the north line of Mill street; thence easterly along the northerly line of Mill Street 24.3 feet to a certain fence; thence northerly along the line of said fence to a point in the southerly line of Jones street; thence westerly along the southerly line of Jones street 23 feet to the point of beginning."

To better understand what follows, we append a replica of a portion of the map of Gobbi's addition to the city of Ukiah filed in the county recorder's office in March 30, 1888, to which we have added the dotted lines, A B, C D, to indicate the boundaries of the disputed strip. We may call attention at this point to the fact that on said map no division line between blocks 9 and 10 appears, and this circumstance is of importance in the controversy between the parties.



The answer to the verified complaint denied the ownership of plaintiff to any portion of said land or his possession or right to the possession thereof or that the defendant "ousted or ejected the plaintiff from said premises, or any part thereof," or that the defendant ever wrongfully or unlawfully withheld any portion of said premises from plaintiff. As a second defense it was al-

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

leged that the deeds under which plaintiff claimed title to said property, namely, a deed from one Terrence Rodgers of May 7, 1918, and from the same grantor of February, 1919, and a deed from Ella King Hodghead of March 20, 1919, conveyed no interest, since said grantors and each of them "had no right, title, interest, claim, or estate, either in law or in equity, in or to the premises described in the complaint, or any part thereof, or ever had any right, title, interest, claim, or estate therein." For a third defense title by prescription was sufficiently set forth. Defendant also asked leave to file a cross-complaint in which it was alleged that one William Proudfoot on June 17, 1889, and for some time prior thereto, was the owner of the land bounded by Jones, Dora, Mills, and Spring streets in said city, and while such owner he subdivided the land into two tracts or subdivisions and named and designated said tracts as "block 9 and block 10 of Gobbi's addition to Ukiah City, and defined and described and fixed the bounds and limits of each of said blocks, as follows: Block 9 aforesaid as comprising and embracing the west 280 feet of the said tract, and being 280 feet east and west and 200 feet north and south, and block 10 as comprising and embracing the remainder of said tract, and being 200 feet east and west and 200 feet north and south." It was further alleged that the plaintiff is, and has been for some time, the owner of said block 10 as thus described, and the defendant and Nancy Cunningham the owners of the south half of said block 9, and the defendant and certain heirs of John C. Gobbi, deceased, were and are the joint owners of the north half of said block 9, and that said block includes the land in dispute; that after the subdivision of the said tract of land by the said William Proudfoot, as aforesaid, the owner of the tracts of land included in said block 9 and said block 10 "opened up, set aside, set apart, laid out, defined, and designated the east 80 feet of said block 9 as a public highway for the use of the public, and also as a private highway for the use and benefit of said owners, their successors and assigns, and did by their acts, words and deeds, and with the intention to dedicate and set aside the same, dedicate and set aside the said tract of land for such public and private use; that thereafter the owner of the lands included in said block 9 and block 10, by mutual agreement, acquiescence and consent, agreed to and did cut down the width of said public and private highway to the width of 40 feet, with center line thereof unchanged, and thereafter constructed substantial buildings and fences along each side thereof as thus fixed, defined, and established; that said public and private highway was by said owners, named, designated, and described as Hortense street; that the said street has been used continuously, except during the period obstructed by the plaintiff as hereinafter mentioned by the public and by the owners of the lands in said blocks 9 and 10, and by the residents in that vicinity without objection on the part of any of the owners of said properties, for a period of more than 20 years prior to the commencement of this action"; that defendant and his cotenants as aforesaid are the owners of the fee to the land lying in said Hortense street and are entitled to the possession thereof subject to its use as a public and private highway, and "each of them uses the same as a means of egress, ingress, and regress to their lands in said block 9 aforesaid; that while the defendant and his cotenants aforesaid were so seized of said premises the plaintiff afterwards, and on or about the 1st day of March, 1919, and without right or title, entered into possession of said premises and ousted and ejected the defendant and his cotenants therefrom, and ever since has and now does wrongfully and unlawfully withhold the said premises and the possession thereof from the defendant and his cotenants." Then follows an allegation that between March 1 and October 1, 1919, the plaintiff constructed a solid concrete wall and caused to be erected thereon a fence along and across the north and south entrances of said Hortense street so as to completely obstruct it and prevent travel thereon, and has ever since "wrongfully and unlawfully and without right obstructed the said highway as aforesaid." The prayer was for the recovery of the possession of said street between blocks 9 and 10, subject to the use thereof for a public and private highway, that said obstructions be removed and the nuisance thereby created be abated, and for general relief. The trial court declined to allow defendant to file said cross-complaint, and this is one of the rulings of which appellant complains.

To prove his title to the north 100 feet of the disputed strip plaintiff introduced two deeds from William Proudfoot (admittedly the common source of title) to E. W. King, dated June 17, 1889, and September 12, 1895, a decree of distribution in the estate of E. W. King, deceased, of the date of October 27, 1915, distributing the residue of his estate to Ella King Hodghead, and a deed from her to plaintiff, dated March 20, 1919, describing the land as follows:

> "Beginning at a point in the southerly line of Jones street 20 feet westerly of the easterly line of Hortense street, if the same were extended southerly in its present course; thence westerly along the south line of Jones street to the intersection of what would be the westerly line of Hortense street if the same were extended southerly in its present course; thence southerly along said extension of the westerly line of Hortense street 100 feet; thence easterly and parallel to the southerly line of Jones street 60 feet, more or less, to a point 20 feet west of what would be the easterly line of Hortense street if the same were extended

southerly in its present course; thence northerly 100 feet, more or less, to the point or place of beginning."

As to the southerly 100 feet in controversy plaintiff put in evidence a deed of reconveyance from E. W. King to William Proudfoot of September 17, 1895, from the latter to Wiley English, dated November 13, 1896, from English to J. B. Stetson of February 23, 1897, a tax deed from the state of California to J. C. Ruddock, dated March 6, 1905, the property having been sold for delinquent taxes for 1897 assessed to Wiley English, a deed from Ruddock to F. L. Caughey of an undivided one-half interest, dated November 10, 1906, a deed from Ruddock and Caughey to Terrence Rodgers of the date of April 9, 1912, and from Rodgers to plaintiff dated February ———, 1919, conveying the following:

> "Beginning at the intersection of the west line of Dora street with the north line of Mill street (being the southeast corner of block IX–X of Gobbi's addition to Ukiah City) and running thence north along the west line of Dora street one hundred (100) feet to the south line of land conveyed by William Proudfoot to E. W. King by deed dated June 17, 1889, and recorded in the office of the county recorder of said county in Book 48 of Deeds, p. 176 (said property being now owned by the grantee herein); thence westerly along the south line of said King lands and a prolongation of said south line two hundred and eighty feet, more or less, to what would be the west line of Hortense street if the same were extended southerly in its present course; thence southerly along said west line of Hortense street (if extended) 100 feet more or less to the north line of Mill street; thence easterly along the north line of Mill street to the place of beginning."

The foregoing clearly showed the record title in and to the whole of the disputed strip to be vested in plaintiff.

[1] Appellant, however, objected to the introduction of said deed from Rodgers upon the ground:

> "That no foundation has been laid, and that he did not have any interest in the land at the date, having theretofore conveyed all his interest in it to Henry Owens on April 18, 1912."

In support of his contention appellant thereafter offered said deed from Rodgers to Owens purporting to convey "the south one-half (S.½) of block nine (9), Gobbi's addition to the town of Ukiah City, according to the plat of said addition on file with the county recorder of Mendocino county, California." Plaintiff objected to this deed upon the ground that it was impossible to determine from it the location of the boundary line between blocks 9 and 10, and hence the deed was void for uncertainty. The court finally adopted the view of plaintiff and sustained his objection. This ruling involves one of the important questions in the case. It was and is the claim of appellant that all the parties in interest from the time the whole tract belonged to William Proudfoot recognized block 9 as being 280 feet from west to east, and thereby including the disputed strip, and block 10 as extending from Dora street 200 feet west to the easterly line of Hortense street if extended. In support of this position appellant refers to several circumstances, among which is the description of block 9 in the said deed of William Proudfoot to E. W. King of June 17, 1889, in which said block 9 is described as extending from a point 200 feet westerly from Dora street a distance of 280 feet to Spring street.

It is not an unreasonable inference that the dividing line between said blocks was generally so understood and recognized, but in said deed there is no reference whatever to any monument, deed, fact, or circumstance suggesting or furnishing any data by which such boundary line can be established. The deed is according "to the plat of said Gobbi's addition," and there is nothing thereon to indicate the location of said line. The rule is well established, as stated by this court in Scott v. Woodworth, 34 Cal. App. 400, 167 Pac. 543:

> "To be valid on its face, a deed must contain such a description of the real property thereby intended to be conveyed as will enable the property to be readily located by reference to the description."

[2] It was further declared therein that, if the writing itself does not "furnish the means whereby the description may be made sufficiently definite and certain readily to locate the property, then the instrument must be held void, since the imperfections of the description cannot be supplied through evidence extrinsic to the writing itself without running up against the positive mandate of the rule that a conveyance of real property must be in writing." As before indicated, if reference had been made in the deed from Rodgers to the description of block 9 as contained in said deed from Proudfoot, or to any other fact or circumstance by aid of which the line could be located upon the ground, a different situation would be presented. If such reference had been made, then we would be governed by the rule affirmed in Donnelly v. Tregaskis, 154 Cal. 261, 97 Pac. 421, quoting from Caldwell v. Center, 30 Cal. 540, 89 Am. Dec. 131, as follows:

> "Although the parties to a deed may describe the property therein conveyed by a reference therein to another deed or map which contains a description, yet the deed and the instrument referred to, when taken together, must be as certain in respect to the description as a description contained in the deed itself."

To the authorities cited in the Scott Case, supra, we may add Reed v. Lammel, 28 Minn. 306, 9 N. W. 858, and Cunningham v. Village of Willow River, 68 Minn. 249, 71 N. W. 532, each involving a situation quite similar to that herein.

In support of his claim to the record title appellant also offered a deed from William Proudfoot to John Cunningham, dated December 5, 1919, purporting to convey by metes and bounds the southern half of the 80-foot strip included within the boundaries of said Hortense street if extended to Mill street. The court, though, properly excluded this deed upon the ground that the grantor had previously conveyed all his interest in the south half of blocks 9 and 10 to Wiley English.

As to the north half of the disputed strip, it is quite plain that the deed from King to W. I. Bailey dated June 21, 1890, offered by appellant, was properly excluded, since it described by metes and bounds and purported to convey block 9 as lying entirely west of said Hortense street, if extended. It therefore did not include the land in controversy. Indeed, without further specification of the instruments offered by appellant, we conclude that the record title to the disputed strip was shown to be in respondent.

Appellant, however, attempted to prove title by prescription. He asked many questions along this line, but the trial court sustained objections to them. Then he made the following offer:

> "We offer to prove by defendant John Cunningham that he knows of his own personal knowledge that since 1912 Henry Owens was in actual and open notorious possession of the south half of block 9, holding and claiming the same as his own during all the time down to the time of his death, which was January 7, 1918, and during each and every year cultivated that tract of land, including the land in controversy in this action, and put it in grain; that during all of the time the tract was inclosed in a substantial inclosure; that as to the north half of block 9, and also including the strip contained in this action, the same was in the actual possession of John Gobbi, and prior to 1912 the same had been used by him as a home, upon which he had built a house, and upon which he lived until the time of his death, and that this tract of land was also inclosed in a substantial inclosure; that since that time the defendant acquired a deed from Henry Owens to the south half of 9 he has been in actual, open, and notorious possession of the same, claiming to hold the same as his own, and during said time has cultivated said tract and with reference to the north half from the time he secured the deeds from the heirs of the Gobbi estate."

[3] It is true that this offer was not complete, since it contained no allusion to the payment of taxes. As to that, however, evidence was subsequently offered, and an objection was sustained upon the ground that it was immaterial. We are aware also that a blanket offer like that, standing alone, is not a sufficient basis for challenging the ruling of the court, but the statement came after objection to questions in relation to the possession of the property and claim of title had been sustained, and appellant desired to make clear the purpose of the offered evidence. The trial court excluded the testimony upon the ground that there was "no deed in evidence between Owens and Cunningham." But, if defendant had shown title in Owens, it would have been a good defense to the action. Title in a third party is a good defense, though defendant does not connect himself with it, and particularly is this so when the plaintiff has not been in the possession of the lands within the period of the statute of limitations or at all. Cranmer v. Porter, 41 Cal. 462; Trenouth v. Gordon, 63 Cal. 379; Robrecht v. Reid, 114 Cal. 356, 46 Pac. 101. In the last of these the rule is stated as follows:

> "It is true that in an action of ejectment, when the plaintiff relies upon a paper title, the defendant may show the true title with right of possession to be outstanding in a third person, without connecting himself with it, and may thus defeat the action."

This is simply an illustration of the well-established doctrine that in ejectment the plaintiff must recover, if at all, on the strength of his own title, and not upon the weakness or want of title in the defendant. Gage v. Downey, 94 Cal. 241, 29 Pac. 635; Reay v. Butler, 95 Cal. 206, 30 Pac. 208.

[4] But the fact is that appellant offered in evidence a decree of distribution in the estate of Henry Owens, deceased, distributing to appellant and his wife "the S. ½ of block 9 of Gobbi's addition to the town of Ukiah City," and in said decree it was "further ordered, adjudged, and decreed that any other property not now known or found be and the same is hereby distributed to John Cunningham and the said Nancy Cunningham share and share alike." This latter clause would, of course, include the title of Owens to any part of the disputed strip even if it was not embraced in the land specifically described in the decree of distribution. After the trial court's attention was called to this decree of distribution, and while appellant was being examined as a witness, the record shows the following:

> "Mr. Wessels: I will ask you to state, Mr. Cunningham, if you know from your own knowledge whether Otis Redemeyer or Terrence Rodgers or Mr. Van Dusen or any of the predecessors of Mr. Redemeyer or his grantors had been in possession of the tract in dispute since the year 1912 or any part thereof.
>
> "Mr. Kasch: Object upon the ground it is incompetent, irrelevant, and immaterial.
>
> "The Court: Not material unless he derived title from Owens in order to make the claim of adverse possession. You must show the continuity by proper conveyance to Mr. Cunningham.
>
> "Mr. Wessels: I will ask you to state whether or not there had been any other person in possession of the south half of block 9 or the south half of the tract in dispute other than Henry Owens, yourself, and your cotenant,

Nancy Cunningham, since the year 1912 down to the present time.

"Mr. Kasch: Same objection, incompetent, irrelevant, and immaterial.

"The Court: Same ruling."

It may be added that appellant sought unsuccessfully to introduce similar evidence as to the north half of said strip. In this connection the following question was asked of Mr. Cunningham:

> "I will also ask you to state whether or not there has been any one whatsoever in possession of the north half of block 9 and the half of the land in question since 1912 other than John Gobbi, his heirs, and yourself and your cotenant?"

The court sustained an objection to this question, and this we think was error. We can perceive of no reason why appellant was not entitled to show actual possession for the statutory period as one of the material elements of title by prescription. It is true that some of the excluded evidence was offered also for the purpose of showing an agreed division line between the two blocks, but, if improper for that purpose, it was at least admissible to support the claim of adverse possession.

[5] Appellant also attempted to introduce evidence tending to show that the 80-foot strip included in the extension of Hortense street had been dedicated to the public for public use as a highway, and that said strip had been used as a public street for a period of 29 years. Appellant claims that "ejectment will not lie for an incorporeal hereditament; a public road or street is an incorporeal hereditament"—citing Wood v. Truckee Turnpike Co., 24 Cal. 474; Mahon v. San Rafael T. R. Co., 49 Cal. 269; Coburn v. Ames, 52 Cal. 385, 28 Am. Rep. 634; Swift v. Goodrich, 70 Cal. 103, 11 Pac. 561; Southern Pacific Co. v. Burr, 86 Cal. 279, 24 Pac. 1032; City of Eureka v. Gates, 120 Cal. 54, 52 Pac. 125; 19 Corpus Juris, "Ejectment," p. 1034.

In the Wood Case, supra, the plaintiff did not own the fee to the land in controversy, but he was claiming as the purchaser under a sheriff's sale of "all the right, title, interest, claim, and property of the Truckee Turnpike Company in and to the Truckee turnpike road, a highway," etc. It was held that said turnpike company held a mere franchise, and that it did not pass to the plaintiff by said sale, and that "all that was offered for sale and all that the plaintiffs bought was the 'road.'" It was in view of these facts that the Supreme Court said:

> "The plaintiffs acquired nothing by the purchase of the 'road,' to which the action of ejectment has any remedial relations. 'Road' is a legal term, strictly synonymous with the term 'way,' and in the complaint, and throughout all the title papers of the plaintiffs, their identity is fully recognized. A way is an easement, and consists in the right of passing over another man's ground. * * * It is an incorporated hereditament, a servitude imposed upon corporeal property, and not a part of it. It gives no right to possess the land upon which it is imposed, but a right merely to the party in whom the way is vested to enjoy the way."

It was therefore held that ejectment would not lie to recover possession of the way.

In the Mahon Case it was held that the action was proper, since the plaintiff owned the fee and brought the action to recover possession, having been improperly precluded by defendant from entering upon the land except upon the payment of a toll, and then only for the purpose of passing over the same.

In 52 Cal. 385, 28 Am. Rep. 634, it is said:

> "In effect, the finding is that Ames & Templeton took the exclusive possession of the alleged highways, and used them for the storage of merchandise, thereby excluding the public from the use of them as public highways. Even though it be conceded that they were legally established as public highways, the defendants had no authority in law to appropriate them to their exclusive use and dominion to the exclusion of the public. In doing so they were trespassers, and in such cases it is well settled that the owner of the fee may maintain ejectment. He is entitled to the possession subject to the public easement," etc.

In Swift v. Goodrich the right to the use of water was involved, which the court declared to be an easement, and held that ejectment would not lie.

In Southern Pacific Co. v. Burr the action related to a strip of land 400 feet in width granted by Congress to the Central Pacific Railroad Company to aid in construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and the Supreme Court held that the grant necessarily involved "a right of possession in the grantee, and is inconsistent with any adverse possession of any part of the land embraced within the grant," and it was determined that the plaintiff could recover in an action of ejectment against one who had entered into possession of a part of the land and claimed title in fee. While it was admitted that perhaps for a mere easement the action would not lie, "wherever a right of entry exists, and the interest is tangible, so that possession can be delivered, an action of ejectment will lie."

In the Eureka Case the action was brought by the municipality to recover possession of land constituting a part of the street, and it was held that—

> "If the owner of the fee has dedicated a street and alley to public use, and the dedication has been accepted by the city in which the street and alley are situated, such city may maintain ejectment to recover possession thereof as against the owner of the fee, though the

city may claim only an easement in the street and alley for public use."

The citation from Corpus Juris is to the effect that—

> "The general rule is that an action for ejectment cannot be maintained for an incorporeal hereditament."

It is apparent that these authorities do not militate against the ruling of the trial court as to the offered evidence. It is clear that appellant was in no position to urge such defense. In his answer he alleged that he was in possession of the disputed strip under a claim of right, and that he and his predecessors in interest had been in such possession since 1912. Even in the cross-complaint, which he sought to file, after alleging the dedication of the strip 80 feet in width for a public highway, he averred in effect that by agreement of the owners of the fee the highway was reduced to a width of 40 feet, and they had entered into the possession of the 20-foot strip on each side respectively. Assuming, therefore, that the strip in question is actually a part of the highway, defendant by his pleadings and also by the evidence showed himself to be a trespasser, and under the decisions the owner of the fee could maintain ejectment against him. Appellant cannot blow hot and cold. He cannot justify his possession upon both grounds, namely, that he had acquired a title by prescription, and also that the land was a part of the highway, and hence not subject to an action by the owner of the record title. The two defenses are entirely inconsistent and irreconcilable. Of course, if there is a highway 80 feet in width extending through to Mill street, both plaintiff and defendant are trespassers, and it is a matter which should receive the attention of the municipal authorities, but under the circumstances already detailed we think that question could not be settled in this proceeding.

[6] We are of the opinion also that the court committed no error in excluding said cross-complaint. It showed both parties to be trespassers, and as long as appellant was occupying a part of the street he could hardly complain of respondent for interfering with his use of it. Moreover, if appellant can succeed in establishing his right to the possession of the disputed strip, the court may in its judgment protect him against any interference with his use of it. Mills v. Fletcher, 100 Cal. 142, 34 Pac. 637; Nelson v. O'Brien, 139 Cal. 628, 73 Pac. 469. The residue of the 80-foot strip is not involved in the proceeding, and any controversy concerning it should be litigated in another action, if necessary.

Although the record is voluminous, and the discussion by counsel has taken a wide range and is characterized by much industry and learning, we think the material issues relate to the question of title, either of record or by prescription, and that the court committed error in the respect already indicated.

The judgment is reversed.

We concur: FINCH, P. J.; HART, J.

On Petition for Rehearing.

BURNETT, J. In his petition for rehearing respondent contends that the ruling of the court below in rejecting the offered evidence as to the payment of taxes was without prejudice for the reason that it did not show that the payment was made for five consecutive years. No such objection was made in the trial court, and the ruling was based distinctly upon the ground that it was not material. When the offer was made of a copy of the official record, respondent objected upon the ground that "it's immaterial who paid the taxes." Then counsel for appellant stated:

> "We offer in evidence a statement prepared by Lee Cunningham, the tax collector of Mendocino county, showing who paid the taxes so far as disclosed by the records in that office."

The transcript then shows the following:

> "The Court: Objection sustained.
>
> "Mr. Wessels: We offer it in evidence for the purpose of—
>
> "Mr. Kasch: Now, with the witness Cunningham it can't be material. I submit the motion to strike out the testimony as he has not connected it up.
>
> "The Court: If that was out, the other document also must go B and C.
>
> "Mr. Kasch: I intended to follow with a motion to strike out those in view of that strip.
>
> "The Court: There is very little materiality in it, the motion will be granted."

As to the record offered it was manifestly not complete, and of itself it was not sufficient to prove said payment for the statutory period, but we must assume that appellant intended to follow it with other evidence that would supply the deficiency. Under the ruling of the court, however, it would be idle for him to present any further proof, since the court had already decided that it was immaterial. As aptly stated by appellant:

> "When the trial court, at the instance and pursuant to the objection of respondent, erroneously excluded proof of one of the elements constituting title of appellant by adverse possession, such error alone constitutes ground for reversal, and thereafter it was not incumbent upon the appellant to go through the useless and idle procedure of offering evidence of the remainder of the elements constituting his title by adverse possession."

Moreover, it is the claim of appellant that such evidence was offered "for the purpose of showing all the lands situated in Gobbi's addition to the town of Ukiah City, bounded on the north by Jones street, on the east by Dora street, on the south by Mill street, and on the west by Spring street that had been, in fact, assessed, and for the purpose of showing all the lands situated therein that had not been, in fact, assessed, and for the purpose of showing that all taxes levied or assessed thereon had been paid, and, so far as disclosed by said records, by whom such taxes were paid." It is the contention of appellant that this evidence would have shown that the land in controversy was not assessed at all; it being treated by the assessors as a part of Hortense street. We cannot say that it would not be material for that purpose. Of course, if the property was not assessed, the element of taxes would be eliminated. And since the later decisions of the Supreme Court (McGrath v. Wallace, 85 Cal. 622, 24 Pac. 793; Baldwin v. Temple, 101 Cal. 396, 35 Pac. 1008) overruling Oneto v. Restano, 78 Cal. 374, 20 Pac. 743, hold that the burden of proof is upon the claimant of title by adverse possession to prove that no taxes have been assessed, if such be the fact, appellant should have been allowed to show it.

It is true that appellant did not state specifically in the trial court that the evidence was offered for that purpose, but he was not permitted to make a full statement, being interrupted, as we have seen, in the midst of his offer by counsel for respondent. We must assume that appellant was not only acting in good faith in the trial court, but that he is sincere in his declaration in this court that he could have shown the facts as claimed by him, if he had been given an opportunity to do so. Of course, we cannot say that he may not fail, but we think the interests of justice demand that he be allowed to make the attempt to establish his claim.

It may be conceded that his various positions were somewhat inconsistent, but it i not claimed, nor could it be, that he was put to an election.

As against plaintiff's claim of the exclusive right to the possession of the tract in dispute, defendant would be permitted to defeat the action on the ground that he had acquired title by prescription, although such claim of title would be of no avail against the municipality or the public.

Another reason why respondent should not prevail herein is that the consideration which he now urges for a rehearing was not presented in the original argument before this court. In his brief the following is all that he said upon the subject:

> "Under point 3 of issue 6, appellant argues that he acquired title by adverse possession, but his point is met by the words of the trial court at page 175: 'Not material unless he (Cunningham) derived title from Owens in order to make the claim of adverse possession. You must show the continuity by proper conveyance to Mr. Cunningham.' Even if we consider every offer of defendant as actually in evidence, he has failed to show continuity of possession by himself and his predecessors in interest of the lands described in the complaint for the necessary period of five years. And if the disputed tract was or is a part of Hortense street, surely counsel will not contend that title to it can be acquired by adverse possession."

The rule is to ignore points made for the first time on petition for rehearing. It is true that this is not an inflexible rule, and in the interests of justice the appellate court may disregard it, but, in view of the strenuous objection made by respondent to every effort of appellant in the trial court to prove the elements of adverse possession, it would not be unfair to apply the rule herein.

At any rate we think the question should be thoroughly investigated by the trial court, and the petition for rehearing is denied.

We concur: FINCH, P. J.; HART, J.

---

61 Cal. App. 439

IMPERIAL COUNTY v. GAREY, County Auditor. (Civ. 4145.)

(District Court of Appeal, Second District, California. March 17, 1923.)

1. Counties 🔑178—General election laws with respect to notice inapplicable to county bond elections.

Neither Pol. Code, § 4088, requiring that county bond elections "be held as nearly as practicable in conformity with the general election law," nor section 1044, requiring that special elections on any proposition be conducted under the provisions of sections 1044, 1120, 1121, 1133, and 1151, warrants the inference that any of the sections dealing with elections generally are applicable to county bond elections with respect to notice, though sections 1133 and 1151, relative to precincting and appointment of election board members provide for acts necessarily preceding the holding of the election.

2. Statutes 🔑207—Particular provision prevails over general provision.

A particular provision of a statute generally prevails over, and will be treated as an exception to, a general provision.

3. Counties 🔑178—Provisions as to notice of county bond elections prevail over provisions of general election laws.

Pol. Code, § 4088, requiring that notice of county bond elections be published in newspapers published in the county, or, if none, posted in five public places, constitutes an exception to and prevails over the general provisions of part 3, tit. 2 (sections 1041–1380), section 1142, subd. f (as added by St. 1921, p. 875, § 1), requiring publication only, and section 1056, requiring both publication and posting, as provided by section 1053, section 1054, subd. 1, and section 1055.

4. Counties 🔑178—Notice of county bond election need only be published in newspaper though also ordered posted by board of supervisors.

While an order of the county board of supervisors, pursuant to statutory authority, has all the sanction and effect of a direct statutory enactment, notice of a county bond election need only be published in newspapers published in the county, as required by Pol. Code, § 4088, though also ordered posted at each polling place by the board, which cannot add to or take from the statutory requirement, which is jurisdictional.

Application by Imperial County for writ of mandate to compel W. D. Garey, county Auditor, to attest certain county bonds. Writ granted.

E. R. Simon and Chas. E. Scott, both of El Centro, for petitioner.

Hickcox, Crenshaw & Trude, of El Centro, amici curiæ.

O'Melveny, Millikin, Tuller & Macneil and Paul E. Schwab, all of Los Angeles, for respondent.

FINLAYSON, P. J. This is an original application for a writ of mandate to compel the auditor of Imperial county to attest certain county bonds, the issuance whereof had been authorized by the electors of the county voting at a special election called for that purpose by the board of supervisors. Respondent bases his refusal to attest the bonds upon the ground that the election was not properly noticed.

The election was held under section 4088 of the Political Code. It is conceded that the notice, which is specifically defined in that section, was given. But it is claimed by respondent that the provisions of other sections of the Political Code respecting notice are equally applicable to such special bond elections, and that the notices provided for by such other sections should have been given. To be more specific, it is claimed that, in addition to the notice which is specifically prescribed by section 4088, there also should have been given the notices defined in section 1056 and in subdivision (f) of section 1142 of the Political Code.

Section 4088 is found in part 4 of the Political Code, the provisions whereof relate exclusively to the government of counties, cities, and towns. The article in which this particular section occurs (article 13) is entitled "Issuance of Bonds," and deals exclusively with the issuance of county bonds. In so far, at least, as notice is concerned, section 4088 provides a complete and comprehensive scheme for calling county bond elections. It reads in part as follows:

> "Any county * * * may incur * * * a bonded indebtedness for any purposes for which the board of supervisors are herein authorized to expend the funds of said county. * * * Such indebtedness shall be * * * incurred in the following manner, to wit: The board of supervisors thereof shall by order specify the purpose for which the indebtedness is to be incurred, the amount of bonds which they propose to issue * * * and shall further provide for submitting the question of the issuance of said bonds to the qualified electors of the county at the next general election, or at a special election to be called by the board for that purpose. * * * If a special election is called, none but qualified voters of the county shall be permitted to vote thereat, and it shall be held as nearly as practicable in conformity with the general election law of the state. * * * Notice shall be given of such election by publication in one or more newspapers published in the county, once a week for at least four weeks, or daily for not less than thirty days prior to said election. If there be no such newspaper, then by posting the same conspicuously in five public places in said county at least thirty days before said election. Such notice must contain the time and place or places of holding such election, the names of election officers to conduct same, the amount and denomination of the bonds, the rate of interest to be paid, and the number of years, not exceeding forty, the whole or any part of such bonds are to run. * * * If two-thirds of the electors of the county voting at such an election shall vote in favor of issuing such bonds, the board must proceed to issue the amount of bonds specified."

Sections 1056 and 1142 are found in title 2 of part 3 of the Political Code. That title contains the general provisions relating to elections. It deals with elections generally.

Section 1142 forms part of a chapter which is headed "Boards of Election." The section deals with the appointment of election officers. Subdivision (f) of the section (as added by St. 1921, p. 875, § 1) after providing that the county clerk or registrar of voters shall mail or deliver a notice of appointment to each person whom the board of supervisors has appointed to act as an election officer, reads:

> "He [the county clerk or registrar of voters] shall also publish the names of the election officers appointed and polling places designated for each election precinct in some daily newspaper published in the county or city and county where the election is to be held, for three successive issues, the last publication to be at least one week before the day such election is to be held."

Section 1056 is found in an article entitled "Election Proclamations." The sections constituting the article are numbered 1053 to 1056, inclusive. Section 1053 provides for the issuance by the Governor of an election proclamation before every general election and also whenever he orders a special election to fill a vacancy in the office of state Senator or member of the Assembly. Subdivision 1 of section 1054 provides that the

Governor's proclamation must contain "a statement of the time of election, and of the offices to be filled." Section 1055 provides for the publication and posting by the several boards of supervisors of the Governor's election proclamation. It is required—

> "to be published in some newspaper printed in the county, if any, and to be posted at each place of election at least ten days before the election, and in case of special elections to fill a vacancy in the office of state senator or member of assembly, the board of supervisors, upon receipt of such proclamation, may, in their discretion, cause a copy of the same to be published or posted as hereinbefore provided, except that such publication or posting need not be made for a longer period than five days before such election."

Section 1056 reads:

> "Whenever a special election is ordered by the board of supervisors, they must issue an election proclamation, containing the statement provided for in subdivision one, section ten hundred and fifty-four, and must publish and post it in the same manner as proclamations issued by the Governor."

[1] We shall first consider respondent's claim that notice should have been given by the county clerk in conformity with subdivision (f) of section 1142. It will be recalled that section 4088 declares that the notice prescribed by it shall contain "the time and place or places of holding such [bond] election" and the "names of election officers to conduct the same." So far, therefore, as the contents of the notice are concerned, subdivision (f) of section 1142 does not differ substantially from section 4088—the former simply declaring that the notice required by it shall contain "the names of the election officers appointed and polling places designated for each election precinct," which is substantially what is required to be set forth in the notice described by section 4088.

Section 4088 does not say that, if a special bond election is had, it shall be "called" in conformity with the general election law. The language is: "* * * and it [a special bond election] shall be held as nearly as practicable in conformity with the general election law of the state." There is an obvious distinction between calling an election, including the giving of notice thereof, and holding an election. This distinction is recognized throughout the Code. Section 1133, for example, declares that the board or body charged with the conduct of any of the elections mentioned in section 1044 may precinct the territory within which such election "is to be held." The use of the phrase "is to be held" (the future tense) clearly indicates that the holding of an election embraces acts which follow the calling of the election—that the holding of an election embraces such acts as, for example, the opening of the polls on the election day, the casting of the ballots, the challenging of voters, the canvassing of the vote, etc.

There is nothing in section 1044 which tends to indicate that it was the legislative intention that the notice of election should be deemed to be a part of the holding of an election. That section, after referring specifically to certain elections, declares that—

> "All other special elections, including all special elections to vote upon or for or against any proposition or question authorized to be submitted to a vote, shall be conducted under the provisions of sections 1044, 1120, 1121, 1133 and 1151 of this Code."

It is true that two of the sections to which reference is thus made, sections 1133 and 1151, do provide for acts which necessarily must precede the actual holding of the election—section 1133 providing for the precincting of the territory within which the special election is to be held and section 1151, providing for the appointment of the persons who are to serve upon the election boards. But section 1044 makes no reference to the subject of notice, either directly or indirectly. It is only to the extent that the specifically referred to sections—sections 1120, 1121, 1133, and 1151—deal with matters which in point of time precede the opening of the polls on the election day that section 1044 can be deemed to prescribe duties which are to be performed in connection with a county bond election prior to the actual holding of the election.

For these reasons we conclude that, with respect to the matter of notice, there is nothing in the language of either section 4088 or section 1044 which in and of itself warrants the inference that any of the sections which deal with the subject of elections generally are applicable.

It only remains to consider whether the county authorities must give the notices prescribed by those sections which relate generally to the subject of elections, notwithstanding section 4088 does not of itself make such other sections applicable to county bond elections.

[2, 3] It is a well-established cannon of construction that where there are two provisions in a statute, one of which is general, and designed to apply to cases generally, and the other particular, relating to only one subject, the particular provision will as a general rule prevail and will be treated as an exception to the general provision. In Felt v. Felt, 19 Wis. 193, the court states the rule thus:

> "But it is a well-settled rule of construction that specific provisions relating to a particular subject must govern in respect to that subject, as against general provisions in other parts of the law, which might otherwise be broad enough to include it."

See, also, Talcott v. Harbor Commissioners, 53 Cal. 199; Trinity County v. Mendocino County, 151 Cal. 284, 285, 90 Pac. 685; Los Angeles v. Los Angeles Pacific Co., 31 Cal. App. 108, 109, 159 Pac. 992; In re Rouse, 91 Fed. 96, 33 C. C. A. 356; Gardner v. School District, 34 Okl. 716, 126 Pac. 1018; Hawkins v. Bare, 63 W. Va. 431, 60 S. E. 391; Dahnke v. People, 168 Ill. 102, 48 N. E. 137, 39 L. R. A. 197; Stockett v. Bird, 18 Md. 484; and Rodgers v. United States, 185 U. S. 83, 22 Sup. Ct. 582, 46 L. Ed. 816. According to this canon of construction the special provision contained in section 4088 with reference to the giving of notice of county bond elections must be held to constitute an exception to the general provision contained in subdivision (f) of section 1142.

What we have said regarding the inapplicability of subdivision (f) of section 1142 is equally true of section 1056. That section, by its express reference to subdivision 1 of section 1054, requires the publication and posting of an election proclamation which shall set forth "a statement of the time of election and of the offices to be filled." Assuming, for the purpose of this decision only, that the form of proclamation thus defined may be made to fit the case of a special county bond election, still the fact remains that section 1056 is general in its terms and is designed to apply to special elections in a general way. Section 4088, on the other hand, relates to one specific subject—the issuance of county bonds; and with respect to the matter of notice it provides such a complete and comprehensive procedure that it is evident that it was intended to be the exclusive expression of the legislative will upon the subject of notice.

There is no conflict between the foregoing views and what was said in Cohn v. Isensee, 45 Cal. App. 531, 188 Pac. 279. There the court was impelled to place upon the statute in question a construction which would harmonize it with the Constitution, and it did not clearly appear in that case that the Legislature intended to prescribe by the special statute all the rules which would govern. In the present case it does appear that it must have been the intention to make the section, which deals specifically with the subject of county bond elections (section 4088), a full and complete expression of the legislative will concerning the matter of notice.

Subdivision (f) of section 1142 requires publication only—not posting. So, also, section 4088 requires publication, and not posting, in all cases where there is a daily or a weekly newspaper published in the county. If publication were made pursuant to the terms of each of these two sections, there would be substantially a duplication of notice, notwithstanding the difference in the time or period of publication prescribed by the two sections respectively. We would be loath to lay at the door of the Legislature the absurdity of requiring such an unnecessary recurrence of duplicate notices. Section 1056 requires both posting and publishing. Section 4088 dispenses with posting in all cases where there is a newspaper published in the county. There is in this respect an inherent antagonism between the two sections. Cohn v. Isensee, supra, expressly recognizes that, where there is such antagonism between the general and the special law the latter operates exclusively upon the subject with which it deals.

[4] In calling the election, the board of supervisors ordered that the notice not only be published but that it be posted at each polling place at least 10 days before the election. Though the notice was published as ordered by the board and as prescribed by section 4088, it was not posted. Wherefore, notwithstanding section 4088 does not make posting a necessary prerequisite where there is a newspaper in which publication may be made, it is contended by respondent that the board's order had all of the effect of a statute, and that a strict compliance therewith was essential. Without doubt an order of the board which is made pursuant to the authorization of a statute has all of the sanction and effect of a direct statutory enactment (Murphy v. San Luis Obispo, 119 Cal. 624, 51 Pac. 1085, 39 L. R. A. 444; San Luis Obispo v. Fitzgerald, 126 Cal. 279, 58 Pac. 699; Inglewood v. Kew, 21 Cal. App. 611, 132 Pac. 780); but that is not this case. Here the notice was given in strict conformity with the specific requirements of section 4088 of the Political Code, and that, as we have seen, is the only notice which the statute demands. The board of supervisors is without power or authority to add to or take from the statutory requirement. The notice prescribed by the Legislature is jurisdictional, and the board of supervisors is powerless to add aught to the jurisdictional requirements which the Legislature has seen fit to provide. Hamilton v. Detroit, 83 Minn. 119, 85 N. W. 933; State v. Gordon, 217 Mo. 103, 116 S. W. 1099; State v. Ross, 160 Mo. App. 682, 143 S. W. 502; State v. Commissioners, 28 Wyo. 30, 200 Pac. 469. Respondent places much reliance upon Thrasher v. Kirksville (Mo. Sup.) 204 S. W. 804. That case is clearly distinguishable from this. There it was held, in effect, that the power of a city to make a contract, if the grant of power be silent as to the precise manner in which the power shall be exercised, carries with it the implied authority at the discretion of the body exercising it, to call for bids and to let the contract to the lowest and best bidder. In the instant case the statute, which is specific as to the kind of notice to be given, leaves no room for the discretionary exercise of any power beyond that specifically delegated by the statute.

The demurrer interposed by respondent to the petition is overruled, and it is ordered that the peremptory writ of mandate issue as prayed.

We concur: WORKS, J.; CRAIG, J.

(61 Cal. App. 470)

COURVIOSIER v. BURGER. (Civ. 2393.)

(District Court of Appeal, Third District, California. March 19, 1923.)

1. Negligence 🔑136(10)—Question for jury on conflicting evidence.

In a personal injury action, where the testimony of plaintiff and that of defendant differed as to how the accident occurred, the question was for the jury.

2. Appeal and error 🔑1002—Jury's finding on conflicting evidence conclusive on appeal.

The jury's finding on conflicting evidence is conclusive on appeal where the Supreme Court cannot say that the evidence on which the finding was based is unworthy of belief.

3. Municipal corporations 🔑705(1)—Automobile driver who failed to blow horn or stop machine on discovery of pedestrian crossing street held negligent.

An automobile driver who turned from one street into intersecting street crowded with traffic and pedestrians, and, with knowledge that a pedestrian was crossing such other street where pedestrians customarily did so, failed to blow his horn or stop machine to permit the pedestrian to safely cross, but zigzagged the machine and turned it toward and ran over her when she backed up to avoid the machine, was guilty of negligence.

4. Municipal corporations 🔑706(7)—Pedestrian crossing street at street intersection not contributorily negligent for failure to look up and down intersecting street.

Pedestrian who started to cross street at the place allotted to and ordinarily used by pedestrians, and who before leaving the sidewalk carefully looked up and down the street, but was struck by an automobile which had turned into the street from an intersecting street, *held* not contributorily negligent as a matter of law, though she did not look up and down the intersecting street.

5. Negligence 🔑72—One placed in sudden peril not held to strict accountability.

Under circumstances of sudden and terrifying peril produced by another, the injured person is not held to the same strict accountability as in positions more favorable for the exercise of deliberate and accurate judgment.

6. Pleading 🔑246(3)—Amendment of complaint when case was called for trial so as to correct typographical error held proper.

In action for injuries sustained when struck by an automobile at street intersection, in which the original complaint alleged that the plaintiff was walking from the northeast corner of certain streets to the "southeast corner," permitting plaintiff to amend complaint when the case was called for trial so as to make it read that plaintiff was walking to the "northwest corner" *held* proper.

7. Trial 🔑165—Refusal to excuse jury during motion for nonsuit held proper.

The court's refusal to excuse the jury while defendant moved for a nonsuit *held* proper.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Daisy Courviosier against Arthur I. Burger. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles Gilmore, of Sacramento, for appellant.

Ray T. Coughlin and Marco S. Zarick, both of Sacramento, for respondent.

BURNETT, J. The action was for damages caused by the alleged negligent operation of an automobile by defendant whereby plaintiff was run over and severely injured, and she was awarded a verdict of $3,000 by the trial jury. The appeal is from the judgment entered thereon in her favor. As to the circumstances of the accident, which occurred on Eighth street, Sacramento, plaintiff testified as follows:

> "I was prepared to go to work, and I was going to the post office, down K street, going towards the post office. I walked on a straight line from the sidewalk, about the center of K street. As I crossed Eighth street, until I reached about six or seven feet from K street, on Eighth, I heard a noise suddenly to my left; so I turned. I saw the car almost on me, so near I could not tell whether it was a car or truck, it was so close to me. Just as I swung back, Mr. Burger turned the car away from me immediately, and immediately back on me. He turned away and started back on me. My first temptation was—when I turned around, I sprung back, I bumped into a woman behind me; she would have been struck if I hadn't. As he turned away from me, he suddenly backed on me immediately and knocked me down, and the front wheel, right-hand, ran over both of my limbs. * * * It was coming direct for me, and I sprang back. As I sprung back the front wheel turned direct away from me, and direct back on me. * * * I sprang back as far as—until I struck somebody; seemed kind it swung away, started back, turned around, swung back on me, knocked me down, ran over me."

The record also shows the following questions and answers:

> "Q. When you stepped off, Mrs. Courviosier, to cross the street, did you look up and down the street both? A. I always do; yes; I did. Q. You looked up and down Eighth street? A. Yes; just as I said, then this car came around, almost ran around the policeman about from K street on Eighth street, so rapidly, right on the corner, what I heard was the noise closer. Q. You saw him round the policeman? A. No; I

did not; I was looking straight ahead; it was perfectly clear when I crossed over. Q. Did you look to the right and left? A. Not any distance, except in front of me. Q. You did not look to the right or left, but was looking straight ahead? A. I looked, except the distance, I know I was the distance before; I saw nothing coming either way. I could have crossed the street if it hadn't come so suddenly. * * * Q. Did the automobile continue on past the corner, or stop at the time it ran over you? A. He stopped; for the first time, he blew the horn; when he was over me he blew the horn for the first time."

Mrs. Carrie Tobin, who was crossing the street just behind plaintiff, testified:

> "I was walking—just walked off the sidewalk, right in front of the S. P. Building. Mrs. Courviosier was just a step or two ahead of me, and proceeded—the machine came up around, started to come around the intersection very quick. Mrs. Courviosier was hit. She was five or six feet from the sidewalk, a step or two ahead of me. The machine came up so quick, knocked her down, and went over her body. I did not hear the horn toot until it was on top of Mrs. Courviosier. * * * Q. Did you notice how the machine was operated; was there anything about that specially, either about the man or the way he managed the machine? A. Yes; the machine zigzagged a couple of times; he turned the machine; she stepped back; he turned it again, turned it right in front of her, and deliberately knocked her down."

It may be added that both of these witnesses testified to declarations in reference to the accident which they claim to have heard the defendant make.

According to plaintiff, the defendant, while at the hospital, "said he was so rattled he did not know what he was doing; he turned around, he was so rattled he did not know what he was doing; that is what he told me in the hospital."

Mrs. Tobin testified:

> "There were two gentlemen sitting in the corner of the Receiving Hospital there. I made the remark that the gentlemen did not blow his horn until he was on top of her. I did not know who Mr. Burger was. He stepped up; he said, 'I beg your pardon, lady, I did not toot my horn at all.' He made the statement in the hospital."

[1, 2] Although Mr. Burger was a witness at the trial, he made no denial of these statements; in fact, he was not interrogated concerning them. He did, however, as might be expected, give a different account of the accident. According to his version, the collision was entirely due to the negligent act of plaintiff in stepping backward in front of the truck. To the extent, though, that his story conflicted with that of plaintiff, it was a matter entirely for the determination of the jury, and, of course, the finding is binding upon us, since we cannot say that the testimony imputing negligence to defendant is unworthy of belief.

The main contention of appellant is that the evidence shows without conflict that plaintiff is chargeable with contributory negligence, and that the verdict would and should have been in favor of defendant if the jury had given due heed to the following instruction of the trial court:

> "If you believe from the evidence that at the time of the accident the defendant, Burger, was driving his motortruck in a careful and prudent manner, and if the jury further believes from the evidence that the defendant, Burger, saw the plaintiff in front of him, and that she was then walking to his left and out of the path of the automobile, and not in a line directly in front of said automobile, the said Burger had the right to assume that the plaintiff would continue on in the same direction in which she was then going and had the right to assume that she would not stop or hesitate or run backwards so as to be in front of the motortruck, and you are further instructed that, if you believe from the evidence that the plaintiff, Daisy C. Courviosier, did stop or hesitate or run backwards and so placed herself in front of the motortruck and in a position of danger, then she was guilty of contributory negligence as will defeat her right of action herein, and your verdict should be for the defendant."

In answer to this contention it is deemed proper to state that this hypothetical instruction was based upon the testimony of defendant, and it was proper for the court to so present defendant's theory of the case, but the jurors discredited his testimony and accepted that of plaintiff's witnesses. The question is, then, whether the testimony, which seems to have carried conviction to their minds, is legally sufficient to support the view that defendant was negligent, that such negligence was the proximate cause of the injury, and that plaintiff acted as an ordinarily prudent person would act under the circumstances. We think there can be no kind of doubt that these questions must be answered favorably to respondent.

There is no controversy as to the general statement of the duty of the driver of an automobile embodied in the following instructions of the trial court:

> "The driver of the automobile was under the legal duty to use reasonable care to avoid colliding with other vehicles or persons in the public highway. His duty was to be on the alert to observe persons who were in the street or about to cross the street and to use reasonable care to avoid colliding with them. He was under an obligation to take notice of the conditions existing in the public street and to propel his car in a manner suitable to those conditions. He was under a duty to observe the condition which existed at the crosswalk. The defendant should, as he approached the crosswalk, have kept a careful watch ahead to avoid injury to pedestrians using the crosswalk. The driver of the motor vehicle in this case, at the time and place in question, was required to maintain such control of his machine that on

the shortest notice he could stop it so as to prevent injury to pedestrians.

> "When one crossing a street at the proper place becomes confused and vacillates as to the course he or she shall pursue, reasonable care may require that the driver stop his automobile in order to avoid the collision."

[3] This duty of the driver in the present case is emphasized by the consideration that he was using a city street crowded with traffic and thronged with pedestrians. He had also just changed his course of travel from K to Eighth street, which involved a situation of increased peril to pedestrians crossing the latter street. Giving full credit, as we must, to plaintiff's testimony, we find defendant in this situation: He turned into Eighth street without giving any audible signal to call attention to the change in his course. He approached the crossing with the same omission, notwithstanding plaintiff was proceeding across the street in the accustomed place and unaware of his approach until the automobile was within a few feet of her. If he had been alert, he could have seen she was oblivious of the impending danger. Indeed, the evidence—his own testimony, in fact—justifies the inference that he did see the plaintiff, and that he knew her attention was not directed to the machine until it was within five or six feet of her. Under these circumstances, he was negligent, of course, in failing to sound the horn, and, moreover, common prudence and proper regard for human safety would direct him to stop his machine when he realized that the danger was so imminent. Besides, there is support for the theory that he was actively and aggressively negligent and even reckless in his management of the machine after he discovered the danger, or, as characterized by the witnesses, he became "rattled," "zigzagged" the truck, and seemed deliberately to pursue the plaintiff.

That the testimony which we have quoted shows a case of negligence on the part of defendant cannot be gainsaid, and, manifestly, that negligence contributed proximately to the accident. This latter proposition is not disputed, and, indeed, is so self-evident as not to admit of candid discussion.

[4, 5] The question remains whether plaintiff, according to her own story, was so incautious and imprudent as to preclude recovery. We are satisfied that the jury was entirely warranted in finding that she did all that the law or enlightened conscience required. A few of her statements appear somewhat uncertain and obscure, but this is not surprising, in view of her unfamiliarity with court proceedings and the stress and excitement of the occasion of the accident. A fair and just inference from her testimony is, however, that she was crossing the street in the place allotted to and ordinarily used by pedestrians; that before leaving the sidewalk she carefully looked up and down the street—that is, she looked south and north on Eighth street—and saw no vehicle approaching. This is all that she was required to do before proceeding on her way. It could not be claimed with any reason that she should have looked up and down K street in anticipation that a vehicle might turn from that street into Eighth street. If that duty were imposed upon a pedestrian, it is easy to see that he might be kept waiting during all the busy hours of the day. When she saw no one approaching she was entirely warranted in pursuing her journey, assuming that, if any one turned from K into Eighth before she crossed, he would give her timely warning of his approach. Manifestly, she could not go forward with safety if she were required to watch constantly for vehicles that might change their course at right angles. Nor does her testimony reveal any want of proper care after she became aware of the proximity of the machine of defendant. It appears that the movement she made was likely to promote her safety, and in all probability would have enabled her to avoid the machine had it not been for the eccentric action of the defendant. Besides, the rule is that under circumstances of such sudden and terrifying peril produced by another the injured person is not held to the same strict accountability as in positions more favorable for the exercise of deliberate and accurate judgment. Scott v. San Bernardino Valley, etc., Co., 152 Cal. 604, 93 Pac. 677. At any rate, it was for the jury to say whether she acted with due caution and circumspection

As before indicated, there is some sanction for the application of the doctrine of the "last clear chance" or wanton indifference, but it is deemed sufficient to base the decision upon the other ground.

The cases cited by appellant are not opposed to the conclusion we have reached.

In Cawley v. La Cross City Ry. Co., 101 Wis. 145, 77 N. W. 179, it was held that the failure of a person to look and listen and to see and hear an approaching car, if within plain view and hearing, is negligence per se. Therein the plaintiff was injured while attempting to cross a railroad track, and the court adhered to the well-established rule that in this class of cases, for reasons which need not be repeated, such duty is inflexible. It may be added that additionally the court held that there was no ground for charging the defendant with negligence at all.

In Moss v. H. R. Boynton Co., 44 Cal. App. 474, 186 Pac. 631, the plaintiff stepped from the sidewalk into the street without looking for the approach of vehicles. Therein it was said by the court:

> "Giving to plaintiff's evidence all the value to which it is legally entitled, and resolving every reasonable inference which may be drawn therefrom in favor of plaintiff, the inevitable

conclusion must be that plaintiff left his place of safety on the sidewalk and stepped directly into the path of the moving automobile."

That such conduct was negligence, and that of the grossest kind, on the part of the plaintiff, is, of course, incontrovertible.

No fault can be found with the doctrine announced in Sheldon v. James, 175 Cal. 474, 166 Pac. 8, 2 A. L. R. 1493, that it is the duty of a pedestrian "to look to the right and to the left whenever he has voluntarily put himself in a position which may be one of peril coming from either direction and in particular when he has received adequate warning of the likelihood of peril." In that case the plaintiff did not look, although he was warned by a "loud and raucous" noise from the machine which was backing toward him.

The case of Beeler v. Atchison, T. & S. F. Ry. Co., 107 Kan. 522, 192 Pac. 741, was decided upon the ground of the insufficiency of the evidence to show negligence on the part of the defendant, and in commenting upon that consideration the court very properly said that "it was not within the province of the jury to indulge in mere conjecture and speculation for the purpose of finding negligence," and the conclusion was reached that the verdict of the jury must have been based upon mere conjecture, since there was no substantial evidence of the want of proper care in the shipment of certain animals.

In Scott v. San Bernardino Valley, etc., Co., 152 Cal. 604, 93 Pac. 677, the judgment in favor of the plaintiff was affirmed, although there was a failure on the part of Scott to observe "the car standing at the corner ready to start at the time he started to make the turn." The opinion contains an interesting discussion of the correlative duties of the motorman and of the driver of the vehicle that was struck, concerning which there can be no difference of opinion. The case is, however, in point only to the extent that it involved the general principles of negligence.

Wheelahan v. Philadelphia Traction Co., 150 Pa. 187, 24 Atl. 688, was the case of a driver of a vehicle attempting to cross a street car track upon which a car was approaching, and it was properly held that the failure of the plaintiff to lean forward so as to prevent the hood on his wagon from obstructing or limiting his view was negligence preventing recovery.

Carson v. Federal Street & Pleasant Valley Railway Co., 147 Pa. 219, 23 Atl. 369, 15 L. R. A. 257, 30 Am. St. Rep. 727, also involved the crossing of a street car track and the application of the familiar rule requiring one to look and listen so as to avoid walking or driving directly in front of a moving car.

We may conclude the consideration of this branch of the case with a reference to the decision of the New York Court of Appeals in Baker v. Close, 204 N. Y. 92, 97 N. E. 501, 38 L. R. A. (N. S.) 487, wherein is pointed out the distinction between a case of this character and one involving a collision "at grade street crossing of a steam railroad." As to the latter it is said that the duty is inflexible for the wayfarer "to look both ways, to listen, and, if necessary, to stop," but—

> "it is different, however, as to the rights and duties of pedestrians and drivers in the use of crossings on our city streets. There, the right of passage is common to all, and both footmen and drivers are bound to exercise reasonable care for their own safety and the safety of others upon the street. The rigorous rule applicable to steam railroad crossings is necessarily relaxed, * * * and the footman is not required as matter of law to look both ways and listen; but only to exercise such reasonable care as the case requires, for he has the right to assume that a driver will also exercise due care and approach the crossing with his vehicle under proper control."

The recent case of Deputy v. Kimmel, 73 W. Va. 595, 80 S. E. 919, 51 L. R. A. (N. S.) 989, Ann. Cas. 1916E, 656, and the note thereto appended contain also interesting and pertinent suggestions upon the subject. We may quote from the syllabus the following:

> "A person lawfully in a public highway may rely upon the exercise of reasonable care by drivers of vehicles to avoid injury. Failure to anticipate omission of such care does not render him negligent. A pedestrian is not bound, as a matter of law, to be continuously looking or listening to ascertain if automobiles or other vehicles are approaching, under penalty that, if he fails to do so and is injured, his own negligence will defeat recovery of damages sustained."

We feel satisfied that under any just and reasonable rule or the sanction of any recognized authority it cannot be said that the verdict of the jury is unwarranted.

[6] When the case was called for trial, plaintiff asked and was granted permission to amend her complaint so as to correct a typographical error. The mistake was in the statement that she was walking from the northeast corner of Eighth and K streets, to the "southeast corner of Eighth and K streets," whereas, it should have been to the "northwest corner of Eighth and K streets."

Of course, appellant was not prejudiced by the action of the court. It would, indeed, have been strange if the trial judge had not permitted the amendment. If he had refused it, he would certainly be subject to censure. But he did what might be expected by those who understand the importance of the exercise of a wise discretion to see that causes are tried upon their merits.

[7] The other complaint of appellant is equally devoid of merit. It is disclosed by the following quotation from the record:

> "Mr. Coughlin: Plaintiff rests.
>
> "Mr. Gilmore: I would like to submit a matter before the court; if the court sees fit, may we excuse the jury.

"The Court: I don't believe it is necessary; just state your motion; I do not care to hear it argued."

Thereupon counsel for appellant moved for a nonsuit, which was denied. We know nothing in the law requiring the court to hear argument upon a motion for nonsuit or to order the motion to be made in the absence or without the hearing of the jury. It is a matter committed to the sound discretion of the trial judge, and we perceive no reason for doubting the propriety of the course that was pursued. No doubt, the trial judge was satisfied that the case was one for the jury, and that it would lead simply to a waste of time and effort to permit argument. We think that such conclusion was entirely justified. If it was thought by appellant that the jurors might be inclined to consider the circumstances as an indication of the judge's opinion in favor of plaintiff, and hence might be more readily induced to find a verdict for her, he should have requested an instruction to meet the situation.

After a consideration of the whole record, we are confident that the verdict should not be disturbed, and the judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

61 Cal. App. 459

GILBERT v. CIVIL SERVICE COMMISSION OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 4390.)

(District Court of Appeal, First District, Division 2, California. March 19, 1923. Hearing Denied by Supreme Court, May 17, 1923.)

1. Municipal corporations ⚷218(3)—Lack of work is good reason for dispensing with services of employee.

Lack of work is good reason for dispensing with the services of an employee.

2. Municipal corporations ⚷217(3)—Seasonal civil service employee after discharge has no better position than other unemployed eligibles.

A seasonal civil service employee, on being laid off, is no more an employee than before his first assignment, but is relegated to the position of an unemployed eligible; nor does his period of temporary service, succeeded by a revival of eligibility for another appointment, create a municipal position or invest the registrant with a permanent appointive eligibility comparable to a tenure of position in a permanent service.

3. Municipal corporations ⚷217(3)—Not necessary that civil service registrants remain continuously unemployed for more than two years before name may be stricken.

Under article 13, § 10, of the charter of the city and county of San Francisco, granting to civil service commissioners the discretionary power to strike any name from the list of eligibles after the lapse of two years from the time it was entered, it is not necessary for a name to have remained on the register continuously for two years before it may be stricken, but where a candidate has been given temporary employment and thereafter relegated again to the eligibles list, his name may be stricken, though a full two years have not elapsed after the close of his temporary employment.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

An action by William Gilbert, for a writ of mandamus to be directed to the Civil Service Commission of the City and County of San Francisco and others. From a judgment for defendants, plaintiff appeals. Affirmed.

James F. Tevlin, of San Francisco, and Wm. Gilbert, of Los Angeles, for appellant.

George Lull, City Atty., and Maurice T. Dooling, Jr., Asst. City Atty., both of San Francisco, for respondents.

NOURSE, J. This is an original proceeding in mandamus, instituted in the superior court to compel the defendants, constituting the civil service commission of the city and county of San Francisco, to restore petitioner's name to a place upon the register of candidates eligible to appointment to the position of ordinary clerk in the classified service of the city and county. A demurrer to the amended petition having been sustained, and the petitioner having failed to further amend, the court rendered judgment in favor of the defendants. From this judgment petitioner prosecutes this appeal.

From the petition it appears that, after an examination held for that purpose, the civil service commission prepared a register of candidates for appointment to the position of ordinary clerk, and that petitioner's name was placed upon said register on the 21st day of June, 1909; that at divers times between said date and the 2d day of August, 1921, the petitioner, after due certification therefor, held various temporary or seasonal positions as ordinary clerk under various civil departments and offices of the municipality; that on the 15th day of July, 1921, the civil service commission adopted a resolution wherein it was declared that the name of the petitioner was then and thereby removed from said register on the ground that said name had remained upon said register for more than two years; that at the time said resolution was adopted the petitioner was actually employed as an ordinary clerk in the office of the auditor of said city and county; that at no time between the said 21st day of June, 1909, to the 15th day of July, 1921, did petitioner's name remain upon said register without appointment or employment as an ordinary clerk under the city and county for a continuous period of two years.

The controversy involves an interpretation of the powers of the civil service commission as defined in section 10 of article 13 of the charter, and which reads in part as follows:

> "The commissioners may strike off the names of candidates from the register after they have remained thereon more than two years."

The position of the appellant is that—

> "An ordinary clerk, while in employment as such, is not a candidate and his name is not upon the register, and that never between June 21, 1909, the date of his original registration, and July 15, 1921, the date of the resolution complained of, was the appellant a candidate, or was his name on the register, for a period of more than two years; secondly, that, in that he was an employee in the civil service at the time the resolution was passed, he could be removed only for cause, upon written charges, and opportunity afforded him to be heard in his defense, and, as no charges were made against him, the resolution complained of was void on this ground, as well as on the ground first above stated."

Respondents answer that appellant's name was continuously upon the eligible list from 1909 until it was stricken off in 1921; that, when an ordinary clerk is given a temporary or seasonal appointment, his name is not taken from the register but a notation of the appointment is made and the "eligibility" of the person is still retained for other or future certification and appointment. As to the second point, respondents answer that the resolution of July 15, 1921, did not affect appellant's tenure of the position that he was filling, but merely rendered him ineligible for further appointment.

At the conclusion of the hearing in the trial court the learned trial judge rendered an opinion, giving his reasons for denying the writ, which we approve and from which we quote:

> "Pursuant to a rule in force since June, 1909, seasonal service in any one or more of the departments for not less than six months entitled the registrant to preference in the matter of temporary clerkships. * * * In other words, the contention of the plaintiff is that service of six months in seasonal clerical positions places the registrant in the category of a civil service employee, having an established position as a permanent seasonal clerk subject to call. On this theory classification as a preferred seasonal clerk is declared to confer a permanency of clerical tenure with employment merely suspended during seasons of idleness. No matter how often the registrant may be laid off for lack of work, it is urged that he retains a permanent status as one qualified to render seasonal service, and through such status becomes vested with a right to the opportunity of employment which abides with him indefinitely.
>
> [1] "The vice of this argument is that it treats one discharged from employment as still holding the equivalent of a permanent position in the city government. It is well settled that lack of work is good reason for dispensing with the service of an employee. Dunne v. New York, 116 App. Div. 331, 101 N. Y. Supp. 678; Eckerson v. New York, 80 App. Div. 12, 80 N. Y. Supp. 168, 170; State v. City of Seattle, 116 Wash. 326, 199 Pac. 449. And the reduction of the force of employees has the effect of abolishing a corresponding number of positions. O'Neill v. Williams, 53 Cal. App. 1, 199 Pac. 870; People v. Delaney (Sup.) 190 N. Y. Supp. 29; Randolph v. Smith, 92 Misc. Rep. 291, 155 N. Y. Supp. 991; Petty v. Kracke (Sup.) 154 N. Y. Supp. 294. Adopting this principle in Rodrigue v. Rogers, 4 Cal. App. 257, 263, 87 Pac. 563, 565, which dealt with the case of an extra clerk whose period of seasonal service had ended, the court said: 'He was employed for a limited term, and upon the expiration of the term of his employment he ceased to hold office or to be an employee of the municipality.'
>
> [2] "Hence, when a seasonal clerk is laid off, he is no more an employee than he was before his first assignment, but is relegated to the position of an unemployed eligible. An appointment to a seasonal position does not cause the removal of the appointee's name from the list of eligibles. The name keeps its place, and, on the termination of the employment the registrant falls back into the group of eligibles, and may receive later a new appointment. But he has no greater right to permanent retention of his name on the general list than any other registrant whose name was placed on the list at the same time as his, but who, bcause of lower rank, has gone the entire period of two years without receiving any appointment at all.
>
> "There is no authority for holding that temporary service for six months, succeeded by a revival of eligibility for another appointment, creates a municipal position or invests the registrant with a permanent tenure of reappointive eligibility comparable to the tenure of position by a clerk in permanent service. The promulgation of an eligible list does not create an absolute right for an indefinite period. The life of the list is governed by the provisions of the law; and every person gaining a place on the list is charged with notice that his opportunity for employment is limited by the legal duration of the list itself. When the list is abolished, the quality of eligibility is lost, and can be regained only through the successful test of a new examination.
>
> [3] "But an argument in favor of the creation and maintenance of a special list in behalf of preferred seasonal clerks is hung upon the use of the word 'candidates' in section 10 of article 13, where the commissioners are authorized to 'strike off names of candidates from the register after they have remained thereon more than two years.' It is argued that, while a clerk is filling a seasonal position, his name no longer appears on the register as that of a candidate, and that he becomes again a candidate only when laid off. Hence, it is urged that the power of the commission to expunge names applies only in respect of those registrants who

have been on the list as continuously unemployed candidates for more than two years awaiting opportunity for employment.

"We must look to the spirit and purpose of the law to determine its meaning. And yet, even if we were held to the strict letter of the law, the clause would hardly be open to the construction suggested. The language of the statute does not imply that the names must remain for over two years as the names of candidates waiting continuously for employment. When applicants take their examinations, they 'take rank upon the register as candidates in the order of their relative excellence'; and this place they hold as long as their names are on the list. So far as their designation for purposes of the register is concerned, they may well be classed as candidates whether they are holding positions or not and it is in this sense that the term is used in the passage above quoted.

"And as I interpret the decisions rendered in Mann v. Tracy, 185 Cal. 272, 196 Pac. 484, and Uhte v. Rosenthal, 37 Cal. App. 519, 174 Pac. 83, it is within the discretion of the commissioners to strike any name from the list of elegibles after the lapse of two years from the time when the name was first entered as that of a candidate elegible for an appointment.

"In the Gilbert Case it is set forth that Gilbert's name was stricken from the register on July 15, 1921, though at that time and thereafter until August 2, 1921, he was doing temporary work in the auditor's office. It is unnecessary to consider whether or not the commissioners' action concerning him was premature. A proceeding such as this is concerned with the protection of an actual subsisting right. It is not to be invoked in support of an abstract right that once existed but no longer endures. There is nothing in the petition of * * * plaintiff showing any present right to the writ."

For the reasons given, the judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J

---

61 Cal. App. 310

ELLIOTT & HORNE CO. v. CHAMBERS LAND CO. (Civ. 4087.)

(District Court of Appeal, Second District, Division 1, California. March 9, 1923. Hearing Denied by Supreme Court May 7, 1923.)

1. Limitation of actions 🔑104½—Limitation does not run where right to sue is prevented by act of debtor or paramount authority.

Where the right to bring an action is prevented by the act of the debtor or by paramount authority, the period embraced within such restraint is to be excluded from any period of limitation affecting the right to sue as made by statute.

2. Municipal corporations 🔑530—Payment of assessment may be enforced so long as assessment lien continues.

The time within which payment of a street assessment may be enforced is the same as the duration of the lien to secure the payment of the assessment.

3. Limitation of actions 🔑111—Time during which statutory assessment lien must be foreclosed is suspended during injunctive relief granted to owner attacking assessment procedure.

The running of Henning's General Laws 1920, § 9, requiring foreclosure of assessment lien within two years after recording of assessment, is suspended, as respects the holder of a warrant acquired in street assessment proceedings under the Vrooman Act, during the period of injunctive relief granted to the owner of the property assessed, in a suit by him attacking the assessment proceedings.

4. Municipal corporations 🔑530—Holder of warrant for assessment over $25 on which no bond issues may enforce it as if assessment was below $25.

Bond Act of 1893 (Deering's Gen. Laws 1915, Act 3932), providing for the issuance of bonds where assessments exceed $25 except where the owner requests that no bond issue, and how such assessments may be collected by the warrant holder, and the Vrooman Act, providing that an assessment lien continues in force for two years from the recording of the warrant, assessment, and diagram, when read together contemplate that at any time before the issuance of the bond property owners, assessed in excess of $25, may give notice and prevent the issuance of the bond, in which event the assessment is to be considered as though it had been of an amount less than $25, and the warrant holder would become possessed of the same rights as to means of collection as he had with respect to assessments which originally fell below $25.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Suit by the Elliott & Horne Company against the Chambers Land Company. Judgment for defendant, and plaintiff appeals. Reversed, with direction.

Arthur M. Ellis, of Los Angeles, for appellant.

W. W. Hyams, of Los Angeles, for respondent.

JAMES, J. Plaintiff appeals from a judgment denying any relief in its suit to foreclose certain liens alleged to have been acquired through street assessment proceedings taken under the Vrooman Act (St. 1885, p. 147). Several assessments, covering different parcels of land owned by the defendant corporation, were alleged to have been made, each of which involved an amount in excess of $25. The trial court sustained a demurrer to the complaint upon the sole ground, as appears from the argument of counsel, that the suit had not been commenced within two years after the recording of the assessment diagram and warrant. Henning's General Laws 1920, § 9. The assessment proceedings provided for the issuance of bonds on assessments exceeding $25 agreeable to the provisions of the bond act of 1893 (Deering's General Laws 1915, p. 1761, Act 3932). The Vrooman Act provides that, from the date of the recording of the warrant, assessment, and diagram, a lien against the property assessed arises and continues in force for a period of two years. Where bonds are to be issued under the bond act, the latter provides, first, that "in case the amount of the unpaid assessment or reassessment upon any lot or parcel of land shall be less than $25, then the same shall be collected as is provided in said Street Work Act." For amounts in excess of $25 it is provided that, after the lapse of 35 days, bonds shall be issued, the principal and interest of which shall be payable in installments covering a term of years (in this case six). It is then provided that, in case of a bondable assessment, if the owner shall, before the bond is issued, make affidavit of his ownership and furnish certificate of title in proof thereof, and request that no bond issue, then no such bond shall issue, and that the holder of the warrant or his assigns "shall retain his right for enforcing collection of said assessment or reassessment as if said lot or parcel of land had not been so listed by the street superintendent." The list last referred to is the list required to be made by the street superintendent and delivered to the treasurer, of assessments amounting to more than $25.

The assessment, warrant, and diagram, as they affected the property of the defendant, were recorded in the office of the street superintendent of the municipality of Manhattan Beach on the 24th day of January, 1917. On the 30th day thereafter, to wit, February 23, 1917, the defendant brought an action against the city of Manhattan Beach and other interested defendants, the purpose of the suit being to have declared void all of the proceedings upon which the assessment was based. On the same day the superior court issued a restraining order to prevent the city treasurer of Manhattan Beach from issuing the bonds, and this injunctive restraint was continued in force until May 8, 1918. On May 1, 1918, the defendant filed with the city treasurer its notice requiring that no bonds be issued on the assessment and supplied the necessary affidavit and certificate of title. This action was commenced by the filing of the original complaint on February 6, 1920. By comparison of dates it will be seen that a little over three years had elapsed at the time the suit was commenced from the date of the filing of the warrant, assessment, and diagram in the street superintendent's office. The suit was commenced within two years after the recording of said warrant, if we exclude that period of time from February 23, 1917, to May 8, 1918, during which time the collection of the assessment was restrained by the injunction which prevented any bonds from issuing. The Vrooman Act provides that, as to the collection of assessments, the right to collect by suit shall exist for the duration of the lien which is imposed upon the property as security for the payment of the amount assessed. Vrooman Act, § 12.

[1-3] Very little argument is made here on behalf of respondent against the proposition that, where the right to bring an action is prevented by the act of the debtor or by paramount authority, the period embraced within such restraint is to be excluded from any period of limitation affecting the right to sue as made by statute. The authorities are ample and full in affirmance of that rule. 17 R. C. L. p. 872, par. 229; Steele v. Bliss et al., 166 Mich. 593, 132 N. W. 345, 37 L. R. A. (N. S.) 859, Ann. Cas. 1912D, 1020. In the latter case it is said that it appears as a "fundamental principle recognized by all the authorities which hold that the running of a statute of limitations is interrupted by an injunction." City of Hutchinson v. Hutchinson et al., 92 Kan. 518, 141 Pac. 589, 52 L. R. A. (N. S.) 1165. It is contended, however, that a statutory lien is bound by fixed and inflexible limits, and cannot be extended unless, perhaps, by a change in the statute itself. The statute of limitations is a thing having equally definite points of beginning and ending. In the case of the street assessments under consideration, the law gives the same duration to the right to enforce payment of the tax as has the lien to secure the same. We have express authority in this state that a lien given by statute may be extended in duration where the act of the debtor prevents the creditor from foreclosing upon the same. In Dewey v. Latson et al., 6 Cal. 131, the court held that a judgment lien, which, under the terms of the statute, was given life for two years from the date of the docketing of the judgment, was extended beyond the period of two years where the judgment creditor was prevented from having execution by reason of an appeal taken. The court there said:

> "The obvious intention was to charge the estate of the judgment debtor, and to give the creditor two years to make his money. The statute intended that this time should run from date of the judgment, or period at which the plaintiff was in a situation to take out execution, and pursue his remedy to final satisfaction. By the defendant's own act, the force of that judgment has been suspended, and the lien, which is merely an incident, must share a like fate."

The above case was referred to in subsequent decisions, sometimes criticized, but never overruled. The reasoning of it is consistent with that adopted by the courts in the decisions referred to the tolling of the time fixed by statutes of limitation. It would be unjust to so construe the law as to allow a property owner to deprive the warrant holder of his right to a lien as security for the payment of a valid assessment, by invoking injunctive authority of the courts in an attack upon the validity of the assessment proceeding. If the property owner were successful in having the injunctive restraint continued until two years had elapsed from the recording of the warrant, the lien would be utterly destroyed and the property might pass into the hands of other owners free from assessment charges. Such a result is certainly not contemplated by the law and may not be countenanced by a court of justice if, upon logical reasons, a different conclusion can be arrived at.

[4] The two statutes read together contemplate that, at any time before the issuance of the bond, property owners who are assessed in excess of $25 will, if they so desire, give their notice and prevent the issuance of the bond; in that event the assessment is to be considered as though it had been of an amount less than $25 and the warrant holder would become possessed of the same rights as to means of collection as he had with respect to assessments which originally fell below the amount of $25.

Our conclusion is that plaintiff's suit was in time; that the demurrer to its complaint was improperly sustained.

The judgment is reversed, with direction to the trial court to overrule demurrer of the defendant as interposed to the amended complaint of the plaintiff, and to allow said defendant to file an answer, if it so desire.

We concur: CONREY, P. J.; HOUSER, J.

---

61 Cal. App. 481

In re CRUTCHER. (Civ. 3784.)

(District Court of Appeal, Second District, Division 2, California. March 20, 1923.)

1. Adoption 🔑1—Unknown at common law; strict compliance with statute necessary.

The proceeding to adopt a child was unknown to common law, and to give the court jurisdiction a strict compliance with the statute is necessary.

2. Statutes 🔑239—Rule requiring strict compliance with statute novel, so far as the common law is concerned, does not compel strained or technical interpretation.

The rule which requires strict compliance with all conditions of a statute, novel in so far as the common law is concerned, does not compel a court to cripple the free functioning of a legislative plan, however new, by applying a strained or technical interpretation of a statute, and no more than a liberal interpretation, with a view to effect the objects of the statute and promote justice, is required (Civ. Code, § 4).

3. Adoption 🔑7—Orphan child may be adopted with approval of court without consent of manager of orphan asylum.

Under Civ. Code, § 224, providing "a legitimate child cannot be adopted without the consent of its parents, if living, * * *" an orphan child not maintained in orphan asylum may be adopted with the consent of the court without the consent of the manager of an orphan asylum, as is required in the cases of abandoned children which have been maintained at such asylum.

Appeal from Superior Court, Los Angeles County; Bertin A. Weyl, Judge.

In the matter of Lewis Pinkerton Crutcher, Jr., a person under the age of 21 years. From an order denying a petition of Lewis Pinkerton Crutcher, Sr., that Lewis Pinkerton Crutcher, Jr., be declared a ward of the juvenile court, petitioner appeals. Affirmed.

Douglas L. Edmonds, of Los Angeles, for appellant.

Tanner, Odell & Taft, of Los Angeles, for respondents.

CRAIG, J. This is an appeal from an order of the juvenile department of the superior court of Los Angeles county, denying the petition of appellant for an order declaring Lewis Pinkerton Crutcher, Jr., a ward of the juvenile court. Petitioner is the uncle of the minor, and the respondents James D. and Kate L. Campbell are the parents of the child by adoption, under a decree of the superior court entered on the 26th day of June, 1914, upon which date the natural father and mother were both deceased. The mother died when Lewis Pinkerton Crutcher, Jr., was an infant, and the father's death occurred on the 3d day of June, 1914, up to which date the child had been cared for by the respondents. In enumerating those who are subject to the jurisdiction of the juvenile court, subdivision 2 of section 1 of the Juvenile Court Law (St. 1915, p. 1225) includes:

> "Those who have no parent or guardian; or who have no parent or guardian willing to exercise or capable of exercising proper parental control; or who have no parent or guardian actually exercising such proper parental control and who is in need of such control."

Therefore this infant is one who may be regarded as a proper subject for juvenile court guardianship unless the existence of some other fact or condition prevents it.

The petitioner contends that the decree of adoption is void. If so, this proceeding falls within the jurisdiction of the juvenile court, as the child would then have no parent or guardian. But respondent invokes the doctrine of res adjudicata, based upon the entry of the decree of adoption and the following additional facts: On the 2d of July, 1914, Lewis Pinkerton Crutcher, Sr., the child's uncle and petitioner here, made a motion to vacate and annul the decree of adoption. This motion was later amended. Thereafter, on the 5th day of August, 1914, it was denied. A second motion to vacate the adoption was filed by Lewis Pinkerton Crutcher, Sr., which was also on August 20, 1920, denied No appeal was ever taken from either of these orders.

On the 1st day of December, 1914, Lewis Pinkerton Crutcher, Sr., filed a petition in the juvenile court, which, after alleging, among other matters, the fact that James D. Campbell and Kate L. Campbell claimed the right to the care and custody of the infant under the adoption proceeding above mentioned, and that the natural parents were deceased, prayed that the child be adjudged a ward of the juvenile court. This petition was, on January 6, 1915, denied and the proceeding dismissed, and no appeal was taken from said judgment and order.

However, the question of res adjudicata is of little importance in determining this appeal, for we do not understand respondent to seriously contend that it is applicable if the decree of adoption is held void upon its face, and appellant insists that it is utterly void in that he asserts that there is no provision in the law of this state for the adoption of a minor orphan child except one who has been maintained in an orphan asylum or charitable institution. This question is therefore squarely presented for our decision.

[1] It is true that the proceeding to adopt a child was unknown to the common law. To give the court jurisdiction in such a matter, compliance with all conditions required by the statute is necessary. This is decided in the Matter of Cozza, 163 Cal. 514, 126 Pac. 161, Ann. Cas. 1914A, 214. But section 221 of our Civil Code states that—

> "Any minor child may be adopted by any adult person, in the cases and subject to the rules prescribed in this chapter."

By section 224 of the Civil Code the consent of the parents is required as a condition essential to a valid adoption in certain cases, and expressly made unnecessary in others, by the following provisions:

> "A legitimate child cannot be adopted without the consent of its parents, if living; nor an illegitimate child without the consent of its mother, if living; except that consent is not necessary from a father or mother (1) deprived of civil rights or (2) adjudged guilty of (a) adultery or cruelty, and (b) for either cause divorce, or (3) adjudged to be habitually intemperate in the use of intoxicants, or who, (4) has been judicially deprived of the custody of the child on account of (a) cruelty or (b) neglect; (abandoned child) neither is the consent of any one necessary in the case of an abandoned child; provided, however, that any such child, being a half orphan, and kept and maintained in any orphan asylum in this state for more than two years, may be adopted with the consent of the managers of such orphans' home without the consent of the parent unless such parent has paid toward the expenses of maintenance of such half orphan at least a reasonable sum during the said time, if able to do so. (Deserted child.) Any child (1) deserted by both parents, or (2) left in the care and custody of another by its parent or parents (a) without any agreement or provision for its support, (b) for a period of one year, is deemed to be an abandoned child within the meaning of this section, and where the parent is a nonresident of this state such child may without the consent of either parent be adopted with the consent of the managers of such home whenever it has been left in such home for more than one year."

Surely, to hold that consent is necessary to the adoption of a legitimate child whose parents are not living, except in the instances specified in the Code section, would be adding a requirement not contained in it.

Except by inference, section 224 of the Civil Code concerns itself with the regulation of the adoption of the child who, being legitimate, has one or both of its parents in esse, or being illegitimate has its mother living. In such cases consent is made necessary in some instances and dispensed with in others. As far as its express provisions are concerned, one parent must be living in order that the section shall have any application. But by necessary implication section 224 of the Civil Code includes and provides for legitimate children whose parents are deceased. Can it be doubted that, by the phraseology of the first clause, "a legitimate child cannot be adopted without the consent of the parent, if living," it was the legislative intent to provide that no parental consent is necessary in the adoption of a legitimate child whose parents are not living? It was probably regarded as superfluous to expressly and solemnly decree that, when the parents are dead their consent to the adoption of their offspring may be dispensed with. If we give due regard to the subject-matter of this legislation, it is apparent that, by the provision last quoted, the Legislature has said in effect "a legitimate child cannot be adopted without the consent of the parents, except that where the parents are not living such consent is unnecessary." Logic compels the conclusion that, by adding the words "if living" to the inhibition contained in the preceding part of the sentence, it was not intended to exclude legitimate orphans from adoption, but rather to indicate that the bar to adoption without consent should have no application in cases where the parents are not living.

It is said that, because the institution of adoption was not found in the common law, nothing can be supplied by inference. To apply this rule strictly would eliminate the entire provision in question. It is only by way of implication that the section allows a legitimate child to be adopted, even with the consent of its parents. The language does not expressly state this may be done, and yet no one has questioned that the right is impliedly created by the statement that such adoption cannot occur without the parent's consent.

Appellant quotes the Supreme Court in Ex parte Chambers, 80 Cal. 216, 22 Pac. 138, as saying "the power to adopt minor children is a creation of the statute which was unknown to the common law, and the mode must be held to be the measure of the power." The same court in In re Johnson, 98 Cal. 531, 541, 33 Pac. 460, loc. cit. 463, 21 L. R. A. 380, referring to this quotation from Ex parte Chambers, said:

> "The court simply meant by this expression that the statute having made the consent of certain parties necessary, there could be no valid adoption without such consent."

[2] The opinion in the Johnson proceeding also holds that the law regulating adoption—

> "is to receive a sensible construction, and its intent is to be ascertained not from the literal meaning of any particular word or single section, but from a construction of the entire scope, spirit and purpose of the statute."

And the rule which requires compliance with all conditions of an enactment, novel in so far as the common law is concerned, does not compel a court to cripple the free functioning of a legislative plan, however new, by applying a strained or technical interpretation. No more strict or different rule of construction can be required in such cases than is established for the construction of a provision of the Code in derogation of the common law, namely, a liberal interpretation with a view to effect its objects and promote justice. Section 4, Civ. Code.

If we are allowed to infer that the negative provision that "a legitimate child cannot be adopted without the consent of the parents if living," means that a legitimate child may be adopted with the consent of such parents, although the section does not expressly so state, it is equally permissible to recognize and give effect to the intent, clearly implied, that if the parents are not living, except in those cases otherwise classified in section 224, the adoption may proceed without parental or other consent, except that of the judge of the superior court. It is pertinent to observe here that the adoption of infants by proper adults willing to confer a home, parental care, and the right of inheritance upon an orphan in need of these advantages is a beneficent provision of the law and one obviously in the interest of public good (Estate of McKeag, 141 Cal. 403, 74 Pac. 1039, 99 Am. St. Rep. 80), and further, that the law has fully secured the infant, whose parents are deceased, against such tragedies as those suggested by petitioner, for example, a nurse having possession of a child for a few days fraudulently conniving with some one who might adopt him without the knowledge of his parents. Section 226 of the Civil Code makes the approval of the judge of the superior court essential to an adoption. It is not strange that this important responsibility should have been committed to such an officer, nor can we consider this safeguard inadequate for the protection of infants against improper adoption, for the common law has always reposed confidence and trust in the hands of judicial officers as in those of no other class of citizens. It may be further suggested that, as against such a fraudulent adoption as that supposed, if a superior court judge should be so imposed upon as to permit it, our law affords ample remedy by appropriate proceedings.

[3] The intent of the legislative mind which enacted this law may be substantially aided by noting the mode of expression employed in other provisions contained in it. Indeed, we need not look beyond this particular section of the Code for a striking illustration of a similar provision, whose wording necessitates an interpretation through the same mode of reasoning which we are confident should be applied to the provision being construed in the instant case. We have here another example of enactment by inferential expression. In dealing with the subject of abandoned half orphan children, section 224 above quoted contains this language:

> "Provided, however, that any such child, being a half orphan, and kept and maintained in any orphan asylum in this state for more than two years, may be adopted, with the consent of the manager of such orphans' home, without the consent of the parent unless such parent has paid toward the expenses of maintenance of such half orphan at least a reasonable sum during the said time, if able to do so."

By the use of the closing qualification, "if able to do so," it is inferentially provided that, if the parent is unable to pay for any part of the support of "such half orphan," even if kept and maintained in an orphan asylum for more than two years, and although the parent has in fact paid nothing to the asylum, the infant cannot be adopted without the parent's consent, and the consent of the manager of the asylum is insufficient and ineffectual to confer jurisdiction upon the court to permit an adoption.

It seems clear that the provision requiring the parent's consent as an essential condition to adoption contains an exception, excluding the necessity for such consent unless the parents are living. Ex parte Chambers, cited by petitioner, involved the construction of another part of the law concerning adoption. The court in that case held that the act of

1878, enacted to authorize managers of orphan asylums to give their consent to the adoption of certain children under their care, provides for the adoption of a distinct class of minors, to wit, abandoned and orphan children in orphan asylums. The infant in whose behalf a writ of habeas corpus was granted had been in the custody of the Protestant Orphan Asylum for more than one year and it was held that the child was therefore within the class established by the act of 1878.

Nothing more is involved in the instant proceeding than a construction of the language of sections 221 and 224 of the Civil Code, and we are convinced that, through their provisions, jurisdiction existed in the court which entered the decree of adoption of Lewis Pinkerton Crutcher, Jr., on June 26, 1914; hence, the juvenile court properly denied the petition for an order declaring him its ward.

The order is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

(61 Cal. App. 528)

CREDIT CLEARANCE BUREAU v. GUARANTY LOAN CO. (Civ. 4413.)

(District Court of Appeal, First District, Division 2, California. March 28, 1923. Hearing Denied by Supreme Court May 24, 1923.)

Appeal and error ⚷882(11) — Absence of proof of freedom from fraud in contract between attorney and client does not preclude recovery where such evidence stricken on defendant's motion.

In an action by an assignee to recover for attorney's services rendered defendant by plaintiff's assignor, where plaintiff has sought to introduce evidence showing that the alleged contract was free from fraud or undue influence, which evidence has been stricken on motion of defendant, who admitted the contract, but denied only the amount agreed upon, *held* that such defendant after an adverse judgment could not invoke the rule requiring proof that the attorney's contract with his client was free from fraud and undue influence.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by the Credit Clearance Bureau against Guaranty Loan Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Edwin H. Williams, of San Leandro, for appellant.

Edward J. Lynch, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover as assignee, on a claim for legal services rendered by the plaintiff's assignor. The plaintiff pleaded its cause of action in two counts, in the first count an agreed value of $1,000, and in the second count a reasonable value of $1,000. On the trial of the case Fabius T. Finch, plaintiff's assignor, was called to the stand as the plaintiff's first witness. He stated in detail the circumstances of his employment and the services which he rendered to the defendant. From his testimony it appeared that he was employed by J. W. Treadwell orally at a time when Mr. Treadwell was the president, a director, and general manager of the defendant corporation. The services rendered consisted of the advice given and also services performed in maintaining an action to establish the title of the defendant to the Hotel Wilson, which is located at Mason and Eddy streets in San Francisco. After the case had been finally terminated Mr. Finch and Mr. Treadwell agreed upon the amount of the fee, and set the figure at $1,000. The witness further gave testimony of and concerning the reasonable value of the services which he had rendered. While the witness was testifying the attorney for the defendant moved to strike out the evidence as to reasonable value, but the motion was denied. When the direct examination of the witness had been finished, and just before the cross-examination commenced, the following proceedings were had:

"Mr. Williams: I want to make a motion to strike out all of the testimony of the witness in relation to the reasonable value of the alleged services, and I base my motion on the ground of the witness' own testimony given here at this time shows that he made an express contract with the Guaranty Loan Company through its duly authorized officer, for the payment to him of $1,000, and further I want to make this statement in open court, as attorney for the Guaranty Loan Company, that at the time that alleged contract was entered into Mr. Finch had already arranged with the corporation, but it was for the payment of $250, not for $1,000.

"The Court: That is the only issue in the case?

"Mr. Williams: That is the only issue in the case.

"The Court: You concede that an agreement was entered into between the company and Mr. Finch, and the only issue in the case is as to the amount?

"Mr. Williams: The amount of the agreement that was entered into.

"The Court: Under that statement of fact I will grant the motion to strike out."

The appellant now contends that, in an action by an attorney against his client on a contract made during the existence of the employment, the burden of proof is upon the attorney to show that the contract so made is free from fraud or undue influence, and that this case falls within that rule. The respondent replies that he did assume the burden of proof and did introduce evidence showing that the alleged contract was based on a sufficient consideration, and that the defendant corporation and its officers were free from undue influence, but that the appellant caused the trial court to strike out the testimony, and that the appellant may not now complain of the ruling made by the trial court. That reply is quite sufficient.

After the proceedings had in the trial court, which we have set forth in hæc verba, the appellant argued in the trial court, and now argues, that it made no stipulation or admission in the trial court which limited its right to attack the making of the contract between the appellant and Mr. Finch. The argument is wholly unsupported by the record. The language shows that Mr. Williams' statement in the trial court was to the effect that an express contract had been made, and that the express contract was for $250, and not for $1,000. The trial court did not misunderstand nor misinterpret the language used by the attorney appearing for the defendant during the trial.

The appellant complains of certain rulings made by the trial court regarding the admission of certain testimony. No one of the rulings was erroneous. As the trial proceeded both parties delineated to the trial court their respective theories. The trial court accepted the statements so made to it in open court and acted thereon.

We find no error in the record.

The judgment is affirmed.

We concur: LANGDON, P. J; NOURSE, J.

---

61 Cal. App. 518

DE BAKCSY v. STRAIN. (Civ. 3792.)

(District Court of Appeal, Second District, Division 2, California. March 26, 1923. Hearing Denied by Supreme Court May 24, 1923.)

1. Sales 🔑181(11)—Finding that seller had failed to deliver grapes as per contract held not sustained by evidence.

In an action to recover the initial payment on a contract to purchase grapes after alleged default of the vendor in making delivery, findings that plaintiff had never received the grapes nor bill of lading for them, and that defendant refused and was unable to deliver, *held* not supported by the evidence where according to the contract delivery could have been made to plaintiff's agent at another place, and there was no showing that such a delivery had not in fact been made.

2. Sales 🔑82(3)—Contracts for sale of grapes held to intend concurrent delivery by seller and payment by purchaser.

Two contracts, each for the sale of a carload of grapes, and reciting receipt of an initial payment of $200, and providing that bill of lading shall be surrendered "on payment for car," and that the balance of the purchase price "shall be payable on surrender of B/L by" vendor, *held* to intend that the seller should offer the bill of lading to the buyer, and thereupon be entitled to receive the balance of the purchase price; that is, the parties were to perform their respective parts concurrently.

3. Sales 🔑392—Tender by purchaser after lapse of time within which seller could perform unnecessary.

In an action to recover money paid under a contract for the purchase of grapes after failure of the vendor to deliver, where it is established that the time within which the vendor could comply with the contract is past, a tender by the vendee before bringing suit becomes unnecessary.

4. Sales 🔑391(1) — After abandonment by seller purchaser may also abandon and sue to recover money paid in action for money had and received.

Upon a breach of an executory contract of purchase by the vendor, the vendee may treat the vendor's breach as an abandonment and may abandon himself and sue to recover what he has paid in an action for money had and received.

5. Sales 🔑128—No formal rescission necessary by buyer after failure of consideration of executory contract or where seller becomes unable to perform.

Where there is a total failure of consideration for an executory contract of purchase, and the vendee has received nothing of value, and the vendor has become unable to perform, no formal rescission is necessary, and the vendee, by instituting an action to recover the consideration paid, in effect rescinds the contract, as he has a right to do under Civ. Code, § 1689, subd. 4.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Action by Cornelius De Bakcsy, doing business under the name Hungarian Grape & Fruit Company, against Thomas Strain, Jr., doing business under the name National Fruit Exchange. Judgment for plaintiff, and defendant appeals. Reversed.

Prescott & Prescott and Frank G. Falloon, all of Los Angeles, for appellant.

Harold E. Thomas, of Los Angeles, for respondent.

CRAIG, J. This is an appeal from a judgment rendered against the defendant. The parties entered into two written contracts for the sale to plaintiff by defendant of muscat grapes. At the time of the execution of each contract plaintiff paid defendant $200 as part of the purchase price. Upon the trial these facts were shown. No evidence was offered for the defense. The action is for money had and received, and the findings are of the facts customarily found in such actions where judgment is for the plaintiff.

Appellant contends, as he did upon the trial, that the evidence does not sustain the findings, and that the facts proved fail to make a prima facie case against him. The contracts are identical in form. Those portions of them which are relevant here are as follows:

"This agreement, made and entered into this 8th day of July, 1920, by and between National Fruit Exchange of Los Angeles, Cal., the party of the first part, and Hungarian Grape & Fruit Company, party of the second part, witnesseth: That the said party of the first part agrees to sell and deliver to the said party of the second part one carload of muscat grapes to be delivered by the party of the first part to the party of the second part on board cars at Hanford or San Bdo districts, and bill of lading to be surrendered by the said party of the first part to the second party's representative at Fresno or Los Angeles on payment for car. * * *

"The purchase price agreed to be paid by said party of the second part to said party of the first part for the aforesaid grapes in the sum of eighty-six ($86.00) dollars per ton, f. o. b. shipping point, payment to be as follows: Two hundred dollars ($200.00) per car or a total of two hundred dollars on the execution and delivery of this agreement, receipt of which is hereby acknowledged.

"The balance of the purchase price for each car, after deducting said sum of two hundred dollars ($200.00) on each car aforesaid, shall be payable on surrender of B/L by party of the first part to party of the second part.

"Shipments to commence as soon as grapes are properly matured for Eastern shipment, and to continue daily."

[1] Among the findings claimed by appellant to be unsupported by the evidence are the following:

"III. The court finds * * * that defendant agreed to deliver said car on demand and as soon as grapes were properly matured for shipping; that plaintiff has never received said car of grapes, and no bill of lading for said car has ever been offered to plaintiff covering said car of grapes; * * * that defendant refused to and is unable to deliver to plaintiff any muscat grapes.

"IV. That defendant has at all times since the execution of said contract failed and refused to deliver said car of grapes or said or any bill of lading for said car of grapes to plaintiff or the or any agent of plaintiff; that plaintiff after muscat grapes were matured demanded the delivery of said car of grapes; and that said car was not delivered to plaintiff, and no bill of lading was ever tendered to plaintiff therefor."

We think the contention of the appellant in this behalf must be upheld. The evidence introduced in the instant case was extremely meager. There was no testimony concerning the matter of delivery. The nearest and only approach to information supplied the court on this point was the statement of the witness De Bakcsy that he did not receive any grapes or bills of lading from the defendant during the year 1920, and, further, that Thomas Strain did not talk to the witness or write to him during the year 1920. But the contract provides that the grapes shall be delivered on board cars at Hanford or San Bernardino districts, and to say that the witness did not receive the fruit is entirely insufficient to prove default in complying with the condition for delivery on board cars.

The agreement concerning the bills of lading is that they might be surrendered to the vendee's representative at Fresno or Los Angeles. The contract contemplates that the vendee had such a representative, and this fact appears affirmatively from a mere reading of the instrument. No attempt was made to show that the surrender of the bills of lading was not made under this provision. So that for all that is disclosed by the record the grapes may have been delivered f. o. b. cars and the bills of lading surrendered to the vendee's representative as expressly stipulated.

Objection was made to the testimony of the witness De Bakcsy above quoted, but for the purpose of this decision we have assumed that such evidence was properly admitted.

[2] In view of the expectancy of a retrial, it is necessary to discuss other points argued. The contracts are executory and contemplate two things to be done by the seller, to wit, the delivery of two carloads of grapes, and the surrender of the bills of lading. They require the buyer to pay a stipulated price. There is no room to doubt that the balance not paid upon the execution of the contracts was to be paid concurrently with the surrender of the bills of lading. In one part of the contract it is provided that the bills of lading shall be surrendered "on payment for car." Later we find the provision that the balance of the purchase price "shall be payable on surrender of B/L by party of the first part to the party of the second part." Reading these provisions together, and considering the circumstances involved in such a sale, the intent seems to have been that the seller should offer the bills of lading to the buyer, whereupon he should be entitled to receive the balance of the purchase price; that is, the parties were to perform their respective parts concurrently.

[3] Appellant's answer admits that the muscat grape crop for 1920 had matured, as alleged in the complaint, before the bringing of suit. This fact is important, for it results from it that, if upon another trial the vendor's default should be shown, a tender by the vendee, before bringing suit, became unnecessary because it would have been futile. The time had passed in which the vendor could comply with the contract. This element places this case in the same class as Carter v. Fox, 11 Cal. App. 67, 103 Pac. 910.

Nothing is shown to have been done by either party except the payment by the vendee of $400. The vendee received nothing, and hence had nothing to return. Under such circumstances he is entitled to bring an action for the recovery of the sum paid as money had and received by the vendor, providing the vendor's default be establishd.

[4] The rule is well settled in this state as announced in Glock v. Howard, etc., Co., 123 Cal. 10, 55 Pac. 716, 43 L. R. A. 199, 69 Am. St. Rep. 17, that upon breach of an executory contract by the vendor the vendee may treat the vendor's breach as an abandonment, and then "he (the vendee) may * * * abandon it," and, "sue * * * to recover what he has paid in an action for money had and received."

[5] By instituting this action to recover the consideration paid to the appellant the respondent has rescinded the contract, as he had a right to do, if the allegations of his complaint be true. Subdivision 4, § 1689, of our Civil Code provides:

> "A party to a contract may rescind the same in the following cases only: * * * If such consideration, before it is rendered to him, fails in a material respect, from any cause." Richter v. Union Land & Stock Co., 129 Cal. 367, 62 Pac. 39.

Where there is a total failure of consideration for an executory contract, and the vendee has received nothing of value, and the vendor has become unable to perform, no formal rescission is required. Grotheer v. Panama Pacific Land Co., 41 Cal. App. 19, 181 Pac. 667; Carter v. Fox, supra. Another case which holds that under such circumstances an action for money had and received is an appropriate remedy is Fontaine v. Lacassie, 36 Cal. App. 175, 171 Pac. 812.

This is not such a case as Hanson v. Slaven, 98 Cal. 377, 33 Pac. 266, where the mutual covenants of the parties were concurrent, and there was no evidence of lack of continued ability on the part of the vendor to comply with his part of the contract by delivering stock, and therefore it was held that either must offer to perform in order to place the other in default.

Because the evidence is insufficient to support the findings in the particulars pointed out, the judgment is reversed.

We concur: FINLAYSON, P. J.; WORKS, J.

---

61 Cal. App. 523

POSZ v. TAYLOR, County Treasurer.
(Civ. 4435.)

(District Court of Appeal, First District, Division 2, California. March 27, 1923.)

1. Schools and school districts 🔑67—Statute as to construction of building by high school district inapplicable to district established some time and having constructed building.

Pol. Code, § 1755, relating to proceedings for the construction of a building by a high school district in the September next succeeding its formation or next succeeding a termination of a lease of temporary quarters, is applicable only to the time of organization of the district; and, where a high school district has been organized for a considerable time and has already constructed and maintained a building, the provisions thereof are not available for raising moneys to construct a new one.

2. Schools and school districts 🔑110—Expense of electrical fixtures for high school building may be paid from maintenance fund raised by special tax levy pursuant to statute.

The board of directors of a high school district have the power, if they deem it necessary, to install electrical fixtures in a high school building, and the expenses therefor may be paid from moneys raised by the special tax levy under Pol. Code, § 1756, which provides for filing of an estimate of the amount required for maintaining school for the current year, including "additions to the plant already constructed," and for itemizing, among other things, "sites, buildings and furniture" and other "miscellaneous expenses."

3. Schools and school districts 🔑90—Claim for balance of work, under contract payable in installments, completed and accepted during fiscal year, held not invalid under limitation of indebtedness which district might incur.

Where a contract contemplated progressive work to be paid for by a district in installments as performed, and part was done during the fiscal year in which the contract was made and paid for out of the funds of that year, a claim for payment for the balance of the work performed and accepted during the following fiscal year is not invalid under Const. art. 11, § 18, limiting the amount of indebtedness which the district might incur in a single year to the income and revenue provided for such year, since the indebtedness contemplated thereby was not incurred, until the work was completed and accepted, and the claim, therefore, is based on a liability incurred during that fiscal year and is a proper charge on the funds of that year.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Mandamus by Louis Posz against James Taylor, as Treasurer of the County of Monterey. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. B. Rosendale, of Salinas, for appellant.

J. H. Andresen, of Salinas, for respondent.

NOURSE, J. This is a proceeding in mandamus commenced in the superior court to require the defendant, as treasurer of the county of Monterey, to pay the claim of plaintiff, amounting to $498.75, based on a contract with the trustees of Salinas union high school district for the furnishing and installation of certain electrical fixtures in the high school building of said district. The facts are that on the 7th day of January, 1921, the plaintiff contracted with the trustees of the school district to furnish and install certain electrical fixtures in the high school building at the total contract price of $1,876.25. Some time during the month of March, 1921, this contract, with the consent of all parties, was modified. The full contract price was made to be $1,498.75, of which sum $1,000 was to be paid at the time of the modification of the contract and the balance thereof was to be paid upon the completion and acceptance of the work. In accordance with the modified contract, the sum of $1,000 was then paid and the major portion of the work was performed during that fiscal year—1920–21. Subsequent to July 1, 1921, the remainder of the work required to be done under the contract was performed and the work was fully completed and accepted by the trustees on the 7th day of December, 1921. The trial was held on May 12, 1922, and the judgment was rendered on the 23d of the same month. It appeared that at the time of the trial there were sufficient moneys in the school district over and above the other necessary expenditures for other school purposes to meet the plaintiff's demand. The presentation and approval of the demand in due form by the proper officials was admitted, and the only question involved is whether it is legally payable out of the general fund of the school district. The trial court rendered judgment in favor of the plaintiff for the full amount of his demand, and from this judgment defendant has appealed upon the judgment roll and a bill of exceptions.

Appellant urges as grounds for the reversal of the judgment that payment of the warrant is restricted to the proceeds of the sale of bonds for the erection of the school building, and that the maintenance fund of the school district is not available for the payment of the claim. Also, that payment of the claim out of the funds of the 1921–22 levy is a violation of article 11, § 18, of the Constitution.

[1] In support of the first ground appellant argues that the Political Code provides two distinct methods for raising money to construct school buildings and that these methods are exclusive. It is argued that the provisions of section 1745 et seq. provide for the issuance of bonds for that purpose, and that section 1755 provides for the levy of a special tax when bonds have not been issued. It is true that these two methods have been provided by the Code, but there is nothing in the Code provisions covering either plan which makes either an exclusive method. Section 1755 plainly relates only to the time of organization of the school district. It requires the school board to file an estimate of the cost of construction of a school building when bonds have not been issued for that purpose, but such estimate must be made "on or before the first Monday of September next succeeding the formation of said district." Another provision of the section is that—

> "If such high school board shall have secured or leased such temporary quarters, they shall, on or before the first Monday of September next before the termination of such lease or arrangement, * * * make and file with the board * * * an estimate of the cost * * * of erecting a suitable building."

It will be noted that the provisions of this section are mandatory. That is to say, it is made the duty of the high school board to make and file such an estimate in the September next succeeding the formation of the district or next before the termination of a lease of temporary quarters. No provision is made in the section for the filing of such an estimate at any other period of the life of the district. From this it follows that if a school district has been organized for a considerable period and has constructed and maintained a high school building, the provisions of the section are not available for the purpose of raising moneys to construct a new building.

When this situation arises, the school trustees have two courses which they may pursue—to call for the issuance of bonds to raise sufficient funds for the construction of a new building, or to proceed under section 1756 to raise money by a special tax levy sufficient for that purpose. This section, it will be noted, provides for the filing of an estimate of the amount of money required for maintaining the high school district for the current school year, including "additions to the plant already constructed." Such estimate is required to be itemized so as to show the amount necessary, among other things, for "sites, buildings and furniture" and "other miscellaneous expenses."

[2] In the case before us the contract called for the furnishing and installation of certain electrical fixtures in the high school building which had been constructed by the school district from moneys raised by two separate bond issues authorized under the provisions of section 1745 et seq. of the Political Code. It is apparent that a high school building could be used for school purposes without electrical fixtures. In fact, at the time when the original section was adopted their use was scarcely known. If, however, the board of trustees of the high school district deem it necessary to install electrical fixtures in a high school building, they have the power to do so, and the expenses thereof may be paid from moneys raised under section 1756 of the Code.

It is very plain that when the Legislature in 1915 amended section 1756 of the Political Code by adding the words quoted above, it did so for the purpose of meeting a situation such as has arisen in this case. Where the moneys raised under the bond issue or under a special tax levy in accordance with the provisions of section 1755 are insufficient to meet the small items which the trustees deem to be necessary, the amendment to section 1756 authorizes the trustees to include such items in the general estimate made under section 1756. If appellant's contention were correct, a special tax would have to be levied upon all the taxable property in the school district under section 1755 to raise money sufficient to meet respondent's claim, which is less than $500. If such were done, the cost of levying and collecting the tax would be greater than the amount collected.

[3] The only other point requiring consideration is that the claim is invalid under article 11, § 18, of the Constitution. As appears from the statement of the facts, the contract contemplated progressive work, to be paid for in installments as the work was performed. A part of the work was done during the fiscal year in which the contract was made and was paid for out of the funds of that fiscal year. The balance of the work was performed and accepted during the fiscal year of 1921–22. Respondent's demand covers an amount due for the work that was completed and accepted on December 7, 1921. The indebtedness contemplated by the constitutional section was not incurred until the work was completed and accepted. Respondent's claim, therefore, is based upon a liability incurred during the fiscal year 1921–22 and is a proper charge upon the funds of that fiscal year. Wyckoff v. Force (Cal. App.) 214 Pac. 489, and cases cited.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

61 Cal. App. 321

Ex parte LAMB. (Cr. 929.)

(District Court of Appeal, Second District, Division 2, California. March 9, 1923. Hearing Denied by Supreme Court, May 7, 1923.)

1. Licenses 🔑18½, New, vol. 12A Key-No. Series—Seller of equitable title to oil lands held by title company held not issuing securities of trust in violation of Securities Act; "trustee."

A title company holding the legal title to an interest in oil lands *held* not a "trustee" within Corporate Securities Act, § 2, subd. 5, whose securities the owner of the equitable interest would be guilty of issuing in violation of that act by a sale of a portion of his equitable interest without a permit from the corporation commissioner; not every confidence reposed in and accepted by one for benefit of another constituting a voluntary trust within Civ. Code, § 2216.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trustee.]

2. Trusts 🔑1—Mere personal confidence reposed in and voluntarily accepted by one for benefit of another does not constitute a trust.

Though every voluntary trust arises out of a personal confidence reposed in and voluntarily accepted by one for the benefit of another, not every obligation arising out of a personal confidence reposed in and voluntarily accepted by one for the benefit of another is a trust; it being necessary in order for a trust to result there must be a trust res or subject-matter under Civ. Code, § 2221.

3. Licenses 🔑18½, New, vol. 12A Key-No. Series—Agreement by owner of equitable interest in oil land to secure transfer of legal title held not to constitute him trustee selling securities in violation of Securities Act.

An agreement by the owner of an equitable interest in oil lands and others desiring to become associated with him so as to participate in future profits *held* to impose a purely personal obligation on him to cause the holder of the legal title to convey certain interest to such other persons and not to constitute him a trustee and as such a company within the meaning of the Corporate Securities Act, whose sale of such interests without a permit from the corporation commissioner was a sale of securities in violation of that act.

4. Trusts 🔑159—Creator of trust may name himself trustee.

It is not essential that the creator of a trust should constitute a third person trustee and transfer the legal title to him, but he may create a trust in his own property by constituting himself a trustee if his words and acts clearly and unequivocally denote an intention to hold henceforth as trustee for another.

5. Licenses 🔑18½, New, vol. 12A Key-No. Series—Deed by equitable owner of interest in oil land held not to constitute him trustee within Securities Act.

A deed by the owner of the equitable title to an undivided interest in oil lands to others desiring to join in the enterprise, wherein he conveyed such interest absolutely and personally covenanted to pay to each grantee a certain part of the proceeds of possible future profits subject to certain reservations in favor of others, *held* not to constitute him a trustee and as such a company within the meaning of the Corporate Securities Act, and such sale without a permit from the corporation commissioner a violation of that act.

6. Licenses 🔑18½, New, vol. 12A Key-No. Series—Sale of equitable interests in oil land held not sale of securities of company within Securities Act.

An agreement between the equitable owner of an interest in oil lands to secure a conveyance by the holder of the legal title of a part of such equitable interest to eight others desiring to join in the enterprise, and deeds to two of such persons of equitable interests, *held* not to constitute such particular persons an association within the meaning of the Corporate Securities Act, and therefore a company, and make the vendor of such equitable interests a seller of securities of such company without a permit from the corporation commissioner in violation of that act.

Application for writ of habeas corpus by E. A. Lamb to be directed to the Sheriff of Los Angeles County. Writ granted.

Ben S. Hunter and Earl D. Killion, both of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., Thomas Lee Woolwine, Dist. Atty., Tracy C. Becker, Deputy Dist. Atty., and Farrand & Slosson, all of Los Angeles, for respondent.

FINLAYSON, P. J. This is a habeas corpus proceeding wherein the petitioner seeks his discharge from imprisonment under a warrant of arrest issued on a complaint against him in the justice's court. The complaint attempts to charge him with a violation of the Corporate Securities Act. The ground of his application is that the pleading does not charge him with a public offense.

The pertinent provisions of the Corporate Securities Act (Stats. 1917, p. 673, amended 1919, p. 231, 1921, pp. 1008, 1114) are the following: Section 2 defines certain of the words and phrases used throughout the act. Subdivision 3 of section 2 declares that—

> "The word 'company' includes all domestic and foreign, private corporations, associations, joint-stock companies, and partnerships, of every kind, and also trustees, as hereinafter defined."

By subdivision 4 it is provided that—

> "The word 'trust' as used in this act includes all voluntary trusts, as the same are defined in the Civil Code, expressly created by or declared in an instrument in writing, * * * to carry on any business or to secure the payment or repayment of money."

Subdivision 5 declares that—

> "The word 'trustee' * * * includes only persons or companies executing trusts as hereinbefore defined."

Section 3 provides that—

> "No company shall sell * * * any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do."

The complaint was drawn upon the theory that petitioner is a "trustee" within the meaning of the act, or that the eight persons with whom he entered into the agreement hereafter described constituted an "association," that in either event there was a "company," within the definition of the act, and that petitioner sold the "securities" of such "company" without having secured from the corporation commissioner the necessary permit.

The case disclosed by the complaint filed in the justice's court is substantially as follows: Attached to the pleading and made a part thereof are two exhibits, marked respectively "A" and "B." The latter bears date September 11, 1922. Exhibit A is a blank form of deed. It gives the form of the "securities" which it is claimed petitioner illegally issued. Exhibit B is the copy of an agreement executed by petitioner, as the party of the second part, and by eight other persons as the parties of the first part. It seems to be conceded that the gist of the "offense" attempted to be charged in the criminal complaint lies in the fact that petitioner executed to two of the eight persons with whom he executed Exhibit B, namely, D. R. Beatty and A. Frank, deeds which, as to form, were substantially replicas of Exhibit A. Whether the complaint states a public offense or not is largely, if not entirely, dependent upon the character of these two exhibits.

Exhibit B, whose execution evidently preceded the deeds to Beatty and Frank, recites the following: (1) Petitioner is drilling an oil well on a certain piece of real property in the county of Los Angeles; (2) the eight parties of the first part desire to become associated with petitioner in the enterprise and to participate in the future possible profits; (3) the legal title to 1890/4000 of the land is vested in the State Torrens Title Company (hereafter for brevity referred to as the Title Company); (4) the Title Company holds such legal title in accordance with an agreement between it and petitioner, by the terms of which the Title Company agrees to grant to petitioner, or to his nominee or nominees, on petitioner's request and after the completion of the well-drilling then in progress, various undivided interests; and (5) the times when the Title Company shall grant such undivided interests to petitioner, or to his nominee or nominees, are specifically set forth in a written agreement between petitioner and Philip A. Grohs and Edward L. Journigan.

Following these recitals Exhibit B provides: The Title Company, when requested by petitioner, is to convey to the eight parties of the first part at least an undivided 390/4000 of the property "as per form of deed attached." The form of deed referred to is, we assume, that which is afforded by Exhibit A. Then follows a paragraph setting forth the proportionate amount of the 390/4000 which is to be granted to each of these eight persons. For example, of the 390/4000 there is to be granted to D. R. Beatty and A. Frank 150/4000 and 75/4000, respectively. It then is declared that the 390/4000 so to be granted to the parties of the first part by the Title Company is given by petitioner as a bonus for $26,000 which the parties of the first part agree to "advance" to petitioner for the purpose of completing the well then being drilled upon the property. Then follows a covenant on the part of petitioner, as the party of the second part, whereby he agrees that out of the net proceeds of all oil and gas produced on the property and accruing to him by virtue of his ownership of the equitable title to the 1500/4000 which will remain in him he will pay to the parties of the first part the sum of $39,000. From the recitals and covenants in Exhibit B it appears, inferentially, that at the date of its execution petitioner was the equitable owner of the 1890/4000 the legal title whereto was in the Title Company, and that if there should be granted to the eight parties of the first part an undivided 390/4000, petitioner would remain the equitable owner of an undivided 1500/4000 of the land.

Exhibit A is, in part, as follows:

> "Grant Deed. E. A. Lamb [petitioner] * * * does hereby grant to ——— all that real property situate in the county of Los Angeles, state of California, and described as follows, to wit: ———/4000ths undivided interest in [here follows the description of 8 lots], subject to: (1) A reservation of one-eighth of all oil and gas produced on the above-described property, in favor of George Bowman. * * * (2) A reservation of one-eighth of all oil and gas produced on the above-described property, in favor of Philip A. Grohs and Edward L. Journigan. * * * (3) A reservation by E. A. Lamb * * * of the right to prospect and drill for oil and gas on the aforesaid land, to mine and extract the same, and to sell and dispose of the oil and gas produced from such operations; yielding and paying to the grantee his proportion of seventy-five (75) per cent. of the net proceeds of all oil and gas produced, accounting therefor to the grantee every sixty days for the net proceeds from the operations during the preceding sixty days; and the right hereunder reserved to continue in force so long as oil and gas be produced in paying quantities, the net proceeds to be computed from, and begin at, the time the first well is completed and put on production by E. A. Lamb, the intent being that E. A. Lamb shall not charge to production the cost of drilling one well to a depth of 4,500 feet, unless oil be obtained in paying quantities at less depth. No part of the cost of the first well shall, in any case, be charged to the grantee herein. Witness my hand this ——— day of ———, 192—."

In the body of the criminal complaint substantially the following is alleged: On September 11, 1922, petitioner "was conducting a business of an association" composed of a number of persons whose names are unknown. As a part of the agreement under which the "association" was operating (exhibit B), petitioner "was then and there trustee for each and all of said persons." The "rights and interests of said persons so being members of said association and the capital stock and property of said association and of each of said members were represented by certain certificates of interest into which the whole of said property * * * was divided." Said certificates of interest are fully evidenced and set forth in a grant deed which was to be executed by petitioner to all the persons who purchased an interest in the association and became members thereof. Exhibit A is a copy of the form of such deed. "The estate and interest of the said E. A. Lamb in and to the real estate and property, and in and to the oil and gas produced on said property * * * and covered by said certificate and grant deed, then and there were and are determined, prescribed and fully expressed in a certain agreement in writing [Exhibit B] made and entered into the 11th day of September, 1922." "Said association was a company and a corporation carried on for profit." For the company and the association and the members thereof "said E. A. Lamb was a trustee as hereinbefore set forth, and *as fully evidenced* * * * *by* said Exhibits A and B." (Italics ours.) Petitioner, on September 11, 1922, for a valuable consideration, executed and sold "certain securities of said association and of said E. A. Lamb" by executing to D. R. Beatty a deed to an undivided 150/4000 of the land and to A. Frank a deed to an undivided 75/4000 thereof.

These allegations in the body of the complaint must be read in the light of the two exhibits attached thereto and made a part thereof. So read, it is manifest that it is from those exhibits that we must determine the precise nature of the rights and interests alleged to have been sold by petitioner to Beatty and Frank; also, the status of petitioner, i. e., whether he was a "trustee" within the meaning of the Corporate Securities Act, and whether the eight persons named in Exhibit B as the parties of the first part constituted an "association" within the meaning of the act.

The theories advanced in the brief filed on behalf of the officer to whom the writ of habeas corpus was directed are: (1) The Title Company was a "trustee" within the meaning of the Corporate Securities Act, and in executing the deeds to Frank and Beatty petitioner aided that "trustee" in issuing and selling its "securities"; (2) petitioner himself was a "trustee" within the meaning of the act, and as such "trustee" he issued and sold "securities" when he executed the deeds to Beatty and Frank; and (3) the eight persons with whom petitioner entered into the agreement (Exhibit B) constituted an "association," within the meaning of the act, and in executing the deeds to Beatty and Frank petitioner issued and sold the "securities" of that "association." Petitioner disputes, and, as we think, correctly disputes, the validity of each of these theories.

[1] But little space need be given to the claim that the Title Company was a "trustee" whose securities petitioner issued. The criminal complaint was not drawn upon that theory. Its charge is that, as a part of the agreement under which the "association" was operating (Exhibit B), petitioner, not the Title

Company, "was then and there the trustee for each and all of said persons so being members of said association." Moreover, it is clear that whether the Title Company was or was not a "trustee," the complaint is barren of any showing that petitioner did anything to aid in the execution of any trust which the Title Company may have assumed. A "trustee," as that word is used in the Corporate Securities Act, includes only persons or companies "executing trusts as hereinbefore defined." Section 2, subd. 5. When petitioner deeded to Beatty an undivided 150/4000 and to Frank an undivided 75/4000 of the land, subject to the reservations contained in each deed, he but conveyed his own equitable title to certain undivided interests in the land, and nothing was done in the execution of any trust which the Title Company may have accepted. So far as that company's title is concerned no change was effected by the deeds which petitioner executed. Indeed, it is expressly alleged in the criminal complaint that petitioner's estate and interest "were and are determined, prescribed and fully expressed" in Exhibit B —showing that the Title Company was still the holder of the legal title at the date of petitioner's deeds to Beatty and Frank.

[2, 3] Petitioner was not a "company" in the sense that he was a voluntary "trustee" within the meaning of the act. He was not a voluntary trustee unless he became such by his execution of one of the exhibits. Exhibit B did not create a "trust" in any sense of the word. Section 2216 of the Civil Code declares that—

> "A voluntary trust is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another."

It is argued by counsel opposing petitioner here that Exhibit B imposed upon petitioner an obligation in favor of the eight persons with whom he contracted; that such obligation arose out of a "personal confidence" reposed in and voluntarily accepted by petitioner; and that therefore Exhibit B did create a voluntary trust, as that word is defined by the Civil Code.

It is true that every voluntary trust is an obligation arising out of a personal confidence reposed in and voluntarily accepted by one for the benefit of another. But the converse is not necessarily true. That is, not every obligation arising out of a personal confidence reposed in and voluntarily accepted by one for the benefit of another is a trust, within the legal meaning of the term. It often happens that a purely personal obligation, unconnected with any property or with any trust res, arises out of a "personal confidence" —an obligation in no wise connected with any estate or title held by the obligor for the benefit of the obligee. Such personal obligations do not constitute "trusts" in any true sense of the word. To the creation of a trust, a trust res or subject-matter is a sine qua non. Martin v. Powell, 200 Ala. 46, 75 South. 358; Bay Biscayne Co. v. Baile, 73 Fla. 1120, 75 South. 860: 39 Cyc., p. 34. "In order for trusts to exist there must be an estate to vest in the trustee, and the property must be clearly and definitely pointed out." In re Johnson's Estate, 100 Or. 142, 196 Pac. 385, 1115. Section 2221 of the Civil Code declares that—

> "A voluntary trust is created * * * by any words or acts * * * indicating with reasonably certainty * * * the subject, purpose, and beneficiary of the trust."

> "Trusts arise when property has been conferred upon one person and accepted by him for the benefit of the other. In order to originate a trust, two things are essential: First, that the ownership conferred be connected with a right or interest or duty for the benefit of another; and, second, that the property be accepted on these conditions." Carr v. Harrington, 107 Ark. 535, 155 S. W. 1166.

> "A trust implies two estates or interests—one equitable and one legal; one person, as trustee, holding the legal title, while another, as the cestui que trust, has the beneficial interest." Hospes v. Car Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637.

> "To the constitution of every valid express trust it is essential that there should be a trustee, an estate conveyed to him, a beneficiary, a legal purpose, and a legal term." In re Walkerly, 108 Cal. 650, 41 Pac. 776, 49 Am. St. Rep. 97.

[4] True, it is not essential that the creator of a trust should constitute a third person trustee and transfer the legal title to him. It is well settled that one may create a trust in his own property by constituting himself a trustee, provided his words or acts clearly and unequivocally denote an intention to hold the property henceforth as trustee for the benefit of another; and as the nature and effect of such a transaction is that the title remains in the settlor who constitutes himself a trustee for the benefit of the other, no transfer or assignment of the title is necessary. 39 Cyc. 66. But even so, it still is necessary that there be specific property to be held by the settlor as trustee, and an absolute parting by him with that beneficial interest which had been his up to the declaration of the trust. Taylor v. Coriell, 66 N. J. Eq. 262, 57 Atl. 810.

Nowhere in Exhibit B does petitioner undertake to hold any property in trust for or for the benefit of another. He simply entered into the purely personal obligation to cause the holder of the legal title, the Title Company, to convey certain interests to the eight persons with whom he was dealing. It follows, therefore, that Exhibit B did not constitute petitioner a "trustee," in any true sense of the term.

[5] Nor was petitioner made a trustee by

Exhibit A or by either of the deeds which he executed to Beatty and Frank, each of which followed the form set forth in Exhibit A. By these deeds petitioner, as grantor, deeded to each grantee a certain undivided interest in the land, with reservations, namely, a reservation in favor of one Bowman of one-eighth of all the oil and gas produced on the land, a reservation of another one-eighth of all oil and gas in favor of Grohs and Journigan, and a reservation to himself of the right to prospect and drill for oil and gas on the land and to sell the same. In connection with the reservation to himself, each deed contains a clause whereby petitioner personally covenants to pay to his grantee the latter's proportion of the net proceeds of the oil and gas.

By each of these deeds petitioner did the following: (1) Subject to the reservations, he conveyed absolutely to each grantee his own equitable title to a certain undivided part of the land; and (2) he personally covenanted to pay to each grantee a certain fractional part of the proceeds of possible future sales of oil and gas. Such a deed left nothing in the grantor which could be the subject of a trust. With respect to the interest actually conveyed to each grantee, petitioner parted with all of the title which he possessed. No title remained in him which could be held in trust for the grantee. The clause whereby he personally covenanted to account for and pay to his grantee a certain proportion of the proceeds of future sales of oil and gas was but a promise to pay over moneys which, possibly, he might thereafter receive. "A mere promise to obtain money and thereupon hold it in trust does not create a trust until it is at least so far executed that the money has been obtained in accordance with the promise." Molera v. Cooper, 173 Cal. 262, 160 Pac. 232.

For these reasons we conclude that the criminal complaint fails to show that petitioner was a "company" in the sense that he was a "trustee" within the meaning of the Corporate Securities Act.

[6] It next is claimed by counsel opposing the writ that if petitioner was not a "trustee" the eight persons who executed Exhibit B as parties of the first part constituted an "association," within the meaning of the act, and that therefore they were a "company," as defined by the act, and that petitioner sold the "securities" of each company.

The word "association," a word of vague meaning, is not specifically defined in the Corporate Securities Act. It has been defined as "a body of persons acting together without a charter but upon methods and forms used by incorporated bodies for the prosecution of some common enterprise." People v. Brander, 244 Ill. 26, 91 N. E. 59, 135 Am.St. Rep. 301, 18 Ann. Cas. 341. See, also, 5 C. J. 1333. For the purposes of this decision we shall assume that the eight persons with whom petitioner executed Exhibit B did constitute themselves an "association" within the meaning of the act, when they entered into the agreement evidenced by that instrument. But even so, there is nothing in the criminal complaint tending to show that petitioner ever issued or sold or aided in the issuance or sale of any of the "securities" of that association.

The "securities" which may not be issued or sold without the permission of the corporation commissioner are the "shares, or other interests or rights, into which the * * * property of companies * * * or rights of * * * members thereof are divided, * * * and all certificates and other instruments issued by them or their authority, evidencing or representing such shares, interests or rights"; also, "any instrument issued or offered to the public by any company" evidencing any right to participate in the profits or earnings or the distributions of assets of any business carried on for profit by the company. According to these definitions it is unlawful (1) to sell, without the requisite permission, any interest in property which is owned by an association or by its members; (2) to issue, without such permission, any instrument evidencing an interest in property owned by the association or by its members; or (3) to issue or offer to the public any instrument evidencing any right to participate in the profits or earnings or the distribution of the assets of any business carried on by the association for profit.

Petitioner did nothing that amounted to the issuance or sale of a "security," within the foregoing definitions. There is some question as to whether the deeds to Beatty and Frank may be regarded as having been made in furtherance of the agreement evidenced by Exhibit B. By that agreement petitioner did not agree that he would convey property to any one. What he did undertake to do was to cause the Title Company, the holder of the legal title to an undivided 1890/4000, to convey to the eight parties of the first part, just as soon as it should be free to do so, an undivided 390/4000 of the property, free and clear of all incumbrances, except taxes, and subject to certain reservations.

If petitioner's deeds to Beatty and Frank may not be deemed to have been executed pursuant to Exhibit B, then petitioner was but conveying his own equitable title to an undivided 150/4000 and an undivided 75/4000, respectively, to each of two grantees, as he had the right to do without securing the permission of any one. If, on the other hand, the deeds to Beatty and Frank may be deemed to have been executed pursuant to the terms of Exhibit B, and if the eight persons designated therein as the parties of the first part did constitute an "association," then by his deeds to Beatty and Frank petitioners simply conveyed certain interests to two members of that association, either for their own exclusive use and benefit or for the benefit of themselves and the six other members of the association. But in either case the deeds were conveyances, not *by* but *to* members of the association. There was therefore no conveyance of any interests owned by the association or by its members. The language of the act is:

> "No company shall sell * * * or offer for sale * * * any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do." Section 3.

Nor did petitioner by either of his deeds to Beatty and Frank issue an instrument evidencing an interest in property owned by the association or by its members. On the contrary, each deed was, as we have shown, an instrument evidencing an interest thereby conveyed to, not by, members of the association. Nor was either deed an instrument "issued or offered to the public" by the association.

It may be that if hereafter any member of the association shall attempt to sell to third parties any part of the 390/4000 without the permission of the corporation commissioner he would thereby subject himself to the pains and penalties of the act. But that is not this case. It is not necessary to decide, and we do not decide, whether such permission would be necessary in that event.

There is no conflict between these views and those set forth in Matter of Girard, 186 Cal. 722, 200 Pac. 593, and Agnew v. Daugherty (Cal. Sup.) 209 Pac. 34. In the Girard Case the petitioner and three other persons were trustees for a "company." As one of such trustees Girard issued and sold to third persons certain interests of the company. That case might be applicable if the petitioner here had executed to a person not a member of the association a deed or other instrument conveying any interest belonging to the association or to its members. In the Agnew Case the petitioner had conveyed mining property to certain persons as trustees under an instrument which provided for the negotiation and sale of trust certificates evidencing 3,000 "interests" in the property. Agnew proposed to begin the sale of the "interests" represented by such certificates. That is, he proposed to sell the property of the "company." In the instant case the utmost that can be claimed is that petitioner vested the association or members thereof with its or their rights and title to the property.

For the foregoing reasons we are constrained to hold that the facts set forth in the complaint against petitioner fail to show that he has violated any provision of the Corporate Securities Act.

Petitioner should be discharged from custody, and it is so ordered.

We concur: WORKS, J.; CRAIG, J.

---

61 Cal. App. 511

HENLEY v. BURSELL et al. (Civ. 2587.)

(District Court of Appeal, Third District, California. March 24, 1923.)

1. Appeal and error ⚷757(1)—Statute, requiring printing in brief of record and evidence, directory only.

Code Civ. Proc. § 953c, as amended by St. 1919, p. 261, requiring printing in the briefs of the record and evidence relied on on appeal must be regarded as for convenience of appellate tribunals and therefore directory only, and should be disregarded wherever substantial justice so requires it.

2. Trial ⚷165—Rule as to construing evidence in motion for nonsuit stated.

In passing on a motion for nonsuit, the trial court must accept, as true, evidence that is favorable to plaintiff, disregarding any conflicting or contradictory evidence, and indulge every inference and presumption therefrom favorable to plaintiff.

3. Insane persons ⚷66—Nonsuit erroneous in suit to quiet title based on deed of insane grantor.

It was error to grant a nonsuit in an action to quiet title, where plaintiff's evidence showed that defendant's title was based on a deed from plaintiff while insane, to one in a fiduciary relation, and without consideration; and in such case plaintiff was not required to return any consideration before bringing suit.

4. Deeds ⚷195—Burden on grantees claiming under deed of incompetent to prove consideration therefor.

In deed by one incompetent to transact business, the inference of no consideration therefor arises on proof of a fiduciary relation between grantor and grantee and casts on grantee and those claiming under her the burden of proving the contrary.

5. Trial ⚷163—Motion for nonsuit should specify grounds relied on.

A motion for nonsuit should specify grounds on which it is made, and ordinarily a ground not stated is not considered.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action to quiet title by S. E. Henley against H. H. Bursell and others. Judgment of nonsuit, and plaintiff appeals. Reversed.

D. M. Edwards and J. S. Clack, both of Visalia, for appellant.

D. E. Perkins, of Visalia, for respondents.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

BURNETT, J. [1] Plaintiff has appealed from a judgment of nonsuit. No brief has been filed by respondents, and on the oral argument their learned counsel relied for affirmance of the judgment chiefly upon the point that appellant should not be heard because he had not printed fully in his brief the evidence as required by section 953c, Code of Civil Procedure, as amended in 1919. In People v. Woods, 213 Pac. 951, however, it is said by the Supreme Court:

> "The statute requiring the printing in the briefs of the record and evidence relied upon on appeal (section 953c, Code Civ. Proc.), particularly since the amendment of 1919 (Stats. 1919, p. 261), must be regarded as one for the convenience of the appellate tribunals, and for that reason directory only, and should be disregarded by the court wherever substantial justice requires it to be done."

Moreover, when the cause was pending in the Supreme Court, respondents moved the court "to require appellant to print and serve upon respondents and file with said court, a supplement to his brief in which shall be set forth in full that portion of the record relied upon by such appellant, including a copy of all of the evidence taken in the court below." Thereafter a supplementary brief—so ordered by the Supreme Court, according to the admission of counsel at the oral argument herein—containing, as stated by appellant, "the parts of transcript relied upon by appellant," was filed, which he claims is sufficient to meet the requirement of the rule; but respondents seem to be of the opinion that it should contain all the evidence received at the trial. To understand the evidence therein set out we must bear in mind that the action was brought primarily to quiet title to certain real property and to have set aside and canceled certain deeds therefor, and it was alleged in the complaint that—

> "All the claim of said defendants, and each and every of them, is based upon a certain instrument purporting to be a deed dated the 17th day of February, 1911, and recorded March 10, 1911, * * * Tulare county records; that said instrument herein referred to if made and executed as herein indicated, was so made, executed and delivered while this plaintiff was ill and afflicted and incompetent to transact business, all of which was well known to each and every of said defendants; that shortly thereafter a guardian was duly appointed for this plaintiff, and plaintiff was committed to the state hospital for the insane at Stockton, Cal., and plaintiff was discharged from the state hospital at Stockton and his competency legally restored on the 21st day of September, 1916; that during plaintiff's incompetency, as aforesaid, defendant Laura M. Henley attempted to convey certain of said real property on the 30th day of November, 1912, to her sister, Anna M. Bursell, * * * and this plaintiff alleges on information and belief that said conveyance was without any consideration whatever and was done for the purpose of defrauding this plaintiff out of the lands therein described and sought to be conveyed.
>
> "That any and all persons claiming any interest whatever in or to said described premises owned by plaintiff as aforesaid, plaintiff alleges on belief, base their claim wholly either upon the alleged instrument so procured from plaintiff during his incompetency aforesaid, or from defendant Laura M. Henley, a party thereto, and during the incompetency of this plaintiff and without adequate valuable consideration and without any consideration whatever to plaintiff."

It thus appears that the attack upon the deeds was based upon the vital facts, that plaintiff was at all times incompetent to transact business, that his incompetency was known to all the parties, and that both deeds were entirely without consideration. The complaint is undoubtedly subject to some criticism, but in the determination of this appeal we are not concerned with that question.

In said supplementary brief appellant, to show that there was evidence of a lack of consideration for the deed, quotes from the testimony of plaintiff as follows:

> "Mr. Edwards: Q. Did you ever receive any money for any of this land or the water stock? A. No, sir. Q. Have you ever received any rent, issues, or profits of this real estate? A. No, sir. Q. Has any one, to your knowledge, received any rent, issues, or profits for you? A. Well, I don't know who received it. It was rented. Q. So far as you know, you never received any benefits directly or indirectly from the rent, issues, or profits since you returned from the asylum? A. No, sir."

Also this appears from the deposition of Laura M. Henley:

> "Q. On February 17, 1911, he deeded to you various real property in and near Porterville, Cal. What consideration was there for that deed, or for what purpose was it made? A. I don't know. Q. State whether or not you afterwards deeded this property away, and, if so, to whom? A. Yes, sir; I did deed it away to Annie Bursell and H. H. Bursell. Q. Mrs. Bursell never has paid you anything for that conveyance? A. No, sir. Q. No one ever paid you any money for any of the Henley lands you conveyed, nor for any stock in the Pleasant Valley Ditch Company? A. No, sir."

As indicative of the mental incapacity of plaintiff, he exhibits the order of Hon. J. A. Allen, judge of the superior court of said county, dated October 14, 1912, "that said Stephen Edward Henley, because of old age, physical debility and mental infirmities, is physically and mentally incompetent to manage his property and is incapable of taking care of himself and of managing his property," also an order of commitment to the state hospital for the insane, dated April 28, 1915, concluding as follows:

> "It is ordered, adjudged, and decreed that said Stephen Edward Henley is insane and that he be committed to and confined in the state hospital at Stockton, Cal."

Quotation is also made from the testimony of plaintiff to the effect that he did not remember conveying the property in question, that he first ascertained that he had conveyed it when he came back from the asylum and examined the records; from the testimony of his daughter, Mrs. Maud Wyer, that plaintiff was not of sound mind on February 17, 1911, that he threatened to kill the family with a knife, he was growing worse mentally from 1907 to 1911; the testimony of M. B. Gibson, an intimate acquaintance, that plaintiff was entirely "without understanding, didn't know what he was doing" in 1911, that plaintiff was not competent to go about the streets alone, the witness assigning his reasons for the opinion. In addition is the testimony of two physicians, based upon hypothetical questions, that the plaintiff was of unsound mind, and of plaintiff himself that he suffered for years with an enlargement of the prostate gland, which condition one of the physicians testified would be likely to produce "mental abnormalities oftentimes bordering on actual insanity."

The particular portion of said section 953c applicable herein is as follows:

> "In filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court.
>
> "No appeal shall be dismissed nor shall any appeal be decided adversely to any party for failure to print in his brief the portion of the record or any part thereof in support of his points, but in such case the court hearing the appeal shall direct such party to print and serve on the adverse party and file with it a supplement to his brief in which shall be set forth in full that portion of the record relied on by such party and not printed in any brief."

Appellant attempted to comply with this requirement, and our examination of the transcript convinces us that he has been fairly successful except in the omission to print any portion of the pleadings. Of this omission respondents complain, and they also assert, as already declared, that appellant should have printed the entire testimony in the case. In this connection it may be stated that appellant at the oral argument offered to print any additional matter that this court might deem appropriate, but we see no necessity for requiring any further expense. The whole record, which is not voluminous, is before us, and we perceive no reason why we may not look into it for information as to the pleadings and to ascertain whether appellant's supplementary brief is fairly representative of the showing made at the trial.

[2] Our examination leaves us in no doubt that the court erred in granting the motion for nonsuit. The rule that should be followed in passing upon a motion for nonsuit is so well settled as scarcely to require comment. It is sufficient to refer to In re Daly, 15 Cal. App. 329, 114 Pac. 787; Marron v. Marron, 19 Cal. App. 326, 125 Pac. 914; and Estate of Arnold, 147 Cal. 583, 82 Pac. 252. Briefly stated, the trial court must accept as true the evidence that is favorable to plaintiff, disregard any conflicting or contradictory evidence, and indulge every inference and presumption favorable to the plaintiff, which fairly arises from the evidence produced.

[3] Applying this rule, the trial court was certainly required to assume that plaintiff made the conveyance in question without consideration, that he was at the time of unsound mind, that he sustained to the grantee a fiduciary relation, and that the subsequent grantees took without consideration and with notice of the infirmity of the conveyance of February 17, 1911.

That thus was presented a case for relief in a court of equity is not and cannot be disputed. Numerous cases are cited by appellant, which sustain this view, but it seems hardly necessary to even cite them in view of the silence of respondents and the practical unanimity of the authorities. However, we may quote from Williamson v. Williamson, 41 Cal. App. 723, 183 Pac. 302, as follows:

> "At the time when defendant made the deed conveying the property to plaintiff the parties were husband and wife; hence, as declared in section 158 of the Civil Code, the transaction was subject to the general rules applicable to dealings in property between a trustee and his beneficiary. Among these rules are the following: All transactions entered into between a trustee and cestui que trust by which the former secures any benefit are presumed to be without sufficient consideration and under undue influence. Civ. Code, § 2235. A trustee may not use the influence which his position gives him to obtain any advantage of the beneficiaries. Civ. Code, § 2231. And if he does, it constitutes fraud for which a court of equity will grant relief. Civ. Code, § 2224; Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; Jackson v. Jackson, 94 Cal. 446, 29 Pac. 957. By virtue of these provisions of the law the position of plaintiff at the time the conveyance was made to her must be deemed that of a trustee for her husband, and since she as a result of the transaction obtained title to the property from one whose relation to her was that of cestui que trust, the transfer is presumed not only to have been made without sufficient consideration, but as a result of undue influence. It therefore devolved upon plaintiff not only to show the execution of the grant, but also to produce evidence showing a sufficient consideration and that it was not obtained by undue influence."

[4] The foregoing is a sufficient answer to the claim of respondents, made at the oral argument, that plaintiff should have returned or offered to return the consideration before beginning the action. We may add that not only does the inference that there was no consideration arise from the proof of the fiduciary relation, casting upon respondents the

burden of proving the contrary, but, as we have seen, there was positive evidence of the want of consideration.

[5] Another reason why the trial court should have denied the motion is found in the circumstance that there was no specification of the grounds of the motion. The record shows that "the motion for nonsuit was made on behalf of defendants upon the ground that plaintiff had failed to prove a sufficient case." In Daley v. Russ, 86 Cal. 114, 24 Pac. 867, it is said:

> "It is undoubtedly the settled rule that a motion for nonsuit should specify the grounds upon which it is made, and ordinarily a ground which is not stated cannot be considered."

In Warner v. Warner, 144 Cal. 615, 78 Pac. 24, it is stated that—

> "The reason for the rule * * * is, that if other grounds were specified, the plaintiff might overcome the objection by additional evidence, but if the defect is inherent in his cause of action, and cannot be cured, the reason for the rule ceases to exist, and the rule itself has no application."

In the Williamson Case, supra, the motion for nonsuit was made "on the ground that they (the plaintiff) have failed to make out a prima facie case; and on the further ground that they have failed to make out such a case, if the case were tried before a jury, as would warrant them in returning a verdict for the plaintiff." This was held to be insufficient, the court stating that the defendant should have pointed out specifically his objection and thereby have given his opponent "an opportunity to introduce evidence to meet the same, subject to the ruling of the court upon an application so to do." Such practice is, of course, commendable, as it encourages the trial of causes upon their merits. The number of cases reversed on appeal from a judgment of nonsuit should be a warning to counsel to exercise the greatest care in the matter of such motions.

We feel confident that under well-established principles the judgment is erroneous, and it is therefore reversed.

We concur: FINCH, P. J.; HART, J.

(61 Cal. App. 569)

PEOPLE v. MITCHELL. (Cr. 949.)

(District Court of Appeal, Second District, Division 1, California. April 5, 1923.)

1. Criminal law 🔑1159(2, 4)—Credibility of witnesses and weight of their testimony for jury.

Under Code Civ. Proc. § 1847, the degree of credibility accorded witnesses and the power of judging of the effect and value of evidence are matters exclusively for the jury.

2. Rape 🔑52(1)—Evidence warranted verdict of guilty.

In a rape prosecution, evidence and inferences properly deducible therefrom *held* to warrant a conviction of statutory rape.

3. Criminal law 🔑404(4)—Admitting in evidence nightgown worn by prosecutrix held not error.

In a rape prosecution., where prosecutrix identified by blood spots the nightgown she wore on the night of the alleged offense and stated there were no blood spots thereon when she went to bed the night before, but they were there when she got up the next morning, and no restriction was placed on defendant as to cross-examination as to where the garment had been kept after the offense, or whether the spots thereon were in the same condition as immediately after the offense, there was no error in admitting it in evidence.

4. Criminal law 🔑452(4)—Defendant's handwriting proved by one who had seen him write.

In a rape prosecution, where a letter from defendant to his wife was introduced by the state, under Code Civ. Proc. § 1943, it was proper to prove his handwriting by one who stated he had seen him write on numerous occasions, and that he believed the handwriting in the letter to be defendant's

5. Witnesses 🔑191—Evidence of letter from defendant to his wife properly received.

In a rape prosecution, evidence of a letter written by defendant to his wife, which was found on the cabin floor shortly after the wife removed therefrom, was properly admitted, notwithstanding that by Pen. Code, § 1322, the wife would not have been a competent witness as to its contents.

6. Criminal law 🔑885—Verdict recommending sentence of not over 5 years held sufficient.

In a rape prosecution, verdict finding defendant guilty, and recommending to the court that his sentence be not over 5 years, *held* to find him guilty as charged in the information, and such recommendation did not render it nugatory within Pen. Code, § 1151, providing that a general verdict is either guilty or not guilty.

7. Criminal law 🔑893—Rule as to construction of verdicts stated.

A verdict is to be construed like other instruments, by taking it in its entirety; and, if the meaning intended to be conveyed may be clearly ascertained by common understanding, it is sufficient, notwithstanding any surplusage, or that there may be included therein irregularities in spelling or awkward or incorrect expressions from a grammatical standpoint.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Frank W. Mitchell was convicted of rape, and he appeals. Affirmed.

Samuel Rosenthal, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Lorrin Andrews, of Los Angeles, for the People.

HOUSER, J. Defendant was convicted of having committed the crime of rape on the person of a girl of the age of 14 years. He appeals from the judgment, and urges the following reasons why he should be granted a new trial:

(1) That the evidence is insufficient to justify the rendition of a verdict of guilty.

(2) That errors of law in the admission of evidence were committed by the trial judge, and the evidence so admitted was prejudicial to defendant.

(3) That the verdict of the jury was not such a verdict as is contemplated by law.

[1] With reference to the first specification, the evidence which the jury had a right to consider in making up the verdict showed that the mother of the prosecuting witness and her younger brother and their stepfather were living in a tent in the town of Johannesburg; that on the 20th of August, 1922, the mother and the stepfather went to the town of Huntington Beach for a stay of a few days, leaving the children alone in the tent; that defendant was well acquainted with all the parties, lived in their immediate neighborhood, knew of the temporary absence of the mother and the stepfather of the girl; that the next day after the departure of the mother and stepfather he visited the girl at least twice, and probably three times, and that it was on the evening of that day when the offense was committed; that on the latter or the last of the occasions on which he visited the girl he found her sleeping alone in one of the beds in the tent which she occupied; that, according to his own testimony, earlier in the day he had had some conversation of an improper nature with the prosecuting witness; that on one occasion he had seen the girl and her stepfather go into a bathroom to take a bath together; that his own wife had told him that the prosecuting witness had confessed to her that she had been intimate with several different men. The prosecuting witness testified that the first knowledge she had of defendant's presence in the tent was when she was awakened by defendant, who was in bed with her, with his arms around her, and that the act of which complaint is made then occurred; that both the nightgown worn by the prosecuting witness at that time, as well as the under garments of defendant which he wore on that occasion, and which were exhibited to the jury, had on them spots of blood; that defendant made damaging admissions with reference to his guilt to the stepfather of the prosecuting witness, and that defendant also wrote a letter to his wife which contained statements from which his guilt might be inferred.

[2] While defendant denied many of the foregoing statements, and made some effort to establish an alibi, it is a well-settled rule of law that the degree of credibility which shall be accorded to a witness, or to all the witnesses, as well as the power of judging of the effect and value of evidence, are matters which lie exclusively within the province of the jury. Section 1847, Code Civ. Proc.; People v. Bush, 68 Cal. 629, 10 Pac. 169; People v. Cesena, 90 Cal. 381, 27 Pac. 300; People v. Compton, 123 Cal. 403, 56 Pac. 44; People v. Preston, 19 Cal. App. 675, 127 Pac. 660. The jury by its verdict clearly indicated to which testimony and evidence it gave credence. From the evidence and from the inferences properly deducible therefrom the jury was warranted in returning a verdict of guilty. In such a case, that an appellate court will not pass upon questions of the credibility of witnesses, or the preponderance of the evidence, has been announced with practical unanimity by all the decisions of this state having a bearing on the subject.

[3] Appellant specifies as error the receipt in evidence of a certain nightgown which the prosecuting witness testified she wore on the occasion in question. After the witness had testified to the fact that she was wearing the nightgown, and that after the act complained of had taken place there was blood upon her person, the following questions were put and the following answers given thereto:

"Q. You say you were wearing a nightgown? A. Yes, sir.

"Q. Would you be able to recognize that if you saw it? A. Yes, sir.

"Q. When had you put that nightgown on? A. Just before I went to bed.

"Q. Had you worn that the night before that? A. No.

"Q. That is the first night you had worn that nightgown—I don't mean that. I withdraw that. You had worn a different nightgown the night before that? A. Yes, sir.

"Q. And put this nightgown on the night of this occurrence, is that right? A. Yes, sir.

"Q. I show you, I ask that this be marked Exhibit 1 for identification; I ask that you examine this nightgown, and ask you to testify whether or not that is the nightgown you wore on that night? A. Yes, sir.

"Q. Were any of these spots on there when you went to bed—on this nightgown? A. No.

"Q. When you got up the next morning were these spots there? A. Yes, sir."

The nightgown was then offered in evidence, and counsel for defendant objected thereto on the ground "that no proper foundation has been laid, no proper identification," which objection was by the court overruled. While no attempt was made by the prosecution to account for the whereabouts of the garment between the date of the alleged offense and the time the witness was giving her testimony on the witness stand, nor to show that its condition had remained unchanged in the meantime, there was no restriction in the matter placed by the court on counsel for defendant, and there is nothing in the record which indicates that any request was made by counsel for defendant to examine the witness for the purpose of ascertaining her knowledge on the subject. Certainly the correctness of the statements of the witness regarding the spots and the identification of the garment were open to a full and fair test on cross-examination, had counsel desired to avail himself of the opportunity. The record shows that he asked the witness no questions on the subject. The identification of the nightgown and the spots thereon was sufficient to admit it in evidence. Where the garment had been kept after the alleged offense was committed, or whether either it or the spots thereon were in exactly the same condition that they were immediately thereafter, is of no great materiality. The point was not whether they had remained unchanged, but rather was that no spots were on the gown before the alleged offense was committed, but were there immediately thereafter.

[4] Over the objection of defendant, a letter from defendant to his wife was received in evidence. Defendant's handwriting was partly proved by the stepfather of the prosecuting witness, who testified that he had seen the defendant write on numerous occasions, and that he believed the handwriting in the letter to be that of defendant. The objection is completely covered by section 1943, Code of Civil Procedure, which permits handwriting of a person to be proved by any one who "believes it to be his, and who has seen him write."

[5] While defendant's wife was not a witness on the trial, counsel for defendant contends that the letter was inadmissible under the provisions of section 1322 of the Penal Code, which provides, in effect, that the wife is not a competent witness against the husband in a criminal action. The evidence shows that this particular letter was found on the floor of a cabin shortly after defendant's wife had removed therefrom. If it may be assumed that defendant's wife could not have testified as to the contents of the letter, it does not follow that no one else who read the letter might not do so. It is analogous to the situation of testimony by a witness who overheard a conversation between husband and wife. People v. Chadwick, 4 Cal. App. 72, 87 Pac. 384, 389; People v. Swaile, 12 Cal. App. 196, 107 Pac. 134.

[6] Counsel for defendant also objects to the form of the verdict which was rendered by the jury. It was as follows:

> "We, the jury impaneled to try the above-entitled cause, find the defendant guilty as charged in the information, and recommend to the court that his sentence be not over 5 years."

Section 1151 of the Penal Code provides that—

> "A general verdict upon a plea of not guilty is either 'Guilty' or 'Not guilty.'"

The effect of defendant's contention is that the recommendation of the jury annexed to the verdict, that the sentence be not over five years, is not mere surplusage, but is a condition which renders the verdict nugatory.

In the case of People v. Holmes, 118 Cal. 444, 50 Pac. 675, it appears that a verdict was returned which, among other irregularities, prayed "the extreme mercy of the court in its sentence and punishment." The verdict was upheld on the ground that it should have a reasonable construction, and be given effect according to its manifest intention. And see People v. Cornell, 29 Cal. App. 430, 155 Pac. 1026, in which the California authorities bearing upon the subject are reviewed. In People v. Bowman, 24 Cal. App. 781, 142 Pac. 495, where one of the verdicts returned by the jury was, "We, the jury, find the defendant guilty of the crime charged and leave to the mercy of the court," it was held that such a verdict was not rendered invalid by reason of the concluding clause.

[7] The only matter to be considered here is the effect which the verdict, if any, produced by the recommendation as to the sentence to be imposed on defendant. A verdict is to be construed like any other instrument, and the rule is that, taking the verdict in its entirety, if the meaning intended to be conveyed may be clearly ascertained by common understanding, the verdict is sufficient, notwithstanding any surplusage, or that there may be included therein irregularities in spelling or awkward or incorrect expressions from a grammatical standpoint. From the language used in the verdict in the instant case there is no difficulty in ascertaining the fact that the jury found the defendant guilty as charged in the information.

The judgment is affirmed.

We concur: CONREY, P. J.; CURTIS, J

(61 Cal. App. 341)

PEOPLE v. SAUNDERS. (Cr. 933.)

(District Court of Appeal, Second District, Division 2, California. March 12, 1923.)

1. Physicians and surgeons 🔑6(1)—Physician may "treat" or "prescribe" for sick person without first making a diagnosis within statute requiring license.

A physician may treat or prescribe for a sick person in violation of Medical Practice Act, § 17, making it unlawful to "diagnose, treat, operate for, or prescribe for any disease," without a license, without first making a diagnosis of the case.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Treat; First and Second Series, Prescribe.]

2. Criminal law 🔑810—Instructions held not inconsistent; "willfully."

In a prosecution for "willfully and unlawfully" practicing medicine without a license, under Medical Practice Act, § 17, an instruction in the language of Pen. Code, § 7, subd. 1, that "the word 'willfully,' when applied to the intent by which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law or to injure another or to acquire any advantage," *held* not erroneous as against the contention that the last sentence was inconsistent with other instruction in the language of section 20 that "in every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence," since the word "it" in the last sentence of the first instruction refers back to the word "willfully."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful—Willfully.]

3. Criminal law 🔑822(1)—Sentence of charge should be read in the light of its context.

A sentence of the court's charge should not be considered as standing by itself, but should be read in the light of its context.

4. Physicians and surgeons 🔑6(10)—In prosecution for practicing without license, defendant had burden of proving he had license.

In a prosecution for practicing medicine without a license, in violation of Medical Practice Act, § 17, the defendant had the burden of proving that he had a license.

5. Physicians and surgeons 🔑6(11)—In prosecution for practicing without license, instruction not to consider favorable results of defendant's treatment held proper.

In a prosecution for practicing medicine without a license, in violation of Medical Practice Act, § 17, in which there was evidence tending to show that the defendant's treatment of his patients had produced favorable results, it was proper for the court to instruct the jury that they were not to be affected in their deliberations by any evidence to the effect that defendant's practice had succeeded with his patients.

6. Criminal law 🔑1172(1)—Instructions stating self-evident proposition held harmless.

In prosecution for violation of Medical Practice Act, § 17, making it a crime to "practice * * * any system or mode of treating the sick or afflicted" without a license, an instruction that a person who is suffering from a misplaced vertebra is sick and afflicted, and that one who engages in the occupation of adjusting or replacing such misplaced vertebra into its normal position is practicing a system or mode of treating the sick and afflicted, and an instruction that one who is suffering from nervousness, headaches, pains, or any other malmental or malphysical condition is sick and afflicted, within the statute, and that one who as an occupation manipulates the bones or kneads the muscles or tissues of such a person to relieve such condition is practicing a system and mode of treating the sick and afflicted, if erroneous as instructions on matters of fact, were harmless, since there could be no possible dissent from the propositions so stated.

7. Criminal law 🔑1178—Point not argued by appellant not considered.

A point stated but not argued by the appellant will not be considered on appeal.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

H. C. Saunders was convicted of practicing medicine without without a license, and he appeals. Affirmed.

Arthur E. Koepsel, of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., J. W. Maltman, Deputy Atty. Gen., and C. D. Ballard, of Los Angeles, for the People.

WORKS, J. Defendant was convicted of the crime of practicing a system and mode of treating the sick and afflicted without a license, a misdemeanor. He appeals from the judgment of conviction.

[1] Appellant's first point is that the evidence at the trial was insufficient to show that he had made a diagnosis in any of the cases in which it was claimed by the people that he had practiced his system of treating the sick. This point is based upon the erroneous view, for which appellant, however, is far from being wholly responsible, that one does not practice medicine or treat the sick unless, as a preliminary to ministering to the necessities of his patient, he makes a diagnosis. In support of this view of the law appellant cites People v. Jordan, 172 Cal. 391, 156 Pac. 451, and People v. Parish, (Cal. App.) 210 Pac. 633. The first-named case does not announce such a rule, but only that diagnosis is a part of the practice of medicine. The effect of the decision there rendered is faithfully epitomized in a sentence of the opinion as follows:

"To diagnose a case is as much a part of the practice of medicine as the drawing of pleadings or the giving of advice are parts of the practice of law."

People v. Parish, however, does state the rule for which appellant contends, and, moreover, People v. Jordan is in that case cited as authority for the statement. The same erroneous estimate of the effect of People v. Jordan is taken in People v. Cochran (Cal. App.) 205 Pac. 473. Under these conditions it becomes necessary for us to pass upon the legal question which is the foundation for appellant's point, although we should not otherwise be called upon to do so, for the evidence in the present case is unquestionably sufficient to support a finding that, beyond a reasonable doubt, appellant did make diagnosis in each of the cases upon which the charge in the information is based.

Irrespective, then, of People v. Jordan, do People v. Parish and People v. Cochran state the correct rule of law? The Medical Practice Act, so called, the enactment for violation of which appellant was convicted (Stats. 1913, p. 722), provides in section 17 (italics ours) that—

> "Any person who shall practice * * * any system or mode of treating the sick or afflicted in this state, or who shall *diagnose*, *treat*, operate for, *or prescribe for*, any disease, injury, deformity," etc., without having a license, shall be guilty of a misdemeanor.

It is at once apparent from this language that the Legislature intended to denounce the act of any one who, not having a license, might diagnose without treating or prescribing, or who might treat or prescribe without diagnosing. Not only so, but the enactment is based upon reason and logic. Physicians are often called as consultants in cases in which diagnosis has already been made by others. They doubtless often prescribe for cases in which they never see the patient and upon the diagnosis of others. Suppose a physician in Pasadena should write or telephone to a physician in Los Angeles, stating that he has under his care a patient who is afflicted with a certain disease, that he has prescribed certain remedies without avail, and asking the Los Angeles physician if he can suggest a remedy. If the latter should thereupon write a prescription and send it to the Pasadena physician, could it possibly be said that he would not be practicing medicine in doing so? The answer to the question is manifest. We conclude that a physician may treat or prescribe for a patient, within the meaning of the statute, without making diagnosis of his case.

[2, 3] The trial court instructed the jury in the words of subdivision 1 of section 7, Penal Code, that—

> "The word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage."

Appellant, wrenching the last sentence of this instruction from its context and taking it as if it stood alone, contends that by that sentence the jury was erroneously instructed as to the law of intent. The trial court also instructed the jury, in the language of Penal Code, § 20, that—

> "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence."

Appellant insists that the sentence to which he objects is inconsistent with the terms of the instruction in the words of section 20. If we take the sentence alone the statement is true, but it cannot properly be taken alone. Reading it in the light of its context, the last part of subdivision 1 of section 7 is to the effect that—

> "The word 'willfully,' when applied to the intent with which an act is done or omitted. * * * does not require any intent to violate law, or to injure another, or to acquire any advantage."

When taken as a whole the instruction was but a definition of the word "willfully." Moreover, it was a definition which was not improper to be given to the jury, even though it be granted that the giving was not strictly necessary. It was proper for the reason that the information charged that appellant "willfully and unlawfully" committed the acts alleged against him. As it was not error to define to the jury the word "willfully," we cannot conceive it to have been improper to give a definition formulated by the Legislature. There is a vast difference between the meaning of the words "willfully" and "unlawfully." The language of subdivision 1 of section 7 of the Penal Code defines the meaning of the former, while section 20, although not strictly a definition, has a direct application to the latter as used in connection with the former in an information or indictment. We can see no error in a trial court giving them both to the jury in proper cases. We are aware that in People v. Stennett, 51 Cal. App. 370, 197 Pac. 372, and in People v. Tomasovich (Cal. App.) 206 Pac. 119, it was said that an instruction in the words of subdivision 1 of section 7 is misleading, and that such an instruction should not be given. We cannot agree with what is said on the subject in the opinions in those cases. It is to be noted that no reversal resulted in either of the cases mentioned because of the point.

[4] The trial court instructed the jury that it was not necessary for the people to prove that appellant had no license to practice his

system of healing and that the burden was on him to prove that he had such a license. Appellant complains of the instruction as error, but it has been settled by the Supreme Court that such an instruction is proper. People v. Boo Doo Hong, 122 Cal. 606, 55 Pac. 402.

[5] The jury was instructed that they were not to be affected in their deliberations by any evidence to the effect that appellant's practice of his system had succeeded with his patients, and this instruction also is complained of. The instruction was entirely proper. There was some evidence in the record tending to show that appellant's treatment of his patients had produced favorable results. It was not only proper, but necessary, to instruct the jury that this evidence must be given no weight in determining whether appellant had practiced without a license. Otherwise the jury might have lost sight of the real question in the case.

[6] It is contended that the trial court erred in giving to the jury two other instructions. The first of these was:

> "That a person is sick and afflicted who is suffering from a misplaced vertebra, and that any one who engages in the business or occupation of adjusting or replacing, or who in the pursuit of an occupation attempts to adjust or replace, such misplaced vertebra into its normal position, is practicing a system and mode of treating the sick and afflicted."

The second was:

> "That one who is suffering at all with nervousness, headaches, pains or any other malmental or malphysical condition whatever, is sick and afflicted within the meaning of section No. 17 of the State Medical Practice Act, and that any one who engages in the business or occupation of manipulating the bones or kneading the muscles or tissues of such person for the purpose of relieving or healing such person of any such condition is practicing a system and mode of treating the sick and afflicted."

It is insisted that these instructions relate to matters of fact and not to matters of law. If for the sake of argument we concede, what we by no means decide, that the two instructions are to be so regarded, the giving of them to the jury was harmless. There can be no possible dissent from the proposition that one laboring under the disabilities named in the instructions is sick and afflicted, or that he who attempts to relieve such an one from his disabilities by the means mentioned in the instructions is practicing a system and mode of treating the sick and afflicted.

[7] Appellant states one other point, but as it is not argued it is not to be considered.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(61 Cal. App. 493)

OGDEN v. LEE. (Civ. 4406.)

(District Court of Appeal, First District, Division 1, California. March 21, 1923. Hearing Denied by Supreme Court May 17, 1923.)

1. Municipal corporations 🔑706(7)—Contributory negligence of one injured by automobile requires nonsuit, though automobile on wrong side of street.

In an action for personal injuries against the driver of an automobile, where it is conceded that defendant at the time of the accident was driving on the wrong side of the street, yet, if by the uncontradicted testimony of plaintiff himself it is shown that he was also negligent and that such negligence contributed proximately to the injuries, a motion for nonsuit is properly granted.

2. Municipal corporations 🔑706(5)—Evidence held to establish contributory negligence of one injured by automobile while crossing street in rain.

In an action for personal injuries against the driver of an automobile, evidence that it was raining and blowing and that plaintiff endeavored to cross a street while holding an umbrella in such a manner that he could not see well, and the fact that he saw, through the top of the umbrella the approaching lights, but was unable to determine whether they were moving or not, and evidence that after seeing them he proceeded directly into their path, *held* to establish contributory negligence and warrant a nonsuit.

3. Appeal and error 🔑1057(1)—Exclusions of part of deposition held not prejudicial where uncontradicted evidence to same effect admitted elsewhere.

In an action for injuries from being struck by an automobile, the exclusion of parts of a deposition, to the effect that the driver of the automobile had admitted he was on the wrong side of the street at the time of the accident, *held* not prejudicial if erroneous, where such effect was established by other testimony without contradiction.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by G. B. Ogden against Don Lee. Judgment for defendant, plaintiff appeals. Affirmed.

Hearing denied by Supreme Court; Lawlor, J., dissenting.

E. J. Talbott and John W. Bantz, both of San Francisco, for appellant.

Walter H. Linforth, of San Francisco, for respondent.

PER CURIAM. Plaintiff, while crossing Webster street, at its intersection with Grand avenue, in the city of Oakland, was struck and injured by an automobile, driven by an employee of the defendant.

This action was commenced by plaintiff for damages as a result of those injuries, and upon trial, before the court sitting with a jury, a motion for a nonsuit was granted, and judgment was entered in favor of defendant, for the reason and upon the ground that the evidence given by plaintiff proved that he was guilty of contributory negligence. Plaintiff appeals.

The record discloses that at the time of the accident defendant's automobile was being driven on the wrong side of the street, and it is upon that ground that plaintiff contends that defendant was negligent. It may be conceded that this contention of plaintiff is sound, and yet if, by the uncontradicted testimony of the plaintiff himself, it is shown that he was also negligent and that such negligence contributed proximately to the injuries complained of, the motion for a nonsuit was properly granted.

The accident occurred on the night of December 21, 1920, shortly before the hour of 8 o'clock. It was raining and blowing at the time. The wind was blowing from the north sufficiently strong to drive the rain before it. Plaintiff was dressed in a black suit and was carrying an opened black umbrella. As he stood on the westerly curb of Webster street, which runs in a northerly and southerly direction, he raised the open umbrella and looked to the north and to the south for approaching vehicles. He observed lights on the easterly side of Webster street, up near Twenty-Third street, at a distance of approximately 125 feet from him, but was unable to say whether they were the lights of an automobile or not. He was asked whether or not the lights were moving at the time he saw them, and with some considerable degree of uncertainty he first answered that if they were moving they were "not moving very much," and, afterwards, in reply to a direct question, "Were they moving, yes or no," he answered, "I couldn't say." Later he stated, "I could not tell positively that it (the light) was not moving." He stated that he then pulled the umbrella down over his head to protect himself from the rain, and proceeded to cross the street. When he reached the center of the street he still had the umbrella well down over his head and tilted to the north for the purpose of shedding the rain; that he then looked to the south under the edge of the umbrella and saw no vehicle approaching from that direction, and he then looked to the north through the "roofing" of the umbrella and observed that the light on the easterly side of Webster street was then within 75 or 80 feet from him. Nevertheless, he continued on his course and walked directly into the pathway of the moving automobile, and was struck and injured.

[1] In view of these facts, which were established by the plaintiff's own testimony, we are convinced that the trial court was correct in holding that plaintiff was guilty of contributory negligence. The motion for a nonsuit was therefore properly granted.

[2] Plaintiff endeavors to justify his contention that he was not guilty of contributory negligence upon the grounds that he believed in good faith that the light which he observed was stationary, and that he did all that the law required him to do when he looked to the right and to the left before attempting to cross to the easterly side of the street.

It is doubtless true that plaintiff did believe that the light he saw was not moving toward him; otherwise he would not have walked squarely in front of the moving machine. But we are constrained to hold, as a matter of law, as did the trial court, that under the circumstances here shown plaintiff did not act as a prudent person in forming and acting upon such belief, particularly in view of the fact that when he was in the middle of the street the light was approximately 50 feet closer to him than it was when he left the curb. If he had paused only a few seconds in the middle of the street, it is plain that he would then have known that it was the light of an approaching automobile.

A complete answer to the second proposition is that even though plaintiff did look to the right and to the left when he reached the middle of the street and before he attempted to cross to the easterly side thereof, he obviously did not heed what he saw. He admits that when he stepped from the curb he saw a light 125 feet from him, and that when he reached the middle of the street this same light was within 70 or 80 feet from him, and without pausing for a few seconds to ascertain whether or not it was the light of an automobile, he continued on, with the umbrella pulled down over his face, until he was struck by the machine.

In the case of Moss v. Boynton Co., 44 Cal. App. 474, 186 Pac. 631, the rule is stated as follows:

> "It was a duty devolving upon plaintiff, as the act of an ordinarily prudent man, immediately before placing himself in a position of danger, to look in the direction from which danger was to be anticipated. This was a continuing duty, and was not met by looking once and then looking away. In the exercise of ordinary care it is the duty of a pedestrian 'to look to the right and to the left whenever he has voluntarily put himself in a position which may be one of peril coming from either direction.' Sheldon v. James, 175 Cal. 474–479."

Measuring the facts of this case by the rule thus stated, the plaintiff was guilty of contributory negligence. Finkle v. Tait (Cal. App.) 203 Pac. 1031; Chrissinger v. Southern Pacific Co., 169 Cal. 619, 149 Pac. 175.

[3] Appellant also complains of a ruling of the trial court excluding, upon the objection of the defendant, certain testimony given by plaintiff in the form of a deposition. Plaintiff's deposition was taken at the request of the defendant prior to the trial.

Plaintiff also testified as a witness at the trial. At the conclusion of plaintiff's testimony, before the court and jury, plaintiff offered in evidence said deposition. Defendant objected to certain answers therein given, which were made in response to questions propounded by the defendant, and the court sustained the objection. The substance of those answers is that the driver of the machine admitted to plaintiff, while plaintiff was being taken, to the hospital, that he, the driver of the machine, was on the wrong side of the street. This ruling, even though it be error, was not prejudicial to plaintiff's case, for the reason that by plaintiff's testimony, given before the court and jury, it was established without contradiction that said automobile was, at the time of the accident, being driven on the wrong side of the street.

The judgment is affirmed.

(61 Cal. App. 464)

In re HOLT'S ESTATE. (Civ. 2567.)

(District Court of Appeal, Third District, California. March 19, 1923. Hearing Denied by Supreme Court May 17, 1923.)

1. Taxation 🔑864—Voluntary declaration of trust by devisee does not affect inheritance tax.

If there was no valid existent trust at the moment of decedent's death, an acknowledgment of a trust subsequently executed by a devisee with reference to the property devised amounts to no more than a voluntary transfer by her, and cannot affect the amount of inheritance tax due the state.

2. Trusts 🔑96—Devise on promise of devisee to use in particular manner creates a trust.

Where a testator makes known to a devisee his desire that the property shall be disposed of in a particular manner, and that he relies on the devisee to carry the desire into effect, and the devisee uses words and does acts calculated to cause, and which he knows do in fact cause, testator to believe he assents thereto, and the testator in consequence thereof makes the devise, a constructive trust is created.

3. Evidence 🔑317(4)—Declarations of testator not communicated to devisee are not binding on him.

The declarations of testator, not made in the presence of a devisee and not communicated to the devisee, relating to the disposition the testator desires to have made of the property devised, are not binding on the devisee, and are incompetent as mere hearsay.

4. Trusts 🔑110—Evidence held not to show devisee's promise to hold property in trust.

Evidence in proceedings to assess an inheritance tax *held* not to sustain an allegation that the devisee had promised testator to carry out his desires with reference to the property, so as to establish a constructive trust which would result in a lower tax.

5. Judgment 🔑735—Finding in probate proceeding not binding, in determining liability for inheritance tax.

The right of a state to collect inheritance tax cannot be prejudiced by any finding of the court in proceedings to probate a will.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

In the matter of the estate of Benjamin Holt, deceased, in which Anna Brown Holt and others were executrix and administrators. From an order of the superior court fixing the amount of the inheritance tax, Myra A. Holt appeals, naming as respondents the executrix and executors and Ray L. Riley, State Controller. Order affirmed.

Harding & Monroe, of San Francisco, for appellant.

Neumiller & Ditz, of Stockton, for petitioners and respondents.

James L. Atteridge, of Sacramento, for other respondent.

FINCH, P. J. This appeal is from an order fixing the amount of inheritance tax chargeable against the property given by the will of decedent to appellant.

The only part of the will material here is the seventh clause, which reads as follows:

> "I give, bequeath and devise unto my sister, Myra A. Holt, of Concord, New Hampshire, the other one-third (1/3) share or portion of said rest, remainder and residue of my said property and estate."

There is nothing in the will to limit or qualify this clause. The value of the property thus passing to appellant is the sum of $335,502.32.

The petition for probate of the will alleged that decedent, during his lifetime, requested and directed appellant that the income of such property—

> "should be enjoyed by her during her natural life, and out of said income thereof, she should provide for her sister Anna M. Holt, during the natural life of said sister Anna M. Holt, and upon the death of said Myra A. Holt, said property * * * should go to the children of said Benjamin Holt, deceased, * * * and to the survivor or survivors of them, share and share alike, and said Myra A. Holt, heretofore by an instrument in writing, which is herewith presented to said superior court, has acknowledged and accepted said trust and declared her intention to accept said property and estate impressed and charged with said trust."

The acceptance and acknowledgment of the alleged trust, so presented, was executed after the death of decedent. The court found the facts alleged in the petition to be true and admitted the will to probate.

The inheritance tax appraiser in due time filed his report containing two exhibits, the one showing the amount of the inheritance tax due if appellant received the property free of any trust, and the other showing the amount of such tax if the property was impressed with a binding trust at the time of the death of decedent. The difference between the respective amounts so estimated is, in round numbers, the sum of $20,000. Appellant filed her objections to the report and alleged that the decedent had requested her to accept the property under the terms of the alleged trust, and that she had promised him to do so, and that she had executed the aforesaid acknowledgment and acceptance of such trust. The court overruled appellant's objections and fixed the amount of the inheritance tax irrespective of the alleged trust.

Appellant contends that, by reason of the alleged oral trust, her only beneficial interest in the property is that of a life estate, that the beneficial interest in the remainder is in the decedent's children, and that therefore the tax should be computed separately upon such interests. It is argued that In re Murphy, 4 Misc. Rep. 230, 25 N. Y. Supp. 107, and In re Farley's Estate, 15 N. Y. State Rep. 727, directly sustain this contention. On the other hand, the state controller relies on the later decision of In re Edson, 38 App. Div. 19, 56 N. Y. Supp. 409, affirmed, 159 N. Y. 568, 54 N. E. 1092. In addition to the cases cited that of Cullen v. Attorney General, L. R. 1 H. L. 190, 144 L. T. Rep. (N. S.) 44, tends to support the controller's position, and People v. Schaefer, 266 Ill. 334, 107 N. E. 617, and In re Romney's Estate (Utah) 207 Pac. 139, directly sustain the contention of appellant. The statute under consideration in Cullen v. Attorney General imposed a tax only upon property passing by "will or testamentary instrument," while the California tax is imposed in case of any transfer made in contemplation of death. The decision, therefore, is not entitled to great weight as an authority in support of the order appealed from. While the reasoning of the court in the Illinois case is persuasive in support of appellant's contention, the question of law under consideration need not be decided because the implied finding against the existence of the alleged oral trust is justified by the evidence.

The testimony tending to establish the alleged trust is short and will be given in full. Counsel for the controller objected to any testimony as to statements made by the testator, "on the ground that it is incompetent, irrelevant, and immaterial—what was said. And it is an attempt to vary the terms of a will in probate." The objection was overruled and the witnesses testified as follows:

C. L. Neumiller:

"Q. Was there anything said by Mr. Holt at that time about it (the bequest to appellant)? A. Of course he discussed the general disposition of his property, and discussed this share that went to his sister Myra in the will, to her and her sister Anna during their lives, and at the death of Myra to go to his children, substantially I think as the acknowledgment and declaration of trust sets forth. Q. Was there anything said in regard to the form in which he was leaving it? A. No; he was making that bequest for his sisters during their lives, and at the death of Myra to go to his children. Q. Was there anything in regard to the knowledge of this on the part of his sisters? A. Judge Jones, who drew the will—and, of course, I was present, and Mr. Eccleston was present; at that time why the question arose of inserting those provisions in the will; that is, as to the trust he was establishing, and at that time he told us his sister Myra understood that thoroughly, he had discussed the matter with her. There was Mr. Eccleston, Judge Jones, myself, and Benjamin Holt present."

O. H. Eccleston:

"Q. What did Mr. Benjamin Holt say at that time, if anything? A. That he wished that share of his property to go to his sisters Anna and Myra, and desired the younger, Myra, to handle the property during their lifetime, and after they had the use of it, it was to go to his children."

Mrs. Anna Brown Holt:

"I am the wife of Benjamin Holt. Q. Did Benjamin Holt ever converse with you in regard to the bequest which he made to his sister Myra Holt? A. He always said Myra was to have it, and then when she passed away it was to go to the children. That is the way it was always understood."

Myra Holt:

"I am a sister of Mr. Benjamin Holt. I am the Myra Holt to whom this legacy was left. I executed the declaration of trust which is on file here in court. Q. Why did you do that? A. I did it because it was my brother's request."

The acknowledgment and acceptance of trust was then admitted in evidence. The controller then introduced in evidence the will, the petition for letters testamentary, and the order admitting the will to probate.

[1, 2] If there was not a valid existent trust at the moment of decedent's death, then the acknowledgment and acceptance executed by the appellant could amount to no more than a voluntary transfer by her to decedent's children and could not affect the amount of inheritance tax due the state. Estate of Rossi, 169 Cal. 148, 146 Pac. 430. Appellant cites 39 Cyc. 177, as follows:

"Where a testator or ancestor makes known to his devisee, legatee, or heir his desire that his property shall be disposed of in a particular manner, and that he relies upon him to carry his desire into effect, and such devisee, legatee or heir uses words, or does acts, calculated to cause, and which he knows do in fact cause, the testator or ancestor to believe that he fully assents thereto, and, where in consequence thereof, the testator or ancestor makes, or omits to make a will or such particular disposition of his property in his lifetime as will carry out his desire, a constructive trust is created."

The rule thus stated is in effect that, if the testator, in the disposition of his property, has acted or refrained from acting in reliance upon the promise of the devisee or legatee, express or implied, to hold the property in trust, the trust will be binding upon such devisee or legatee.

> "While a testator may make a gift to a legatee solely for the purpose of enabling him, if he sees fit, to dispose of it in a particular way, still, if there is no promise by him, either express or implied, to so dispose of it, and the matter is left wholly to his will and discretion, no secret trust is created, and he may, if he chooses, apply the legacy to his own use." Amherst College v. Ritch, 151 N. Y. 323, 45 N. E. 887, 37 L. R. A. 305; O'Donnell v. Murphy, 17 Cal. App. 625, 120 Pac. 1076.

Counsel for appellant recognized the necessity of showing such a promise by alleging, in the objections filed to the report of the inheritance tax appraiser, that "the said Benjamin Holt asked the said Myra A. Holt if she would accept the said bequest under the terms as above stated, and the said Myra A. Holt accepted the said trust and told him that she would hold the property under the terms first above set forth." The evidence, however, is singularly silent upon the issue thus tendered. There is no evidence that appellant even knew, during the lifetime of decedent, that her brother intended to create the alleged trust.

[3-5] The declarations of the testator, not made in the presence of appellant, or communicated to her during his lifetime, were not admissible to prove such knowledge on her part. Evidence of such declarations is not competent proof of past events, being mere hearsay. Estate of Carson, 184 Cal. 437, 445, 194 Pac. 5, 17 A. L. R. 239. Appellant did not testify that she had such knowledge prior to her brother's death. Her statement that she executed the acknowledgment and acceptance of the alleged trust "because it was my brother's request" is not inconsistent with the assumption that she may have acquired knowledge of such request, for the first time, after her brother's death. It is not unreasonable to assume that, if she had made the alleged promise to her brother she would have positively so stated in her testimony. In the order admitting the will to probate, introduced by the controller, the court found that the decedent, during his lifetime, requested and directed appellant to use and dispose of the property in accordance with the terms of the alleged trust. There was no finding therein, however, that appellant, expressly or impliedly, by conduct or otherwise, promised to comply with such request and direction. Furthermore, the rights of devisees, legatees, heirs and other claimants are not to be determined in a proceeding for the probate of a will. 28 R. C. L. 377. Certainly the right of the state to collect an inheritance tax cannot be prejudiced by any finding of the court in such a proceeding. The finding relative to the alleged trust is wholly foreign to any matter then before the court for determination. The order, therefore, is not competent evidence that the decedent requested appellant to hold and dispose of the property in accordance with the terms of the alleged trust, and a court is not required to base a finding on incompetent evidence. Hutchings v. Castle, 48 Cal. 152. If it can be said that the evidence possibly is such that either of two opposite conclusions might be drawn therefrom, it certainly cannot be held that it is so conclusive in favor of appellant's contention as to require a finding in her favor. The admissions of appellant, made after her brother's death, may be sufficient to establish the alleged trust as against her, but they can be given no weight in her favor as against the state. Independent of such admissions, the evidence in support of the trust is exceedingly slight.

The order is affirmed.

We concur: HART, J.; BURNETT, J.

191 Cal. 129

MANSFIELD v. PICKWICK STAGES, NORTHERN DIVISION, Inc., et al. (S. F. 10578, 10576, 10577, 10575.)

(Supreme Court of California. May 8, 1923.)

1. Election of remedies 🔑1—Does not estop party to dismiss and pursue another remedy unless injury to adverse party is shown; "election of remedies."

The doctrine of election of remedies is based on the doctrine of estoppel, and in order for it to operate so as to estop one who has made an election from changing it and pursuing a different remedy a disadvantage constituting a real injury to the adverse party and amounting to fraud must be shown; an election of remedies being defined as the choosing between two or more different or coexisting modes of procedure and relief allowed by law on the same state of fact.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Election.]

2. Venue 🔑22(1)—Right to change of venue to county of defendant's residence not absolute.

A defendant being sued in a county other than his residence has a right, upon a proper showing and in the absence of a sufficient countershowing, to a change of venue to its own county, but this is not a right to an absolute transfer, but only a right to be protected against being compelled to proceed to trial in a county other than the one designated by law for the trial of such actions.

3. Election of remedies 🔑12—Action held not barred by commencement and dismissal of previous action in different county.

The commencing of an action against a defendant stage line to recover for personal injuries in one county and its dismissal and the bringing of suit in another county, neither of which was the county of defendant's residence, *held* not sufficiently prejudicial to defendant so as to make applicable the doctrine of election of remedies and bar the second action.

In Bank. Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Four actions by D. W. Mansfield, Mrs. J. H. Weider, Edward Leitert, and Lester Lawrence against the Pickwick Stages, Northern Division, Inc., and others. From orders denying its motion for a change of venue, the named defendant appeals. Orders affirmed.

B. P. Gibbs, of Los Angeles, and Barry J. Colding and Theodore Hale, both of San Francisco (J. E. Pemberton, of San Francisco, of counsel), for appellant.

Reisner & Honey, of San Francisco, for respondent.

MYERS, J. The defendant in each of the above-entitled actions prosecutes these appeals from orders denying its motion for a change of venue from Monterey county to Los Angeles county. Each action is for damages for personal injuries sustained in an accident which occurred in Monterey county. The defendant, a corporation, had its principal place of business, and therefore its legal residence, in Los Angeles county. Prior to the commencement of these actions in Monterey county each of the plaintiffs filed a complaint upon the same cause of action in the city and county of San Francisco, whereupon the defendant moved for a change of venue to Los Angeles county, the county of its residence, and the plaintiff thereupon dismissed the action and refiled the same in Monterey county. Defendant's sole contention on this appeal is that when plaintiff filed the action in the city and county of San Francisco the defendant thereupon had an absolute right, upon proper procedure, to change the place of trial to its home county, that the plaintiffs sought to deprive defendant of this right by dismissing and refiling the actions in Monterey county, and that under these circumstances plaintiffs should be held to have made an irrevocable election of remedies, and to be estopped thereby to resist defendant's motion for a change of venue from Monterey county to Los Angeles county.

"An election of remedies is defined as the choosing between two or more different and coexisting modes of procedure and relief allowed by law on the same state of facts." 9 R. C. L. p. 956.

"Election of remedies has been defined to be the right to choose or the act of choosing between different actions or remedies where plaintiff has suffered one species of wrong from the act complained of. Broadly speaking, an election of remedies is the choice by a plaintiff to an action of one of two or more coexisting remedial rights, where several such rights arise out of the same facts, but the term has been generally limited to a choice by a party between inconsistent remedial rights, the assertion of one being necessarily repugnant to or a repudiation of the other." 20 C. J. p. 2.

The general rule is that the remedy first sought must be pursued to judgment. Many cases go to the extent of holding that, where a party has brought his action in pursuit of one remedy, he cannot, by dismissing it before judgment, be permitted to pursue another and different remedy, but that the commencement of the first is a conclusive election by which he is bound. Hines v. Ward, 121 Cal. 115, 120, 53 Pac. 427.

"The doctrine of election, as applied to a choice of remedies, which precludes a party from claiming repugnant rights, is but an extension of the general principles of equitable estoppel, and proceeds upon a like theory, that the inconsistent attitude of the party will put his adversary to some disadvantage." Hines v. Ward, supra."

Of course, under the well-settled principles of the doctrine of estoppel, the disadvantage here referred to must be a real injury, such as would, in contemplation of law, amount to a fraud upon the party invoking the estoppel. When it is of this character, the doctrine of election of remedies will be applied by the courts. Buckmaster v. Bertram, 186 Cal. 673, 678, 200 Pac. 610.

[1] The sole injury claimed to have been suffered by the appellant herein is that it was put to the expense of preparing to present to the San Francisco court its motion for change of venue. If this should be held such an injury as to give rise to an estoppel, the logical conclusion must be that the plaintiff by having filed and then dismissed his action in San Francisco should be barred thereby from thereafter prosecuting the same in any court.

"The rule has long been established that a judgment of dismissal given upon motion of the plaintiff, before the hearing or trial of any issue of law or fact and without any determination of the merits of the cause, is no bar to a subsequent suit in any court upon the same cause of action." Carr v. Howell, 154 Cal. 383, 97 Pac. 885.

[2, 3] It has been held that where one brings an action for the recovery of the purchase money paid upon the theory that the contract was rescinded and a judgment of nonsuit is rendered because no rescission of the contract had been proved, the plaintiff may afterwards bring an action for specific performance of the contract (McGibbon v. Schmidt, 172 Cal. 70, 155 Pac. 460); also that the bringing of an action for rescission of a contract for exchange of properties in which a nonsuit is granted because of a failure to tender a deed to defendant before suit brought is not a bar to an action for damages for fraudulent representations. Herdan v. Hanson, 182 Cal. 538, 189 Pac. 440. Manifestly the defendant in each of the foregoing cases was put to vastly more expense and inconvenience than was the defendant herein.

The fallacy in appellant's position herein rests upon its assumption that the commencement of the actions in San Francisco county conferred upon the defendant an "absolute right, upon proper procedure presented to change the place of trial to its home county," which "right could not be taken from defendant by any change in election of remedies by plaintiff." It is true that upon the commencement of the actions in San Francisco county defendant had a right upon a proper showing, and in the absence of a sufficient countershowing, Sheffield v. Pickwick Stages (Cal. Sup.) 214 Pac. 852, to a change of venue to its home county, but, in its essence, this was not a right to a transfer to its home county, but a right to be protected against being compelled to proceed to trial in a county other than one designated by law for the trial of such actions. Monterey county is a proper county for the commencement and the trial of these actions. Code Civ. Proc. § 395; Gridley v. Fellows, 166 Cal. 765, 138 Pac. 355; Rains v. Diamond Match Co., 171 Cal. 326, 153 Pac. 239.

The orders appealed from are affirmed.

We concur: WILBUR, C. J.; LAWLOR, J.; LENNON, J.; WASTE, J.; SEAWELL, J.; KERRIGAN, J.

191 Cal. 149

CITY STREET IMPROVEMENT CO. v. QUIGLEY. (S. F. 9815.)

(Supreme Court of California. May 12, 1923.)

1. Municipal corporations ⟹514(11)—Reassessment for street improvements irregularly levied held void.

Where a reassessment for a street improvement does not comply with the order of the board of supervisors, is not levied at the uniform rate per front foot, is not levied at the rate specified in the assessment itself, and is not levied for the amount of the work done with the expenses therefor, but only for a fraction thereof, it is void.

2. Municipal corporations ⟹459, 472—Assessment for more than 50 per cent. of assessed value of property, and not spread uniformly, held void.

Assessments for street improvements not restricted to 50 per cent. of the assessed value of the property, and not spread uniformly for the entire cost of the work, *held* void.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the City Street Improvement Company against Thomas D. Quigley to foreclose a street assessment lien. Judgment for plaintiff, and defendant appeals. Reversed.

R. M. F. Soto, of San Francisco, for appellant.

Platt Kent, of San Francisco, for respondent.

WILBUR, C. J. This is an action to recover a street assessment for the improvement of Moraga avenue between Eighth and Ninth avenues. Plaintiff recovered judgment, and the defendant appeals. The assessment is a frontage assessment levied under the street improvement ordinance of the city and county of San Francisco, No. 2685, new series, the provisions of which ordinance have been before this court in a number of recent cases. Bienfield v. Van Ness, 176 Cal. 585, 169 Pac. 225; City Street Improvement Co. v. Pearson, 181 Cal. 640, 185 Pac. 962, 20 A. L. R.

1317; Federal Construction Co. v. Wolfson, 186 Cal. 267, 199 Pac. 512; and Federal Construction Co. v. Newhouse, 186 Cal. 284, 199 Pac. 519. The street assessment first made under the provisions of this ordinance on March 24, 1916, exceeded half the assessed value of the defendant's lot as shown on the tax assessment roll for the previous year. Such assessment was expressly prohibited by the charter of the city and county of San Francisco (section 8 of chapter II of article VI and section 33 thereof), and by section 28 of the street improvement ordinance, as no provision was made in the proceedings for the payment of the assessment in installments as required by said section 33 of the charter.

In the absence of such provision we have held that the assessment is void (City Street Improvement Co. v. Pearson, supra; Federal Construction Co. v. Wolfson, supra), and that no appeal need be taken from such an assessment by the property owner to the board of supervisors for the reason that the supervisors are powerless to correct the error.

Notwithstanding that fact, in the case at bar the board of supervisors, upon an appeal by the defendant, set aside the original assessment and ordered a second assessment "to cover the cost and expense of the street work described in the complaint." The amount of this second assessment upon the defendant's property is exactly one-half of the assessed value of his property as shown by the assessment roll of the preceding year, to wit, $200. In view of this situation, it is necessary to state additional facts. Only two lots front on the work, which was done on only one side of the street and for part of a block. One lot is 25 feet by 70 feet, fronting on Eighth avenue (the 70 feet fronting on the work on Moraga avenue), and the other, the lot of the defendant, fronting 25 feet on Moraga avenue. As a result only 95 feet of frontage is assessed for the improvement in question. The total cost and expense of the work, together with incidental expenses in connection with the improvement, is $994.50, giving the rate per front foot $10.468421. At this rate the lot with 70 feet frontage was assessed $732.79, and the defendant's lot of 25 feet frontage was assessed but $261.71 in the original assessment. By the new assessment dated May 31, 1917, made by the board of public works after the order of the board of supervisors on appeal, the amount of the assessment on the 70-foot lot was reduced to 50 per cent. of the assessed valuation of that lot, to wit, $260, and the assessment upon defendant's lot was reduced to 50 per cent. of the assessed valuation, to wit, $200, and thus the entire assessment was reduced to $460. It is true that by this method the board of public works has so adjusted the assessment that it does not violate the particular provisions of the street improvement act and of the charter prohibiting the assessment of any lot for certain improvements at more than 50 per cent. of its assessed value, but by so doing the board has violated the provisions of the ordinance with regard to the method of assessment in several particulars, a few of which need only be mentioned.

[1, 2] The assessment does not comply with the order of the board of supervisors. The assessment is not levied at a uniform rate per front foot. It is not levied at the rate specified in the assessment itself, which is the rate hereinabove stated. It is not levied for the amount of the work done with expenses therefor, but only for a fraction thereof. For these reasons the assessment is void, and, inasmuch as the supervisors could not levy an assessment which complied with the provisions of the law restricting the amount of the assessment to 50 per cent. of the assessed value of the lot and also with the provisions requiring that the assessment be spread uniformly for the entire cost of the work, the remedy by appeal is not availing, and the new assessment as well as the old was void.

Judgment reversed.

We concur: KERRIGAN, J.; SEAWELL, J.; WASTE, J.; MYERS, J.; LAWLOR, J.; LENNON, J.

(191 Cal. 133)

LEUSCHEN v. SMALL CLAIMS COURT OF HIGHLAND TP., SAN BERNARDINO COUNTY, et al. (L. A. 7670.)

(Supreme Court of California. May 12, 1923. Rehearing Denied June 7, 1923.)

Courts 🔑175—Small claims court held to have jurisdiction of actions ex delicto as well as ex contractu.

A small claims court, operating under Code Civ. Proc. § 927, as added by St. 1921, p. 117, with a justice of the peace presiding, has jurisdiction of actions ex delicto as well as ex contractu.

In Bank.

Application by F. R. Leuschen against the Small Claims Court of Highland Township, San Bernardino County, and another for a writ of prohibition to prevent the court from assuming jurisdiction of an action in tort. Writ denied.

David R. Faries and John R. Berryman, Jr., both of Los Angeles, for petitioner.

Chas. D. Pennock, in pro. per.

WILBUR, C. J. This is an original proceeding in prohibition to prevent the respondent from proceeding with the trial upon a claim of $30.10 damages due to alleged negligence of the petitioner. Section 927 of the Code of Civil Procedure, enacted May 16, 1921 (Stats. 1921, p. 117), provided as follows:

> "All justices of the peace shall exercise the jurisdiction conferred by this title and while sitting in the exercise of said jurisdiction shall be known and referred to as the small claims court; provided, that the jurisdiction of such justices court, when sitting as a small claims court, shall be confined to cases for the recovery of money only where the amount claimed does not exceed fifty (50) dollars and the defendant named is a resident of the township or city and county in which the action is to be maintained."

It is claimed by the petitioner that the jurisdiction of the justice of the peace when sitting as a small claims court does not include claims for tort. It is clear that an action for tort is included in the phrase "cases for the recovery of money only," and unless there is something in the statute which limits or modifies this provision, it is clear that the respondent is authorized to proceed in the matter now pending before him, as a justice of the peace sitting as a small claims court. It is claimed that the affidavit filed by the party instituting the proceeding in the so-called small claims court indicates that it was not the intention of the Legislature to include in the jurisdiction of the small claims court actions for tort. This claim is based upon the formal affidavit by which the proceedings were instituted, which requires the claimant to make oath—

> "that the defendant is indebted to the plaintiff in the sum of $——; that this affiant has demanded payment of said sum; that the defendant refused to pay the same and no part thereof has been paid."

Section 927h, added by St. 1921, p. 119, provides that:

> "No formal pleading, other than the said claim and notice, shall be necessary and the hearing and disposition of all such actions shall be informal, with the sole object of dispensing speedy justice between the parties."

By section 927g, added by St. 1921, p. 119, it is provided that the parties shall not be represented by any party other than themselves.

Assuming that the word "debt" applies only to claims arising ex contractu, it is argued that the form of affidavit is inapplicable to actions for tort. We think, however, that this is too narrow a view of the scope of the legislation. For some purposes it has been held that a judgment resulting from a tort is a debt. See Ex parte Prader, 6 Cal. 239, wherein it was held a violation of the Constitution of 1849 to imprison a defendant for the nonpayment of a judgment for an assault and battery. It is, we think, too narrow a view of the legislation and its purpose to hold that the use of the word "indebted" in informal and nontechnical affidavits filed to initiate the proceeding is a controlling factor in the determination of the jurisdiction.

The movement for small claims courts is not new. 3 Blackstone, p. 81. In 1605 the English Parliament passed an act "for the recovering of small debts, and for the relieving of poor debtors in London." This statute provided a summary method of collecting debts of less than 40 shillings, by "tradesman, victualler or labouring man." This act provided:

> "That if an action of debt, or action upon the case upon an assumpsit for the recovery of any debt, to be sued or prosecuted against any the person or persons aforesaid, in any of the King's courts at Westminster, or elsewhere, out of the said court of requests, it shall appear to the judge or judges of the court where such action shall be sued or prosecuted, that the debt to be recovered by the plaintiff in such action doth not amount to the sum of forty shillings, and the defendant in such action shall duly prove, either by sufficient testimony, or by his own oath, to be allowed by any the judge or judges of the said court where such action shall depend, that at the time of the commencing of such action such defendant was inhabiting and resiant in the city of London, or the liberties thereof, as above, that in such case the said judge or judges shall not allow to the said plaintiff any costs of suit, but shall award that the same plaintiff shall pay so much ordinary costs to the party defendant, as such defendant shall justly prove before the said judge or judges, it hath truly cost him in defence of the said suit." 3 Jac. 1, c. 15.

A similar statute was passed in 1741. 14 Geo. II, c. 10. This statute provided:

> "That from and after the twenty-fourth day of June, one thousand seven hundred and forty one, it shall and may be lawful to and for every citizen and freeman of city of London, and every other person and persons inhabiting, or that shall hereafter inhabit, within the said city or the liberties thereof; and all and every person or persons who do or shall rent or keep any shop, shed, stall or stand, or seek a livelihood in the said city or liberties thereof, which now have or hereafter shall have any debt or debts owing unto him, her or them, not exceeding the sum of forty shillings, by any person or persons whatsoever inhabiting or seeking a livelihood within the said city or liberties thereof, during their respective inhabiting within the said city or liberties thereof, or seeking a livelihood as aforesaid, to cause such debtor or debtors to be warned or summoned by any of the bedels, or officers of the said court of requests for the time being, by writing left at the dwelling house, lodgings, shop, shed, stall, or stand, or any other place of seeking a livelihood of such debtor or debtors, or by any other reasonable warning or notice to be given to the said debtor or debtors, to appear before the commissioners of the said court of requests, holden in the Guildhall of the said city, and that the said commissioners, or any three of them, or more, shall after such summons as aforesaid have power and authority by virtue of this act, from time to time to set down, or cause to be

set down such order or orders, between such party or parties, plaintiff or plaintiffs, and his, her or their debtor or debtors, defendant or defendants, touching such debts not exceeding the said sum of forty shillings in question before them, as they shall find to stand with equity and good conscience, all such order or orders to be registered in a book as they have been accustomed to be; which order or orders so made as well the party plaintiff as the debtor or defendant shall observe, perform and keep in all points; any thing in any act contained to the contrary thereof in any wise notwithstanding."

These acts undoubtedly applied only to actions ex contractu, but the present movement for small claims courts apparently originated in Chicago. Journal of American Judicature Society, vol. 2, p. 23. The plan there adopted was to transfer all the litigation in which $35 or less was claimed, to one justice of the municipal court, "on a special calendar to be heard in a separate branch to be known as the small claims branch." These small claims, of course, included claims ex delicto as well as ex contractu. Apparently it was the success of the Chicago court and of the small claims court in Portland, Or., that brought about the new legislation for such court in this state. An original draft of the bill is found in the transactions of the Commonwealth Club of California, vol. 15, No. 3, p. 165. Assemblyman Rosenshine, who introduced the bill in the state Legislature, discussed the subject on page 127 of the same publication. It appears from this discussion that the main purpose of the legislation was to provide a similar procedure for all litigation involving small claims, and no distinction is suggested between actions ex contractu and ex delicto.

The state of Massachusetts, in providing for the small claims court, authorized justices of the district courts, etc., to make rules providing for a simple, informal, and inexpensive procedure for the determination of claims in the nature of contracts or torts other than slander or libel in which the plaintiff does not claim as debt or damages more than $35. Stats. Massachusetts, 1920, p. 553. See, also, Gen. Laws of Massachusetts, 1921, vol. 2, c. 218, § 21, p. 2352.

The editor of the Journal of the American Judicature Society, in commenting upon the statute recently adopted in California (issue of June, 1921, vol. 5, p. 29), in summing up the California law, said:

> "It will amount, in operation, substantially to this: That a person having a claim less than fifty dollars will proceed under the Small Claims Act if he has confidence in the justice of the peace, otherwise he will follow the customary procedure and demand a jury."

We are satisfied that this summary is a correct construction of the act, and that the jurisdiction of the court included actions ex delicto as well as ex contractu.

In discussing a somewhat similar statute, the Supreme Court of Minnesota, in Flour City Fuel & Transfer Co. v. Young, 150 Minn. 452, 185 N. W. 934, said:

> "The theory from the standpoint of a small debtors' court is that litigation by the common-law method over small claims is wasteful, and fails to bring practical justice because of an expense out of proportion to the amounts involved, the time of the parties consumed in the litigation when they should be engaged otherwise, and the attendant delay in reaching a result. The legal profession notes the waste more clearly than laymen. It is recognized that to some extent defendants decline to pay, knowing that the smallness of the claim practically insures against compulsory payment. It is recognized that some persons having small claims submit to a denial of payment because they cannot incur the expense and await the termination of the ordinary trial. Under the act the expense is put upon the taxpayers of the city, and the trial is speeded. It is all over in a few days. The effort is to avoid contention and a prolonged controversy, and lawyers are excluded. While it is recognized that litigation without expense may encourage the assertion of doubtful or unfounded claims, or claims that might as well go unasserted, the thought of the statute is that on the whole justice is best subserved by a summary consideration of small controversies without expense to the parties. This is not the place to discuss the character and history and policy of such courts. We are interested in them here only as they affect the legal questions presented. A study of them is given under the title of Justice and the Poor in bulletin No. 13, Carnegie Foundation, 41–67. See, also, Renaud v. State Board, 124 Mich. 648, 83 N. W. 620, 51 L. R. A. 458, 83 Am. St Rep. 346; 26 Harv. Law Rev. 302, 310; 64 Pa. Law Rev. 356; bulletin No. 8, Am. Jud. Soc. In an article in 1 Minn. Law Rev. 107, written shortly prior to the passage of the Minneapolis Act, and in 2 Minn. Law Rev. 491, written shortly after, William R. Vance, then dean of the University Law School, writes of such courts, their purposes and working, and gives their historical background; and he mentions the constitutional question which now engages our attention."

In Olson's Oregon Laws, 1920, vol. 1, p. 900, § 948—33, providing for the organization of a department of the district court, to be known as the small claims department, it is provided that said courts "shall have jurisdiction, but not exclusive, in cases for the recovery of money only where the amount claimed does not exceed twenty dollars ($20)," etc. The section in regard to making the claims differs from that in California, for it provides for a statement in a brief and concise form of the nature and amount of said claim, etc. Section 948—37. The law of Kansas upon the subject (General Statutes of Kansas, 1915, § 3319) gives jurisdiction to the small debtors court of small debts and amounts not exceeding $20. In this court the plaintiff appears before the judge personally and states his case orally. Section 3321.

It is apparent that the Legislature of California intended to formulate a method of procedure for small claims of all kinds which would obviate the expense and delay due to ordinary methods of litigation and that this system was intended to operate for the rich and poor alike. We have freely referred to publications and reports with reference to small claims courts, not because they should influence us in interpreting doubtful provisions of the statute, but merely to show that their obvious construction agrees with the general purpose indicated by such publications and the statutes of other states growing out of the demand for more simple, less expensive, and more speedy decisions of cases involving small amounts.

Writ denied.

We concur: KERRIGAN, J.; MYERS, J.; LAWLOR, J.; WASTE, J.; LENNON, J.; SEAWELL, J.

---

191 Cal. 123

GAVER v. EARLY et al. (S. F. 9716.)

(Supreme Court of California. May 4, 1923.)

1. Guardian and ward 🔑54—Interest allowable on funds misappropriated by guardian's attorney from date of each misappropriation.

Where the attorney of a guardian misappropriated funds of the estate, interest should be allowed on the various sums misappropriated from the date of each misappropriation.

2. Guardian and ward 🔑54—Where guardian's misappropriation of trust funds is willful, he is liable for legal interest compounded annually.

Where the misappropriation of trust funds is willful, instead of careless, and it is not shown that a larger sum was realized therefrom, the limit of the liability of the guardian is the return of the principal sum with legal interest thereon compounded annually.

3. Trusts 🔑103(1)—Guardian's attorney misappropriating funds held trustee of owner of estate for an accounting.

A voluntary relation of personal confidence and trust exists between a guardian and her attorney, and the attorney becomes a trustee for the owner of the estate under Civ. Code, § 2219, for the purpose of an accounting.

4. Guardian and ward 🔑54—Simple interest only will be charged guardian where misappropriation of funds not willful or intentional.

Where an attorney of a guardian has misappropriated funds, but the guardian has not been guilty of any willful or intentional wrongdoing, simple interest only will be charged to the guardian.

5. Trusts 🔑234—Trustee surrendering or limiting his control over funds which are lost is liable.

If a trustee enters into any arrangement in relation to trust funds which surrenders or limits his control over them, he becomes a guarantor of the fund, irrespective of his motive, or whether his surrender of control was the cause of the loss of the fund.

6. Guardian and ward 🔑37—Guardian delegating administration of trust to another is responsible for the action of such other.

When a guardian delegates the administration of the trust to another, he must be held responsible for the action of each person.

7. Guardian and ward 🔑65—Guardian confiding application of trust fund to attorney is responsible for its loss.

While a guardian may employ attorneys or agents to reduce the estate to possession and to protect it, if he confides the application of the trust fund to the care of an attorney or even a cotrustee, he will be held personally responsible for any loss that may result.

8. Guardian and ward 🔑54—Denial of interest compounded annually against guardian on sums misappropriated by her attorney held abuse of discretion.

Where a guardian confided the care of the trust funds to her attorney, who misappropriated the funds, and it appeared that the guardian failed to examine and inquire into the correctness of the accounts submitted by the attorney, and failed to supervise the management of the ward's property, it was an abuse of discretion for the trial court to deny to the owner of the estate interest compounded annually on the sums misappropriated.

Myers, J., dissenting.

In Bank.

Appeal from Superior Court, Sonoma County; A. B. Mackenzie, Judge.

Action by Andrew Poe Gaver against William H. Early and Lulu I. Steitz, executrix of the estate of Ellen Gaston, deceased, substituted in place of deceased defendant for an accounting. Judgment for defendants, and plaintiff appeals. Affirmed.

A. H. Crook, of San Francisco, and W. F. Cowan, of Santa Rosa (R. C. Young, of San Francisco, of counsel), for appellant.

Geary & Geary, of Santa Rosa, and F. A. Meyer, of Petaluma, for respondents.

WASTE, J. The appellant instituted the action out of which this appeal arose against his former guardian, the respondent Ellen Gaston, now deceased, and her attorney, the respondent William H. Early, for the recovery of certain moneys received by them during the administration of appellant's guardianship estate, which, he alleged, were fraudulently concealed and omitted from the accounts of his guardian, and never accounted for. The trial court found that the guardian abandoned all control over the guardianship matters to the attorney, who misappropriated a large part of the funds of the estate, and fraudulently converted them to his own use. Judgment was entered in favor of appellant and against the said respondents for $21,084.77, with interest thereon at the rate of 7 per cent. per annum from the date of the judgment until paid. From this judgment both of the defendants appealed, and in each instance the judgment of the lower court was affirmed. Gaver v. Early (Cal. App.) 209 Pac. 390; Gaver v. Early et al. (Cal. App.) 209 Pac. 394. Petitions for hearing in this court after decision in the District Court of Appeal were denied.

Plaintiff appealed from that portion of the judgment which allowed interest only from the date of its rendition until paid, which portion of the judgment was also affirmed by the District Court of Appeal. The petition of plaintiff to have the cause heard and determined by this court was granted, and the cause was transferred for hearing and decision. A full and complete statement of the facts of the case germane to the appeal will be found in the two decisions of the District Court of Appeal, above referred to. For this reason we do not recite them here.

[1, 2] It is the contention of the appellant that the trial court should have allowed him interest on the various sums which were misappropriated and used by respondent Early from the dates of such misappropriation. This contention must be upheld, and the only question to be determined is the rate of interest to be charged. The rule is now well established in this state that, where the misappropriation of trust funds is willful, instead of careless, and it is not shown that a larger sum was realized therefrom, the limit of the liability of the guardian is the return of the principal sum, with legal interest thereon compounded annually. Estate of Elizalde, 182 Cal. 427, 435, 188 Pac. 560; Estate of Piercy, 168 Cal. 755, 757, 145 Pac. 91; In re Guardianship of Hamilton, 139 Cal. 671, 73 Pac. 578.

[3] Respondent Early received the funds belonging to appellant's estate for and from the guardian knowing their character. A voluntary relation of personal confidence and trust existed between Mrs. Gaston and her attorney, and the latter became a trustee for the appellant, under the provisions of section 2219 of the Civil Code, for the purpose of an accounting. Aldrich v. Willis, 55 Cal. 81, 85; Montgomery v. Rauer, 125 Cal. 227, 230, 57 Pac. 894. His conversion of the funds was willful, but it is not shown what, if any, amount he realized by reason of his fraudulent misuse of the minor's estate. Consequently he should be charged with legal interest from the dates on which the money was converted to his own use, compounded with annual rests.

[4, 5] It is contended that a different rule holds in the case of the respondent Mrs. Gaston by reason of the findings of the trial court that she was not guilty of any willful or intentional wrongdoing in the matter. In such cases, and without other intervening circumstances, the general rule is that where the trustee has not been guilty of some positive misconduct or willful violation of duty, simple interest only will be charged. Wheeler v. Bolton, 92 Cal. 159, 172, 28 Pac. 558; Estate of Cousins, 111 Cal. 441, 452, 44 Pac. 182. Both of these cases recognize, also, that where the trustee has mingled money belonging to his trust with his own funds, and used them for his own advantage, courts have almost universally charged him with compound interest. On this appeal the question of the liability of Mrs. Gaston for the fraudulent acts of Early does not arise. Indeed, it could not, for it is well settled that, if a trustee enters into any arrangement in relation to trust funds which surrenders or limits his control over them, he becomes a guarantor of the fund, irrespective of his motive, or whether his surrender of control was the cause of the loss of the fund. In such case, in the event of loss, the court will not enter upon an inquiry whether the loss is due to such abdication of control. Estate of Wood, 159 Cal. 466, 472, 114 Pac. 992, 36 L. R. A. (N. S.) 252.

[6, 7] When a guardian delegates the administration of the solemn trust imposed by the guardianship to another, the guardian must be held responsible for the other's action in the premises. Hence the action of the guardian's chosen agent must be, as a general rule, imputed to the guardian in all matters relating to the administration of the guardianship trust. Rittenberry v. Wharton, 176 Ala. 390, 406, 58 South. 293. In collecting and assuming to take charge of the assets of the estate of the appellant, Mrs. Gaston in some instances seems to have received such assets and to have indorsed and delivered them to her attorney. In other instances the latter seems to have collected the assets himself. The trial court found that these sums were paid to and received by respondent Early as the attorney and agent of Mrs. Gaston, for and on account of the estate of the minor, while acting within the scope of his authority as such agent. Early thereby became the agent of Mrs. Gaston, to whom she attempted to delegate her duties as trustee. She had no right to shift her duty to him. If a trustee confide the application of a trust fund to the care of another, whether a stranger, or his own attorney or solicitor, or even cotrustee, he will be held personally responsible for any loss that may result. Under such circumstances a trustee may employ attorneys or agents, according to the usual course of business, to reduce the estate to possession and protect it; but when once in his hands his personal duty to dispose and manage it begins, and this duty is not to be delegated.

Abrams v. U. S. Fidelity & Guar. Co., 127 Wis. 579, 584, 106 N. W. 1091, 5 L. R. A. (N. S.) 575, 115 Am. St. Rep. 1055; Bermingham v. Wilcox, 120 Cal. 467, 472, 52 Pac. 822.

The question presented, therefore, is: Should the respondent Mrs. Gaston be charged with simple or with compound interest? Section 2239 of the Civil Code provides that a trustee is responsible for the wrongful acts of a cotrustee to which he consented or which, by his negligence, he enabled the latter to commit. In re Osborn, 87 Cal. 1, 6, 25 Pac. 157, 11 L. R. A. 264; Fox v. Tay, 89 Cal. 339, 348, 24 Pac. 855, 26 Pac. 897, 23 Am. St. Rep. 474.

Notwithstanding the effect of some of the findings which tend to relieve Mrs. Gaston of any intentional or willful wrongdoing in the matter of the administration of the estate, other findings are that she negligently, and without due regard for her duties as guardian, turned over and abandoned to the respondent Early the management and control of the possession of the moneys, securities, and properties of her ward, and failed and neglected to supervise the management of her ward's property. She also failed to examine and make any inquiry concerning the correctness of the several accounts proposed by Early, filed by her as such guardian, and presented to the court. Regarding Early either as agent for or cotrustee with Mrs. Gaston, his acts were imputable to her. He fraudulently misappropriated the funds of the estate to his own use, and, by imputation, his principal or cotrustee is liable for the amount misappropriated, with legal interest from the date of such misappropriations at the legal rate compounded annually.

[8] We think, therefore, it was an abuse of the discretion of the trial court to deny appellant interest compounded annually.

The cause is remanded, with directions to the trial court to modify the judgment in the particulars indicated, and, as so modified, it will stand affirmed.

We concur: WILBUR, C. J.; LAWLOR, J.; LENNON, J.; KERRIGAN, J.

MYERS, J. I dissent from so much only of the judgment and of the opinion of Mr. Justice Waste as holds the estate of Mrs. Gaston liable for compound interest. Inasmuch as the trial court found that she was guilty of negligence merely, and not of any willful misconduct, I think that her estate should be charged only with simple interest. Civ. Code, § 2262, and section 1917 prior to its repeal in 1919 (Laws 1919, p. lxxxiii). I concur with the remainder of the opinion and the conclusions thereof.

61 Cal. App. 545

WILSON v. SOUTHERN PAC. LAND CO.

(Civ. 2569.)

(District Court of Appeal, Third District, California. March 29, 1923. Hearing Denied by Supreme Court May 28, 1923.)

1. Principal and agent 🔑190(3)—Evidence justified finding that purchaser's agent was secretly vendor's agent also.

In action for rescission of a land sale contract, evidence *held* to justify finding that purchaser's agent for the purchase of the property was, without purchaser's knowledge, agent for vendor also.

2. Principal and agent 🔑70—That purchaser's agent secretly acted for vendor justified judgment of rescission and recovery of payments.

In a land sale contract, where, unknown to the purchaser, his agent secretly acted for vendor in the sale, such facts justified a judgment of rescission and recovery of the moneys paid by purchaser.

3. Evidence 🔑271(18)—Purchaser's memorandum admissible to show agency of another in purchase of property.

In action to rescind a land sale contract and recover moneys paid thereon, because of agent acting in double capacity, evidence of a memorandum made by purchaser at the time of the transaction was admissible as tending to show that another acted for him in negotiating the purchase.

4. Principal and agent 🔑70—Where agent without principal's assent acts in double capacity, transaction voidable at principal's election.

Where an agent without assent of his principal has acted in a double capacity, no question of fairness or unfairness can be raised, but the transaction will be held constructively fraudulent and voidable at principal's election.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Fannie L. Wilson, as executrix of the estate of Charles S. Wilson, deceased, substituted in the place of said Charles S. Wilson, against the Southern Pacific Land Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Thunen, of San Francisco, for appellant.

Young & Young, of Los Angeles, amici curiæ.

C. E. Spencer and H. L. McNair, both of Los Angeles, for respondent.

FINCH, P. J. This appeal is from the judgment rendered at the second trial of the action. At the first trial the court granted defendant's motion for a nonsuit. The judgment was reversed on appeal. 46 Cal. App. 738, 189 Pac. 1040. In the opinion of the appellate court, the issues and the law applicable thereto are stated. Appellant's principal contention is that the evidence is insufficient to support the findings and it is sufficient herein to examine the evidence produced at the second trial.

[1] Plaintiff testified that H. C. Farnum purchased the lands in controversy for plaintiff in January, 1914; that plaintiff did not view the lands or make any investigation thereof but relied on Farnum's representations; that he did not know prior to the purchase that Farnum was the agent of defendant to sell the lands. He further testified:

> "At the time the applications were signed in my behalf for the purchase of these properties, there had been a conversation between me and Mr. Farnum as to my giving him an interest in the profits if the land was sold. When I made up my mind to purchase the property I fixed up that memorandum for Mr. Farnum, which is Plaintiff's Exhibit No. 5, bearing date February 2, 1914. I wrote the memorandum in pencil first. Later it was copied and I put down the date."

The memorandum referred to by the witness reads as follows:

> "Memorandum of Charles S. Wilson regarding the following described land: The east half of section 25, 4 south, 5 east, S. B. M., Riverside county, Cal. The above-described land was acquired through H. C. Farnum as my agent, and he is to have one-fourth of the profits which may be realized on sale thereof, after deducting all moneys paid or expended thereon by me, and interest at 10 per cent. per annum, provided said land can be sold at a profit on or before one year from date of contract of sale, and Farnum can have a one-fourth interest in the land by paying one-fourth of all money expended, with 10 per cent. interest on same within same time.
>
> "Charles S. Wilson, February 2, 1914."

Plaintiff testified that he did not inspect the land until in April, 1916; that he first learned that Farnum had acted as agent of defendant in the sale of the land and had received a commission for the sale in February, 1917, and that he immediately offered to reconvey the property to defendant and demanded the return of the moneys paid by him on the purchase price thereof.

H. R. Burns was defendant's agent for the sale of its lands. Prior to the sale to plaintiff, Burns, had agreed to pay Farnum a commission on any sales made by the latter and did pay him a commission on the sale made to plaintiff. Farnum's testimony, given at the former trial, was read in evidence. He there testified that he bought the land for plaintiff; that he told Burns, at the time of the purchase, that he was acting as the agent of plaintiff and doing business for him; that he signed plaintiff's name to the application to purchase the land; and that Burns said:

> "You are his agent; it is perfectly proper for you to sign them."

Farnum further testified:

> "We didn't say anything to Mr. Wilson about the commission, and Mr. Burns suggested that I shouldn't."

[2] The foregoing evidence justifies the finding that Farnum, with defendant's knowledge, acted as plaintiff's agent in the purchase of the property, and, without plaintiff's knowledge, also acted as defendant's agent in the sale of the property. Under such circumstances the judgment of rescission and for recovery of the moneys paid by plaintiff was proper.

[3] The admission in evidence of the memorandum quoted, Plaintiff's exhibit No. 5, is assigned as error. The instrument was clearly admissible as tending to show that Farnum was plaintiff's agent. Other errors in the admission and rejection of evidence relating to the value of the land and similar questions are assigned. The value of the land and the fairness of the transaction are not issues necessary to be determined in a case of this character.

[4] As stated in the opinion on the former appeal, where the agent, without the assent of his principal, has acted in a double capacity, no question of fairness or unfairness can be raised, but the transaction will be held constructively fraudulent and voidable at the election of the principal. The admission or rejection of such evidence, therefore, could not have changed the result. There are 56 assignments of alleged errors. It is not necessary to consider them all specifically. None of them could have prejudiced defendant's rights.

It is not necessary to determine whether want of knowledge by defendant of Farnum's double agency would be a defense. The evidence shows that defendant had such knowledge.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

61 Cal. App. 548

KLARQUIST v. SECURITY TRUST & SAVINGS BANK. (Civ. 4154.)

(District Court of Appeal, Second District, Division 1, California. March 30, 1923.)

1. Appeal and error ⚷629—To warrant relief from default in failure to file transcript within court rule No. 2, burden on appellant to show good reason.

Where an appellant is shown not to have complied with Court Rule No. 2 (176 Pac. vii), regarding the filing of transcripts on appeal, the burden is upon him to show good reason for his failure in order to warrant relief from his default.

2. Appeal and error ⚷628(3)—Relief from default in failure to file transcript held unwarranted.

A showing, as grounds for relief after default by failure to file transcript on appeal, that respondent's counsel had stated, while discussing a possible settlement, that appellant "need not be in any rush to file a transcript," *held* not equivalent to a stipulation for an extension of time such as would warrant relief from the default.

3. Appeal and error ⚷628(1)—Unusual pressure of other work not legal excuse for failure to file transcript within required time.

The fact that counsel for appellant was under "an unusual pressure of work" during the period immediately preceding the time when the transcript should have been filed is not a legal excuse warranting relief after failure to file within the required time.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by W. E. Klarquist against the Security Trust & Savings Bank. Judgment for plaintiff, and defendant appealed. On motion to dismiss appeal. Motion granted.

Page & Hurt and Arthur F. Coe, all of Los Angeles, for appellant.

H. G. Redwine, of Los Angeles, for respondent.

HOUSER, J. This matter involves, first, a motion by respondent to dismiss an appeal, and, secondly, a motion by appellant that it be relieved from its default in failing to file its transcript on appeal within the time permitted under the rules of this court. A lapse of 66 days occurred between the settling and filing of the bill of exceptions in the superior court and the date of the notice to dismiss the appeal, and the transcript on appeal was not offered for filing until 2 weeks later.

An affidavit by counsel for appellant in opposition to the motion to dismiss the appeal, as well as in support of its motion to be relieved from its default in not having filed the transcript within the 40-day period permitted under rule 2 of this court (176 Pac. vii), shows that—

> "Both prior and subsequent to the 18th day of December, 1922, affiant had conversations with Mr. Redwine, attorney for the respondent, the substance of which was that Mr. Redwine wanted to know if the case could not be settled, if the bank would not consider a compromise, etc., to which affiant replied that he wished to look more thoroughly into the law on the question and would like to have a little more time to look into the matter, to which Mr. Redwine answered that that would be all right and that affiant need not be in any rush to file the transcript, or words to that effect."

The affidavit also shows that counsel for appellant had been under "an unusual pressure of other work" during the period immediately preceding the time when the transcript should have been filed.

Counsel for respondent in his answering affidavit vigorously denies ever having had any such conversation or conversations either in substance or effect.

[1-3] Respondent having shown that appellant has not complied with the rule of this court in the matter of filing its transcript on appeal, the burden rests upon appellant to show good reason for its failure in order that it should be relieved from its default. Assuming that counsel for appellant is correct in his recollection of what occurred, the fact that there was a possible compromise of the judgment discussed, and that counsel for respondent stated that "affiant need not be in any rush to file the transcript," is not equivalent to a stipulation for an extension of time to do so; although this court does not wish to be understood that by either words or by acts may one counsel lull the other into a sense of security and thus take an unfair advantage. So far as this court is aware, there is no way by which it may be determined which counsel is correct; but, at most, the alleged conversation goes no further than a general statement that there was no great hurry to get the transcript filed, and the fact that counsel was under "an unusual pressure of other work" is, of course, no legal excuse.

As is said in Erving v. Napa Valley Brewing Co., 16 Cal. App. 43, 116 Pac. 332:

> "To accept this as a legal justification for the failure to comply with a rule of court designed to expedite and facilitate the disposition of causes upon their merits would be to discourage diligence in the prosecution of appeals and establish a precedent that might lead to vexatious delays in the future."

In order that rules may have some force it is necessary that a compliance therewith be insisted upon. The rule invoked in this matter is particularly essential to the orderly disposition of the business of the court. Appellant, having failed to observe the rule and not having sustained the burden cast upon

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

it by showing good cause therefor, must suffer the consequences.

The appeal is dismissed, and appellant's motion for relief is denied.

We concur: CONREY, P. J.; CURTIS, J.

61 Cal. App. 550

POE v. DONLEY. (Civ. 3841.)

(District Court of Appeal, Second District, Division 1, California. April 3, 1923.)

Exceptions, bill of ⟹50—Party failing to present proposed bill and amendments to judge within 10 days after service of latter on him cannot settle bill thereafter.

A party failing to present to the trial judge his proposed bill of exceptions and proposed amendments thereto within 10 days after service of the latter on him, as required by Code Civ. Proc. § 650, cannot have the bill settled thereafter.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by S. R. Poe against G. W. Donley. From an order refusing to vacate an order dismissing a proposed bill of exceptions, defendant appeals. Affirmed.

J. F. Seymour, of El Centro, for appellant.
C. L. Brown, of El Centro, for respondent.

CURTIS, J. This is an appeal from an order of the superior court of the county of Imperial refusing to vacate a previous order of the same court dismissing defendant's proposed bill of exceptions. The bill of exceptions was prepared by the defendant, served upon plaintiff, and filed and presented to the judge on the 20th day of October, 1919.

Defendant, appellant herein, claims that no amendment or amendments to this proposed bill of exceptions were ever served upon him by plaintiff, and that therefore he had performed all the acts required of him by law for the settlement of his bill of exceptions. He insists that it was the duty of the court to proceed with the settlement of the bill without any further action on his part, and that the court had no authority to dismiss the same. Plaintiff, on the other hand, claims that, by stipulations given to him by defendant, his time within which to prepare amendments to defendant's proposed bill of exceptions had been extended to January 10, 1920, and that within said time certain proposed amendments were prepared by him and served upon the defendant, and that no action to have said bill of exceptions settled by the court was thereafter taken by defendant. On October 14, 1921, over 21 months after the serving of said amendments upon defendant, plaintiff filed his motion to have the bill of exceptions dismissed. At the time the court made the order appealed from it had before it the affidavits of the parties, setting forth their respective claims as hereinbefore set out.

It is evident from the ruling of the court that it found that plaintiff had served upon the defendant amendments to the proposed bill of exceptions, and that defendant had never presented to the court for settlement the proposed bill and amendments thereto. Upon this condition of the record the court ruled that the defendant had no right to have his bill of exceptions settled and dismissed the same. We think the court was right in its ruling. Section 650 of the Code of Civil Procedure provides that the party seeking the settlement of the bill of exceptions must, within 10 days after the proposed amendments are served upon him, present to the judge who tried the case the proposed bill of exceptions and the proposed amendments thereto. No attempt was made by the defendant to comply with this section of the Code. A compliance therewith is essential to the right of a party to have his bill of exceptions settled, and if he fails to comply his right is gone. Moultrie v. Tarpio, 147 Cal. 376, 81 Pac. 1112.

The order is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

61 Cal. App. 552

MAIER et al. v. LUCE, Judge et al. (Civ. 4157.)

(District Court of Appeal, Second District, Division 1, California. April 4, 1923.)

1. Injunction ⟹148(1)—Bond properly required as condition precedent to restraining order.

When a complaint was filed seeking to restrain defendants from operating taxicab company under certain name and using certain style of cabs, court as condition precedent to issuing restraining order properly required bond from petitioners under Code Civ. Proc. § 529.

2. Injunction ⟹235—Bond issued on application for temporary restraining order held to apply only thereto, though stating it was issued for injunction.

Where, on filing of complaint for injunction, the court issued a temporary restraining order on which it required plaintiffs to give an undertaking, such bond related only to the restraining order, though it recited that plaintiffs had applied for an injunction and that it was given in consideration of the issuing of said injunction, and such bond expired with the restraining order and could not bind the sureties until the final disposition of the case.

3. Injunction 🔑219—Contempt of court must rest on proceedings of record and not oral announcement by the judge.

Under Code of Civ. Proc. §§ 1209–1212, contempt of court is a specific criminal offense, and the defendant in injunction could not be held guilty of such offense by violating an order having no support in the record, but resting solely on an oral announcement by the judge.

4. Contempt 🔑23—Order nunc pro tunc cannot be made basis for contempt proceeding.

An order made nunc pro tunc, including therein requirements different from those expressed in existing court records, cannot be made the basis of a contempt proceeding until after such changes in the order have been brought to the personal attention of the person thereby affected.

5. Injunction 🔑148(1) — Bond prerequisite whether or not order made on ex parte application.

In those cases in which the court must require written undertaking on the part of applicant to indemnify party enjoined by reason of wrongful issuance of the injunction, such undertaking is a prerequisite to the order, and it is immaterial whether the restraining order be made on ex parte application or on an order to show cause previously made.

6. Contempt 🔑21—May not be based on void order.

One may not be punished for contempt because of disobedience of a void order.

Application by William Maier and another for a writ of prohibition against E. A. Luce, as Judge of the Superior Court, and another, to prevent contempt proceedings against petitioner. Writ granted.

A. Rosenthal, of San Diego, for petitioners.

George H. Stone and Wright & McKee, all of San Diego, for respondents.

HOUSER, J. In this matter petitioners seek to prohibit the superior court of the state of California, in and for the county of San Diego, and E. A. Luce, as judge thereof, from proceeding with the punishment of one of the petitioners, under an order to show cause why he should not be punished for a contempt of said court.

In a suit pending in said court, an injunction was sought enjoining and restraining defendants, who are the petitioners herein, from operating under the name of "San Diego Cab Company," as well as from using in their business taxicabs known as "yellow cabs." On the filing of the complaint, the court issued an order to show cause why the defendants should not be so enjoined, and at the same time issued a temporary restraining order, on which the court required the plaintiffs to give, and they did give, an undertaking in the usual form, excepting that instead of reciting that the plaintiffs therein had applied, or were about to apply for a restraining order, the bond recited that plaintiffs had applied for an injunction, and the undertaking provided that the sureties therein, "in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake in the sum of $500, and promise to the effect that they will pay to the parties enjoined such damages, not exceeding the sum of $500, as such parties may sustain by reason of said injunction, if the said superior court finally decides that plaintiff was not entitled thereto." On the hearing of the order to show cause therein, the court held that defendants had no right pending the hearing of the case to use cabs painted a yellow color. The cause was thereupon set for hearing two days later. No new bond was required by the court, nor was one ever given upon the temporary injunction, and on the subsequent hearing of the cause the court granted a motion for nonsuit. Thereafter a motion for new trial was made on behalf of plaintiffs, and because of the fact that between the date of the granting of the motion for nonsuit, and the time of filing the motion for new trial, counsel, who was related to the judge before whom the action previously had been heard, had been substituted as attorney for plaintiffs, the cause was transferred to another department of the superior court of said county presided over by Honorable E. A. Luce. The motion for new trial was granted, and the court included within the order therefor a provision that "the said temporary injunction is hereby continued in full force and effect pending the further order of this court." Thereafter, on a showing made by plaintiffs in that action, defendants were ordered to show cause why they should not be punished for contempt of court because of their alleged violation of the terms of said temporary injunction. On the hearing of said order to show cause, it appearing that through inadvertence and mistake in preparing the written minutes of the court covering the order for the temporary injunction, the full, true, and correct order of the court was not entered in the minutes of the court, the judge who had issued the temporary injunction made and entered a nunc pro tunc order correcting said minutes so that such minutes as corrected showed that in addition to restraining the defendants from the use of yellow cabs and taxicabs, the bond in the penal sum of $500 given upon the temporary restraining order which had theretofore been approved by the court, was ordered continued in full force and effect as a bond upon the temporary injunction. The court found that defendant William Maier had violated the terms of the temporary injunction, and consequently that he was guilty of a contempt of the court; and it was ordered that because of said contempt of court the said William Maier be punished by a fine of $200, and that in default of payment thereof he be confined in the county jail for a period of five days.

[1, 2] The only point relied upon by counsel for petitioners is that the court was without jurisdiction to issue a temporary injunction before a new bond had been given by plaintiffs. When the complaint was filed in which petitioners here were made defendants therein, the court, as a condition precedent to the issuing of a restraining order, properly required from plaintiffs an undertaking indemnifying defendants from any damage which they might sustain by reason of such restraining order if it should be finally decided by the court that plaintiffs were not entitled thereto. Section 529, Code Civ. Proc.; Neumann v. Moretti, 146 Cal. 31, 79 Pac. 512; San Diego Water Co. v. Pacific Coast Steamship Co., 101 Cal. 216, 35 Pac. 651; McCracken v. Harris, 54 Cal. 81. Although that undertaking refers to an "injunction," it will be presumed that all persons connected with its issuance were aware of the law requiring that a bond be given before the restraining order could issue. The fact that an undertaking was given at that time would indicate that the "injunction" referred to therein was the restraining order which was then signed by the judge of the court. The restraining order directs defendants to refrain from the commission of particular acts, and it constituted an injunction as thoroughly and effectively as would any other order given by the court directed to defendants. The fact that it is denominated a restraining order in no wise affects the nature of the command. Neumann v. Moretti, 146 Cal. 32, 79 Pac. 512.

The restraining order in this case forbade the commission of certain acts until the further order of the court, but the almost universal trend of authorities, including the early case of Hicks v. Michael, 15 Cal. 107, is to the effect that its force was expended on the hearing of the order to show cause. In the case just cited the order restrained defendants "until the hearing of the whole matter," but the court, by Field, C. J., said that such words did not operate to change it into an injunction pending the suit, and that the restraining order expired by its own limitation, which was only until the propriety of granting the temporary injunction could be determined on the hearing of the order to show cause; and to the same effect see Cohen v. Gray, 70 Cal. 86, 11 Pac. 508; San Diego Water Co. v. Pacific Coast Steamship Co., and Neumann v. Moretti, supra. The ruling in the foregoing cases effectually disposes of respondents' contention to the effect that the bond, taken in connection with the restraining order, bound the sureties until the final disposition of the case. Sureties have a right to stand on the letter of their bond. Carter v. Mulrein, 82 Cal. 169, 22 Pac. 1086, 16 Am. St. Rep. 99, citing cases. The sureties on the bond in question here only obligated themselves with reference to the restraining order, and the judge was powerless to extend their liability beyond the precise terms of their contract.

[3, 4] It will be remembered that at the time the order to show cause why defendants should not be punished for contempt of court was issued, neither by the court's minute order, nor by written order of any sort, was either the original restraining order or the undertaking given as the basis for its issuance, kept or attempted to be kept in force—the nunc pro tunc order to that effect not being signed by the judge who heard the order to show cause in the matter of the temporary injunction until a period of two months had elapsed after the hearing thereon, and being after the time when defendants were ordered to show cause why they should not be punished for contempt of court. Contempt of court is a specific criminal offense, made such by the provisions of sections 1209-1212 of the Code of Civil Procedure (Ex parte Gould, 99 Cal. 360, 33 Pac. 1112, 21 L. R. A. 751, 37 Am. St. Rep. 57; Cosby v. Superior Court, 110 Cal. 52, 42 Pac. 460; McClatchy v. Superior Court, 119 Cal. 419, 51 Pac. 696, 39 L. R. A. 691; Reymert v. Smith, 5 Cal. App. 380, 90 Pac. 470); and one may not be held guilty of such an offense by reason of his violation of an order of court having no tangible existence of record, but resting solely in a mere oral announcement by the judge. Interested parties have a right to stand upon the permanent written record of such orders. An order made nunc pro tunc, including therein requirements different from those expressed in existing court records, cannot be made the basis of a contempt proceeding until after such changes in the order have been brought to the personal attention of the person thereby affected. Cosby v. Superior Court, 110 Cal. 52, 42 Pac. 460.

[5] As has been heretofore stated herein, on granting an injunction, excepting in certain enumerated instances, the court must require a written undertaking, on the part of the applicant, indemnifying the party enjoined for any damage which he may sustain by reason of the wrongful issuance of the injunction. Such undertaking is prerequisite to the order. In other words, any injunctional order issued in the absence of such undertaking is inoperative (Elliott v. Osborne, 1 Cal. 396), and it is immaterial whether the restraining order be made on an ex parte application or upon an order to show cause previously made. McCracken v. Harris, 54 Cal. 83. And see Neumann v. Moretti, supra.

In the case of State v. La Follette, 100 Or. 1, 196 Pac. 412 (1921), which was a contempt proceeding, it is said that while there are some decisions to the contrary, although the court acquired jurisdiction over the suit, no jurisdiction was thereby acquired to allow a preliminary injunction without requiring the filing of a bond; that the failure on the part of the applicant to give an undertaking rendered the injunction absolutely void; and that respondent could not be punished as for contempt of court because of the violation by him of the provisions of the injunction. In MacWatters v. Stockslager, 29 Idaho, 803, 162 Pac. 671 (1917), it is held that an injunction was void and inoperative by reason of the failure of the district judge to exact an undertaking; that its violation did not constitute contempt of court; and that the respondent was without jurisdiction to adjudge the violator guilty and to punish him. State v. Williams, 221 Mo. 227, 120 S. W. 740 (1909), is authority to the effect that a statute exacting a bond as a condition precedent to the granting of an injunction goes to the very jurisdiction of the court, and that the issuing of an injunction without requiring the bond would be in excess of jurisdiction. And the court in State v. McQuillin, 260 Mo. 164, 168 S. W. 924 (1914), holds that an injunction issued without bond is inoperative, and disobedience to its commands is not a contempt. Baker v. Meisch, 29 Neb. 227, 45 N. W. 685 (1890), contains the declaration that unless an undertaking be given a party enjoined is not liable for contempt for disregarding the injunction.

In Ex parte Miller, 129 Ala. 130, 30 South. 611, 87 Am. St. Rep. 49, it is held that an injunction is conditional in its nature, and that there can be no injunction and consequently no contempt for its violation until the bond has been given. And see, also, the following cases: Castleman v. State, 94 Miss. 609, 47 South. 647; Baur v. Wilkes-Barre L. Co., 259 Pa. 117, 102 Atl. 430; Boykin v. Patterson (Tex. Civ. App.) 214 S. W. 611; Griffith v. State (Tex. Civ. App.) 210 S. W. 293; McHenry v. State, 91 Miss. 562, 44 South. 831, 16 L. R. A. (N. S.) 1062; Smith v. People, 2 Colo. App. 99, 29 Pac. 924; Diehl v. Friester, 37 Ohio St. 473; Lawton v. Richardson, 115 Mich. 12, 72 N. W. 988; Western Academy Beaux Arts v. De Bit, 101 Wash. 42, 171 Pac. 1036; Swope v. Seattle, 35 Wash. 69, 76 Pac. 517; 1 Spelling on Injunctions (2d Ed.) § 935; Winslow v. Nayson, 113 Mass. 411; Conley v. Brewer, 85 W. Va. 725, 102 S. E. 607.

A Nebraska case entitled State v. Greene, decided in 1896 and reported in 48 Neb. 327, 67 N. W. 162, is in point. In that case, as here, a judge ordered that the bond given on issuing the restraining order be allowed to stand in place of a new bond which should have been given when the injunction was issued. In passing upon that matter, the court said:

"Although by the order allowed by Judge Sinclair the bond given under the restraining order was ordered to stand in the place of a new one, such bond did not and could not have the effect to give any validity to his order. Not only is there no statute which authorizes a court or judge to make an order dispensing with the giving of a bond in granting a temporary injunction in such a case, or to require that a former bond shall stand, but, if the requirements of the Legislature mean anything, or are to be observed and enforced, a new bond should have been required of and given by the relator, to make the injunction effectual."

[6] No one may be punished for contempt because of his disobedience of a void order. Brown v. Moore, 61 Cal. 432; Ex parte Brown, 97 Cal. 83, 31 Pac. 840; Ex parte Clarke, 126 Cal. 240, 58 Pac. 546, 46 L. R. A. 835, 77 Am. St. Rep. 176.

The weight of authority leads this court to the conclusion that not only was the nunc pro tunc order ineffectual as against petitioners, but that the failure of the court to require a new bond on the order for a temporary injunction rendered the temporary injunction inoperative. The attempt by the court on granting the motion for new trial to revive the order for temporary injunction was likewise ineffectual. It follows that the petitioners' prayer for relief should be granted.

It is ordered that the alternative writ heretofore issued herein be and is hereby made permanent.

We concur: CONREY, P. J.; CURTIS, J.

---

61 Cal. App. 536

RICE LANDS & PRODUCTS CO. v. BLEVINS et al. (Civ. 2588.)

(District Court of Appeal, Third District, California. March 28, 1923. Hearing Denied by Supreme Court May 24, 1923.)

1. Vendor and purchaser ⟹18(3)—Time of essence of option to purchase within specified time, though not expressly made so.

Time is of the essence of an option to purchase within a specified time without being expressly made so by the contract, and the option must be exercised within the time limit.

2. Brokers ⟹50—Cannot recover compensation for sale made by owner after expiration of broker's contract.

Where an agent for the sale of land fails to negotiate a sale within the time specified by his principal, he is not entitled to a commission for his efforts to sell the property, though he called it to the attention of a buyer who subsequently purchased from the owner, unless the delay was caused by the negligence, fault, or fraud of the owner.

3. Brokers ⟹43(2)—Time limit for sale of land cannot be extended by parol.

Under Civ. Code, § 1624, subd. 6, a written agreement limiting the time within which a broker may negotiate a sale of land cannot be extended by oral agreement.

4. Brokers ⟹50—Optionee to whom owner agreed to pay commission on sale of property to another held not entitled to commission for sale after expiration of option.

Under a contract to pay a commission for selling property, to purchase which promisee had been given a written 60-day option, referred to in the commission contract, promisee could not recover a commission for selling the property after expiration of the option.

5. Brokers ⟹39—Owners' agreement to sell on terms to which they were not obligated sufficient consideration for broker's agreement to waive commissions.

An agreement to sell property on terms, to which the sellers had not obligated themselves, is a sufficient consideration for a broker's agreement to waive his right to commissions.

6. Evidence ⟹151(1)—Seller's reasons for entering credits to plaintiff in form of commissions held admissible.

Testimony by parties selling property to a corporation formed by individuals, to whom they had given options to purchase and agreed to allow commissions for selling it to another as to their reasons for entering certain credits in their books in the form of commissions, *held* admissible, in an action for commissions, which they claimed were waived, as tending to rebut the inference that they recognized their obligation to pay them.

7. Appeal and error ⟹1050(1)—Improper admission of details of conversation not substantially different from admissible testimony as to reasons for acts therein agreed on held not reversible error.

Admission of the details of a conversation wherein parties selling property to a corporation organized by individuals, to whom they had given options to purchase it and agreed to pay commissions for selling it to another, agreed to reimburse one of such optionees for services rendered and money expended in furthering the enterprise by giving credits in the form of commissions as being more convenient than to make a single payment, *held* not ground for reversal, though erroneous, not being substantially different from their admissible testimony as to the reasons for their acts, nor likely to have influenced the jury.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by the Rice Lands & Products Company against R. E. Blevins and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Nusbaumer & Bingaman and Gilbert L. Jones, all of Oakland, for appellant.

Frank Freeman, of Willows, and Brown & Albery, of Colusa, for respondents.

FINCH, P. J. May 17, 1915, defendants gave C. F. Adams a written option to purchase 2,988 acres of land, the greater part of which was in rice, together with water rights, pumping and equipment, and rights of way. It appears that defendants owned a half section of the land and held the remainder under lease with agreement to purchase. They had in turn leased parts of the lands to tenant rice growers. The option provided:

> "We will convey to you clear title to all the above land, and transfer all rights, privileges, leases, etc., relating to the entire project for the net sum of $80.00 per acre, to be paid for the 2,988 acres above described.
>
> "Terms: $35,000 cash and the balance in six annual equal payments. The deferred payments to bear 6 per cent. interest, or upon payment of $5,000 we will agree to give possession of property on December 1, 1915. The further sum of $30,000 is to be paid on December 1, 1915, and the remainder in six equal payments with interest. The above option to purchase is not exclusive and is good for acceptance within 60 days, unless property is sold within this period to other parties."

On the same day, by a separate writing, defendants gave Adams their promise to pay him a commission in the event of a sale, reading as follows:

> "Referring to the option of May 17th for purchase of the property of the Blevins-Mallon rice project, should you be able to procure a purchaser for the above property, we will allow you a sale commission of 10 per cent. This commission will be paid to you as the payments are received from the purchaser."

Defendants also gave George F. Scott and J. F. Campbell an option to purchase the same property, and on June 7, 1915, they paid the defendants $1,000 on account thereof. Within a few days thereafter Adams, Scott, and Campbell agreed to act together in the sale of the property under the Adams option, and the Scott-Campbell option was allowed to lapse.

In the latter part of June Adams, Scott, and Campbell proceeded to organize the plaintiff corporation for the purpose of purchasing the property under the option. The articles of incorporation were filed with the secretary of state on the 31st day of July, 1915. July 17th the sum of $1,000 was paid on the option, and the defendants executed the following instrument:

> "Received from C. F. Adams $1,000.00 on account as per contract of May 17, 1915. Said contract is hereby extended to August 1, 1915."

Defendants credited the payment in their ledger account with "Scott, Campbell & Adams." The payment does not appear in their journal. Other payments, including that made by Scott and Campbell on June 7th, were entered in the journal as follows:

> "June 7 Scott, Campbell & Adams 1,000 * * * on option acct. * * * Aug. 17 Scott, Campbell & Adams 1,000 * * * on

---

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

contract. Aug. 25 Scott, Campbell & Adams 1,000 * * * on contract. * * * Sept. 15 Scott, Campbell & Adams 1,500 * * * on a/c. * * * Oct. 8 Scott, Campbell & Adams 1,000 * * * on contract."

October 11, 1915, the parties entered into two agreements by the terms of which the defendants agreed to sell and the plaintiff to purchase the property described in the option of May 17th. The total purchase price under the two agreements of October 11th is the same as that stated in the option contract, but the latter contract is not referred to in either of the former. One of the contracts of October 11th recites that $5,945 had theretofore been paid by plaintiff, and the evidence shows that this sum was made up of the payments heretofore enumerated and an additional sum due Adams from defendants. This contract provides for installment payments as follows: October 12, 1915, $5,000; October 20, $5,000: November 9, $10,000; December 1, $14,500; February 1, 1916, $5,000; payment of defendants' promissory note to a third person, $5,000; and four annual installments of $15,488.75 each, the first thereof to be paid December 1, 1916. By the other agreement the defendants sold all their rights and interests in the remainder of the lands and property described in the option contract for the sum of $20,000, payable in four equal annual installments commencing December 1, 1916, the plaintiff to take such property subject to all the terms and conditions of the lease under which it was held by defendants and to discharge all defendants' obligations under the lease. The lands described in both agreements were taken subject to various leases made by defendants to their tenants. The plaintiff was given immediate possession and all of defendants' interest in the growing crops, and was required to reimburse defendants for certain expenditures made by them in cultivating a part of the land and to pay all power bills from July 23, 1915, and for pump and ditch attendance from August 1st. Plaintiff has performed all the terms of both agreements.

December 4, 1916, Scott, Campbell, and Adams assigned to plaintiff their claim for commissions under the contract of May 17, 1915, and plaintiff duly notified defendants of such assignment. The defendants gave credit, at the rate of 10 per cent. on installment payments, until the sum of $5,904.37 had been so credited, after which they refused to allow or pay any further sum. After payment of the full purchase price plaintiff instituted this action to recover the remainder alleged to be due as commissions.

The complaint alleges the execution of the contracts of May 17, 1915, the sale of the property in pursuance thereof, and "within due time," and the assignment to plaintiff of Adams' claim for commissions. The answer denies that Adams sold the property in accordance with the terms of the contract, or "within due time," and alleges that plaintiff, after the option "had been abrogated and annulled and had expired by lapse of time," purchased the property "on entirely different terms of payment." As a separate defense, the answer alleges:

> That "said written option lapsed and became null and void, because the same was not exercised within the time provided therein, or as provided in any written extension thereof, and that thereafter these defendants made a verbal agreement with the said C. F. Adams in reference to the sale of said property, and that said verbal agreement was fully carried out and consummated on the 11th day of October, 1915; * * * that, * * * in consideration of these defendants giving credit to the said C. F. Adams and the plaintiff herein for sums theretofore paid under the terms of said written option, the said C. F. Adams waived, released, and renounced any right or claim that he might have had or did have to any commissions from these defendants on account of the sale of said real property and said rice project."

The jury returned a verdict in favor of defendants, and judgment was entered accordingly. The court denied plaintiff's motion for a new trial, and this appeal is from the judgment.

It is evident that the commission contract is not complete in itself. It expressly refers to the option contract, and the latter must be looked to for the purpose of ascertaining the terms of the sale referred to in the former. Appellant says:

> "It is manifest that the reference is thus made for the twofold purpose of describing the properties subject to sale, and of setting forth the terms of payment. To say that the right to secure and present a purchaser was limited to 60 days is to write into the contract a term which the vendors might have prescribed, but did not."

It is not apparent, however, why the reference should be held to embrace some of the terms of the option contract to the exclusion of other terms. Both instruments were executed at the same time, and evidently as a part of the same transaction, and they must be construed together as one contract. The plaintiff sets up the option contract as the contract of employment to make the sale. It is alleged:

> "That on the 17th day of May, 1915, the defendant in writing did employ one C. F. Adams to sell a certain rice project and certain real property, * * * all situated in the county of Colusa, and described in said writing as follows."

Following this allegation, the option contract is set forth at length, except the last two clauses thereof. It is then alleged that defendants agreed to pay a commission of 10 per cent "in case a sale of said property was made in accordance with the said writing."

On July 17th defendants, in writing, extended the term of the option to August 1st. There is no pretense that Adams succeeded in selling the property prior to October 11, 1915. Plaintiff never became obligated to take the property before that time, nor is there any evidence that plaintiff was financially able to pay the purchase price until October 11th. Adams testified that about October 8th he told defendants "that we were going ahead with the original project and raise the money by the sale of stock and complete the purchase." Appellant recognizes that nothing which occurred prior to October 11th bound defendants to carry out the option contract. In its opening brief it is said:

> "About five months elapsed from the date of the Adams option agreement to the date when all negotiations terminated in a binding contract between defendants and the purchaser whom Adams produced. During every day of that five months it was open to defendants to find another purchaser or to entertain any offer made them by any other person than plaintiff."

There was no written extension of the time provided in the option contract beyond August 1, 1915. Defendants testified that there was no oral extension thereof. Mallon testified that about August 10th he told Adams that "the contract was dead Mr. Blevins had given, and we would have nothing to do with it."

[1] It may be stated as a general rule that time is of the essence of an option to purchase within a specified time, without being expressly made so by the contract.

> "Frequently the time for acceptance is limited in the offer. This is usually done in the case of options. In such case the acceptance must be within the time specified. A limitation of the time for which a standing offer is to run is equivalent to the withdrawal of the offer at the end of the time named. The rule that in equity time is not of the essence of a contract does not apply to a mere offer to make a contract. An acceptance after the time limited in the offer will not bind the person making the offer, unless he assents to the acceptance so made after it is made." 6 R. C. L. 609.

[2-4] The option contract having expired on the 1st of August, the defendants were at liberty to treat it thereafter as if it had never existed. Since the agreement to pay a commission was dependent upon the option contract, the former expired with the latter, and Adams' agency to sell the property was at an end. To entitle an agent to a commission he must make a sale within the time limited by his contract of agency.

> "It must * * * appear that the broker performed the duty assumed by him within the time limited in his contract, or within such extension of time as may have been granted by his employer. If he failed to do that, he is not entitled to the commission, even though he made efforts to sell the property, and first called it to the attention of the party who subsequently made the purchase, unless the delay was caused by the negligence, fault, or fraud of the owner." Zeimer v. Antisell, 75 Cal. 509, 512, 17 Pac. 642, 643, Ropes v. John Rosenfeld's Sons, 145 Cal. 671, 79 Pac. 354; Hicks v. Post, 154 Cal. 22, 96 Pac. 878.
>
> "The evidence must also show that the transaction was completed within the time limited in the contract." Wright & Kimbrough v. Dewees, 52 Cal. App. 42, 197 Pac. 957.

The time limited in such a contract cannot be extended by an oral agreement. Civ. Code, § 1624, subd. 6; Hicks v. Post, supra.

In considering the evidence it must be kept in mind that Adams was acting in a two fold capacity, though not improperly so, as the fact was known to both parties. Originally he was defendants' agent to sell the property. After the incorporation of plaintiff he was its active agent in the purchase of the property. He testified that all payments prior to October 11th were made and received under the original contract. Defendants testified that no payments between August 1st and October 11th were made or received under the original contract. Mallon testified that he notified Adams early in August, and prior to the first payment made in that month, that the contract of May 17th was dead, and that defendants would have nothing more to do with it, that they would not enter into any agreement, and that Adams did not thereafter ask for any written option. Under the foregoing state of the evidence the court instructed the jury that if the defendants, after August 1st and prior to October 11th, notified Adams that "his option or contract to purchase and his option for commissions" had expired and would not be renewed or that they canceled the same, and that subsequently a sale of the property was made upon different terms and conditions and as a new proposition, then the plaintiff could not recover. Appellant contends that this instruction is based upon "the mistaken conception of the law that the commission agreement came to an end with Adams' option agreement to purchase." What has already been said disposes of this contention.

[5] Three witnesses testified that in the negotiations leading up to the execution of the agreements of October 11th it was expressly agreed that no commissions were to be paid for making the sale. Adams testified that no such agreement relative to commissions was made. The court instructed the jury that, if such agreement was made and constituted "a new proposition to purchase," the plaintiff could not recover. Adams was a stockholder and officer of the plaintiff corporation and was acting in its behalf at the time of the alleged agreement to waive his claim for commissions. The terms of the agreements of October 11th were materially different from those of the option contract.

By the terms of the latter Adams had the right to make a cash payment of $35,000 and take immediate possession or to pay $5,000 cash, $30,000 on the 1st of December, and take possession on the latter date, at which time the crops probably would have been harvested and removed by defendants. By the terms of the agreements finally executed, plaintiff was given credit for $5,945 theretofore paid by Scott, Campbell, and Adams, and was required to pay $5,000 the following day and installments thereafter, which up to December 1st, amounted to the additional sum of $29,500, and was given immediate possession, together with defendants' interest in all of the crops. If it be assumed that the option and commission contracts were continued in full force up to the time of the final agreements, they did not obligate defendants to sell the property on the terms provided in such final agreements. The agreement of defendants to sell the property on terms to which they had not obligated themselves was a sufficient consideration for Adams' agreement to waive any right he may have had to commissions. Other errors claimed to have been made in the instructions to the jury are similar to those discussed and need not be specifically considered. It is sufficient to say that no error appears in any of them.

[6, 7] Plaintiff proved the entry in defendants' books of certain credits, made after October 11, 1915, in the form of commissions, as heretofore stated. Those entries tended strongly to prove that defendants understood that they were obligated to pay the commissions claimed by plaintiff, and also to discredit the testimony of Blevins and Mallon to the effect that Adams had agreed to waive such commissions. In an effort to overthrow the inference naturally arising from such acts on their part, both of the defendants testified that Scott had originally been associated with them in their rice project, but that, after rendering services and expending money in the furtherance of the enterprise, he had been compelled to drop out on account of financial inability to continue; that, after the sale of the property, the defendants agreed that they were under moral obligations to reimburse Scott, and therefore gave the credits referred to, and that the credits were given in the form of commissions as payments were received on the purchase price of the property because that was more convenient than to make such reimbursement in a single payment, but that such credits were not intended as the commissions provided for in the contract of May 17, 1915. Mallon was permitted, over plaintiff's objection, to give the details of the conversation between himself and Blevins, no one else being present, in which it was agreed between them to make such reimbursement and the manner in which it would be made. Blevins testified that thereafter, and prior to the assignment of Adams' claim for commissions to plaintiff, he related the substance of this conversation to Scott and Campbell and fully explained to them what the defendants proposed to allow in the form of commissions and the reasons therefor as stated. It was proper to permit defendants to explain why they gave the credits and made the entries thereof in their books in the form of commissions, but it does not appear upon what theory the details of the conversation between them was admissible. The conversation, however, was not substantially different from the testimony of the defendants as to the reasons for their acts, and it is not believed that the jury could have been influenced by its admission.

The judgment is affirmed.

We concur: HART, J; BURNETT, J.

(61 Cal. App. 531)

WINTERBURN v. SHERIFF et al.

(Civ. 4033.)

(District Court of Appeal, Second District, Division 2, California. March 28, 1923.)

1. Replevin 🔑4 — Replevin will not lie for property so incorporeal as stock of corporation nor for certificates evidencing such stock.

Replevin will not lie for property so incorporeal as "stock" in a corporation, and an action under Civ. Code, § 328, against a corporation and another to require the corporation to cancel certificates wrongfully held by its codefendant and reissue new certificates to plaintiff, cannot be treated as an action in replevin against the corporation's codefendant to recover the stock or the certificates evidencing them.

2. Corporations 🔑98—Statute authorizing suit to obtain new or duplicate stock certificates "wrongfully withheld" refers to withholding, not by corporation, but by third person.

"Wrongfully withheld," within the meaning of Civ. Code, § 328, which provides that, when certificates of corporate stock have been "wrongfully withheld," the owner may bring an action against the corporation to obtain a new or duplicate certificate, does not mean withholding by the corporation but by a third person.

3. Corporations 🔑503(1)—"Residence," within meaning of sections of Code of Civil Procedure relating to place of trial, is county where principal place of business is located.

A corporation's "residence," within the meaning of that term as used in the sections of the Code of Civil Procedure which determine the place of trial of actions, is the county where its principal place of business is located.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Residence.]

4. Corporations 🔑503(3)—Denial of change of venue as to corporation's codefendant in action to compel issuance of duplicate stock certificates held not error.

Civ. Code, § 328, authorizing an action against a corporation to obtain a new or duplicate certificate of stock which has been lost or is wrongfully withheld and providing it may be brought in the county in which the principal place of business of the corporation is located, is not at variance with Const. art. 12, § 16, giving the plaintiff in a personal action against a corporation the right to sue in the county where its principal place of business is situated, or in the county where the contract was made or is to be performed, and where a third party wrongfully withholding stock certificates belonging to plaintiff has been joined with the corporation, and suit brought in the county of the corporation's residence, denial of a change of venue requested by the corporation's codefendant is not error, since Code Civ. Proc. § 395, provides civil actions must be tried in the county where the defendants "or some of them reside."

5. Venue 🔑41—Change of venue from county where a necessary defendant resides to county of other defendants' residence will be denied.

Where an action is brought in the county where a necessary party defendant has his residence, a change of venue to the county where other defendants reside will be denied.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Elmer E. Winterburn against Carrie V. Sheriff and the Penn Investment Company. From an order denying the first-named defendant's application for a change of venue, she appeals. Order affirmed.

Robert M. Clarke, of Los Angeles, for appellant.

Chas. F. Blackstock, of Oxnard, for respondent.

FINLAYSON, P. J. The defendant Carrie V. Sheriff appeals from an order denying her application for a change of the place of trial to the county of her residence, Santa Barbara county.

The action was brought in the county of Los Angeles, where the corporation defendant has its principal place of business. Save for its prayer for general relief, the only remedy sought by the complaint is that which is afforded by section 328 of the Civil Code, which, so far as it is pertinent, reads:

> "Whenever a certificate of stock or of shares in a corporation organized under the laws of this state has been lost, destroyed or wrongfully withheld, the owner thereof may bring an action against such corporation in the superior court of the county in which is located its principal place of business, for the purpose of obtaining a new or duplicate certificate. If by the books of the corporation the stock stands in the name of a person other than the plaintiff, or if by such books it appears that some other person claims or has some right, title, or interest in, or lien upon, such stock, all such persons must be made parties defendant with the corporation. Summons must be issued and served as in other civil actions, and in addition thereto, the court must direct its clerk to issue * * * a notice setting forth the pendency of the action; * * * if no one appears within the time designated in such notice, nor within the time allowed by law after the service of such summons, the court must hear such evidence as may be offered in support of the allegations of the complaint, and make and file its decision thereon, and thereupon may enter its judgment canceling the lost, destroyed or wrongfully withheld certificate and directing the corporation, upon payment to it of all costs incurred by it in the premises and without costs against the corporation, to issue to the plaintiff a new or duplicate certificate."

After alleging that the defendant Penn Investment Company is a corporation having its principal place of business at Los Angeles, and that it had theretofore issued to plaintiff certain of its certificates of stock, the complaint alleges that—

> "The defendant Carrie V. Sheriff is wrongfully in possession of said certificates and wrongfully withholds the same from this plaintiff, who is the owner thereof as aforesaid; [and] that all of said certificates of stock are lost to this plaintiff."

Wherefore plaintiff prays judgment "canceling said lost certificates and each of them and directing the corporation defendant * * * to issue a new certificate."

The points urged by appellant are: (1) Instead of being brought under section 328, the suit is in reality an action of replevin to recover the certificates alleged to be wrongfully withheld by appellant, and therefore the controversy is entirely between plaintiff and appellant; wherefore it is claimed that the action should have been transferred to the county of appellant's residence. (2) That part of section 328 which gives jurisdiction to the superior court of the county wherein the corporation has its principal place of business is repugnant to section 16 of article 12 of the Constitution and void. We can perceive no merit in either point.

[1] In no sense can this be regarded as an action of replevin. It cannot be deemed to be an action to replevy the intangible shares of stock represented by the certificates. An action of that character will not lie for property so incorporeal as "stock" in a corporation. Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624. Nor can it be treated as an action for the replevin of the certificates which evidence the shares, even though the complaint does allege that the certificates are "wrongfully withheld" by appellant. Plaintiff is not seeking to regain possession of the certificates.

On the contrary, he seeks their cancellation and the issuance of a new certificate.

[2] Appellant's argument in support of her point that this is an action of replevin, in which she is the only necessary party defendant, is based upon the assumption that the words "wrongfully withheld," as used in section 328, refer to a wrongful withholding by the corporation and not to a wrongful withholding by a third person. Upon this assumption it is argued that because the complaint alleges the certificates to be wrongfully withheld by appellant it therefore states no more than a cause of action against her for the replevy of the certificates. Appellant places an erroneous construction upon the words "wrongfully withheld," as used in this Code section. If by these words the Legislature had in view a wrongful withholding by the corporation, then that defendant would be a wrongdoer and there would have been no reason for exempting it from costs occasioned by its own wrongful act. Moreover, if appellant's construction were permissible, there would be no reason in the provision which authorizes the entry of a judgment canceling the wrongfully withheld certificate and directing the issuance of a new or duplicate certificate. If the section meant that the certificate must be "wrongfully withheld" by the corporation, the appropriate judgment would be one directing the return of the old certificate—not its cancellation and the issuance of a new one.

[3, 4] It is not necessary to consider appellant's claim that there is a conflict between section 16 of article 12 of the Constitution and that part of section 328 which provides that the action may be brought in the superior court of the county in which is located the corporation's principal place of business. Even if such conflict did exist, it would not avail appellant. The remaining provisions of section 328 and the part claimed to be unconstitutional are not so mutually connected and interdependent as to warrant the belief that the Legislature would not have adopted any of the provisions of that section if it could not have given effect to its declaration that the action may be brought in the superior court of the county in which is located the corporation's principal place of business.

The Penn Investment Company is a necessary party defendant. The action was brought in the county of that defendant's residence, i. e. in the county where it has its principal place of business. For it is now established that a corporation's residence, within the meaning of that term as used in those sections of the Code of Civil Procedure which determine the place of the trial of actions, is in the county where it has its principal place of business. Cohn v. Central Pacific R. R. Co., 71 Cal. 488, 12 Pac. 498; National Bank v. Superior Court, 83 Cal. 491, 497, 24 Pac. 157; Cook v. Ray Mfg. Co., 159 Cal. 696, 115 Pac. 318.

[5] Under the provisions of section 395 of the Code of Civil Procedure all personal actions (with certain exceptions, among which an action of the present character does not fall) "must be tried in the county in which the defendants, or some of them, reside at the commencement of the action." Section 16 of article 12 merely gives to the plaintiff in a personal action against a corporation the optional right to sue either in the county where the principal place of business of the corporation is situated, i. e. in the county of its residence, or in the county where the contract was made or is to be performed, or where the obligation or liability arises or the breach occurs. In the instant case respondent has brought the action in the county in which the corporation has its residence. Where the action is brought in the county where a necessary party defendant has his residence, a change of venue to the county where the other defendants reside will be denied. Hirschfeld v. Sevier, 77 Cal. 448, 19 Pac. 819; Quint v. Dimond, 135 Cal. 572, 67 Pac. 1034. And this is the rule where, as here, a corporation is a necessary party defendant and the action is brought in the county of its residence. Hellman v. Logan, 148 Cal. 58, 82 Pac. 848. For these reasons we conclude that the motion for a change of venue was properly denied.

The case of Brady v. Times-Mirror Co., 106 Cal. 56, 39 Pac. 209, is not contrary to our conclusion. There the plaintiff, suing a corporation and two natural persons, elected to bring the action, not in the county of the corporation's residence, but in the county where the liability arose—a county in which none of the defendants resided. It was held that the plaintiff was not at liberty, while thus availing himself of the privilege given him by section 16 of article 12, to deprive a defendant other than the corporation of the right of trial in the county of his residence.

The order is affirmed.

We concur: WORKS, J.; CRAIG, J.

61 Cal. App. 497

PEOPLE v. Y. WONG. (Cr. 659.)

(District Court of Appeal, Third District, California. March 23, 1923.)

1. Criminal law ⇨90(1)—Superior court has jurisdiction where penalty is in excess of that which police or justice's court can impose.

Where the penalty prescribed for a particular offense is in excess of that which it is competent for the police or justice's court to impose, the superior court has jurisdiction unless it is specifically conferred by statute exclusively on the police or justice's court.

2. Criminal law ⇨84(2)—Within legislative power to confer jurisdiction on police and justice's court to try misdemeanors.

Under Const. art. 6, § 5, it is within the legislative power to confer jurisdiction on police and justice's courts to try all misdemeanors, whether ordinary or high-grade, though the superior court has and will retain jurisdiction of all misdemeanors not otherwise provided for.

3. Criminal law ⇨90(1)—Police and justice's courts may, under varying freeholders' charters, have jurisdiction of misdemeanors in one city while not in another.

Under Const. art. 11, §§ 8 and 8½, authorizing freeholders' charters to establish and regulate the jurisdiction of police and other municipal courts, jurisdiction of high-grade misdemeanors may competently be conferred upon police courts in one city and still retained by the superior courts in other cities whose charters do not vest in them such jurisdiction; St. 1885, p. 213, as amended by St. 1891, p. 292, conferring jurisdiction on the police or justice's courts over misdemeanors, being inapplicable.

4. Criminal law ⇨90(1)—Where charter made no reference to police or municipal court, justice's court does not have jurisdiction of high-grade misdemeanors; "otherwise provided for."

Though the freeholders' charters of unincorporated cities may provide for police and justice's courts if they are silent on the question of the jurisdiction of such courts over high-grade misdemeanors, the jurisdiction of such courts is "not otherwise provided" for within the meaning of Const. art. 6, § 5, and is retained by the superior court unless conferred generally by statute, and where the charter of the city of Stockton approved by St. 1911 (Ex. Sess.), p. 254, et seq., made no reference to police or municipal courts, *held*, that the justice's court did not have jurisdiction of high grade misdemeanors unless by virtue of some general law.

5. Statutes ⇨124(1)—Act declaring jurisdiction of police courts in certain cities held not invalid because subject not expressed in title.

St. 1885, p. 213, as amended by St. 1891, p. 292, entitled "An Act to provide for the police courts in cities having 30,000 and under 100,000 inhabitants, and to provide for officers thereof," and which provided among other things that "all misdemeanors punishable by fine, or by imprisonment, or by both" shall be within their exclusive jurisdiction, thereby divesting the superior courts of former jurisdiction of indictable misdemeanors, *held* not invalid under Const. art. 4, § 24, requiring the subject of an act shall be expressed in its title.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Y. Wong was charged with a misdemeanor. From an order dismissing the information, the State appeals. Affirmed.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen. (Frank B. Smith, of Los Angeles, of counsel), for the People.

Joseph D. Malloy, of Stockton, for respondent.

HART, J. The district attorney of San Joaquin county filed in the superior court thereof an information charging the defendant with a misdemeanor, in that, on or about the 19th day of May, 1922, and prior to the filing of said information, in said court, said defendant practiced and attempted to practice and advertised and held himself out as practicing a system or mode of treating the sick and afflicted, without having at said time "a valid unrevoked certificate from the State Board of Medical Examiners of the state of California" so to do. Stats. 1913, p. 722. At the time the defendant was called for arraignment before the superior court upon said information, his counsel moved the dismissal of the accusatory pleading on the ground that said court was without jurisdiction to try the defendant on the charge thus alleged against him, and the motion was granted. From the order granting said motion of dismissal the people appeal.

The specific ground upon which the order of dismissal was made was that, under the statute of 1885 (Stats. 1885, p. 213), as amended by the Legislature of 1891 (Stats. 1891, p. 292), the jurisdiction of all misdemeanors committed within the limits of incorporated cities of the class to which the city of Stockton belongs, the crime here charged being alleged to have been committed in said city, is vested exclusively in the police or justice's court of said city. Section 17 of the State Medical Act, so called, upon which the information in this case is founded, prescribes as a penalty for practicing or attempting to practice the science of treating the sick or afflicted or in holding one's self out as such a practitioner, without having at the time of so doing a valid, unrevoked certificate as provided in said act, a fine of not less than $100 nor more than $600 or imprisonment for a term of not less than 60 days nor more than 180 days, or both such fine and imprisonment. Under section 1425 of the Penal Code the power or authority of a police or justice's court to inflict penalties for misdemeanors is limited to the imposition of a fine not exceeding $500 or imprisonment not exceeding six months, or by both such fine and imprisonment, except as to certain of the offenses specifically enumerated in said section, for which a greater penalty is prescribed in the sections of the Penal Code defining the same. See, also, § 4426, Pol. Code; People v. Sacramento Butchers' Ass'n, 12 Cal. App. 471, 488, 489, 107 Pac. 712.

[1-3] It is manifest that, unless there is some law or provision of law expressly vesting in a police or justice's court exclusive jurisdiction of the offense charged in the information herein, the sole jurisdiction of said offense is in the superior court, since the penalty prescribed therefor by the medical act is in excess of that which it is within the legal competence of a justice's or police court to impose. That it is within the power of the Legislature to confer upon police and justices' courts exclusive jurisdiction to try all misdemeanors, whether of the ordinary or what is commonly termed high-grade misdemeanors, is not an open question in this state. Section 5 of article 6 of the Constitution in effect so ordains. It is in said section provided that the superior court shall have original jurisdiction "in all criminal cases amounting to a felony, and cases of misdemeanor not otherwise provided for." Under that language of the Constitution the Legislature may repose exclusive jurisdiction in police courts of all classes of misdemeanors punishable by fine or imprisonment or both. People v. Cory, 26 Cal. App. 735, 742, 148 Pac. 532. See, also, Ex parte Wallingford, 60 Cal. 103; Gafford v. Bush, 60 Cal. 149; Green v. Superior Court, 78 Cal. 536, 21 Pac. 307, 541; Ex parte Westenberg, 167 Cal. 309, 139 Pac. 674. While the superior court, under said provision of the Constitution, has and will retain jurisdiction of misdemeanors "not otherwise provided for," such jurisdiction will be divested the moment the Legislature, under the power vested in it to establish inferior courts in any incorporated city or town, township, county, or city and county (article 6, § 1, Const.), and to fix the number and the jurisdiction and powers of such inferior courts (article 6, § 11, Id.), by law confers upon justices' or police courts exclusive jurisdiction of all misdemeanors. And, under the terms of section 8½ of article 11 of the Constitution, it is competent in all freeholders' charters framed under the authority of section 8 of article 11 to provide for the "constitution, regulation, government, and jurisdiction of police courts, and other municipal courts," vesting them with "such civil and criminal jurisdiction as may by law be conferred upon inferior courts." Under the authority of the first mentioned provision of the Constitution, a freeholders' charter may legally provide that any police or municipal court that may thus be established shall, within the limits of the city for which such charter has been adopted and approved, have exclusive jurisdiction of both ordinary and so-called high-grade misdemeanors or cases of misdemeanor of which the superior court has jurisdiction so long as jurisdiction of such misdemeanors is "not otherwise provided for." And jurisdiction of high-grade misdemeanors may completely thus be conferred upon and exercised by police or municipal courts of certain cities, and still be retained by the superior court as to other cities governed by freeholders' charters, to which cities the statute of 1885 is not applicable and whose charters, although establishing police courts, have not vested in or conferred upon them jurisdiction of those high-grade misdemeanors. See People v. Sacramento Butchers Ass'n, 12 Cal. App. 471, 477, 478, 479, 107 Pac. 712, supra; Union Ice Co., etc., v. Rose, 11 Cal. App. 357, 104 Pac. 1006; McGranahan v. Police Court of the City, etc., of S. F. (Cal. App.) 205 Pac. 98.

[4] From the foregoing it is manifest that if there were no general valid statute expressly conferring upon police or justices' courts of incorporated cities jurisdiction of all misdemeanors, and the freeholders' charters of such cities, even if providing for police or other municipal courts, were silent as to that matter—that is, had omitted to provide that such courts should be clothed with jurisdiction of all misdemeanors—then there would not be jurisdiction of such misdemeanors "otherwise provided for," and hence such jurisdiction would remain exclusively in the superior courts.

The freeholders' charter of the city of Stockton, which was approved by the Legislature, in extra session, in 1911 (Stats. 1911 [Ex. Sess.] p. 254 et seq.), makes no provision for a police or other municipal court, nor does it make any reference whatsoever to any municipal or other court. If, therefore, the superior court in and for the county of San Joaquin has been divested of jurisdiction of high-grade misdemeanors, and such jurisdiction is exclusively vested in and exercisable by the justice's court of the city of Stockton, the authority for the exercise of that jurisdiction by the last-mentioned court, must be found in some general law; and, as above shown, there is such a law in the act of the Legislature of 1885, above referred to, and which still exists as it was then enacted, except as to one of its sections to which the Legislature of 1891 made a certain amendment, which, however, does not affect the determination of any question which we are called upon to consider and decide upon this appeal.

[5] But the Attorney General challenges the validity of said act on the ground that its title does not conform to the mandate of the Constitution that the subject of every act of the Legislature shall be expressed in its title. Const. art. 4, § 24.

The title of the act of 1885 reads as follows:

> "An act to provide for police courts in cities having 30,000 and under 100,000 inhabitants, and to provide for officers thereof."

The act, as amended in 1891, contains precisely the same title. The city of Stockton belongs to the class of cities mentioned in the title of said act, and, if there be no constitutional objection to the act, it, of course, applies to said city. The first section of the act provides that in every city having 30,000 and less than 100,000 inhabitants the judicial power shall be vested in a police court to be held therein by the city justices, etc., and adds to the duties "now" required of such justices by law the duty of holding such police court. The second section of the act specifically enumerates (in four distinct subdivisions) the offenses of which such police court shall have "exclusive jurisdiction," the third subdivision of said section providing that such "exclusive jurisdiction" shall extend and attach to the following offenses:

> "Breaches of the peace, riots, affrays, committing willful injury to property, and *all misdemeanors punishable by fine or by imprisonment, or by both such fine and imprisonment.*" (Italics ours.)

Thus it is to be perceived that, assuming said statute to be valid, the jurisdiction of all misdemeanors, whether of the high or the low grade class, is exclusively vested and cognizable in the police courts of cities having any number of inhabitants between the minimum and maximum numbers mentioned in the title and the body of the act in question; and it is as to that particular provision which it is contended by the attorney general that the title of the act of 1885 does not respond to the provision of the Constitution requiring that the subject of every act of the Legislature shall be expressed in its title.

The argument in support of the contention thus stated is that the title of said act, to satisfy the requirement of section 24 of article 4 of the Constitution, that the subject of an act shall be expressed in its title, should in express language not only declare that exclusive jurisdiction of high-grade misdemeanors shall be vested in "said police courts," but that it should likewise declare that the superior courts shall thereby be divested of "their former jurisdiction of indictable misdemeanors." The contention and the argument are alike devoid of merit.

The establishment of a court means the creation of a tribunal vested with power to hear and determine controverted issues of fact and of law, and this means, of course, that its jurisdiction is pointed out and fixed by the act creating it. Indeed, a so-called "court" without jurisdiction to hear and determine controverted matters would be no court at all. Hence, the declaration in the title of the act of 1885 that the purpose of said act was and is to provide police courts for cities containing the designated number of inhabitants of necessity means that such a tribunal is thus to be created with a certain defined and fixed jurisdiction—that is, with the power to hear and determine certain classes of cases.

The manifest purpose of section 24 of article 4 of the Constitution, commanding that every act of the Legislature shall embrace but one subject, and that such subject shall be expressed in its title, was "to protect the members of the Legislature as well as the public, against fraud; to guard against the passage of bills the titles of which gave no intimation to the members of the Legislature or to the people of the matters contained therein." Ex parte Liddell, 93 Cal. 633, 636, 29 Pac. 251; Cooley, Const. Lim. (6th Ed.) 169. But, in construing that provision of the Constitution, no court has ever held that, to meet the purpose and intent thereof, it was requisite to insert in the title of an act anything beyond what was necessary to disclose the general nature or character of the subject of the legislation contained therein. In other words, it is not necessary that the title of an act should contain an abstract of its contents. Abeel v. Clark, 84 Cal. 229, 24 Pac. 383, and cases therein cited. "When the general purpose of the act is declared (in the title), the details provided for the accomplishment of that purpose will be regarded as necessary incidents." Thus it is held in many cases that an act entitled in general terms "an act to incorporate" a certain town may lawfully provide all means necessary for the government of the town, including taxation, courts, definition of misdemeanors, punishment of offenders, municipal improvements, etc. State v. Town of Union, 33 N. J. Law, 350; Cooley, Const. Lim., 172, note 1; Ex parte Liddell, supra.

In the recent case of People v. French, 214 Pac. 1003, this court through Presiding Justice Finch, made a careful review of the cases above considered, and also several later California cases construing the intent and explaining the scope of the constitutional provision in question. In that case the appellant, then a prisoner in the state prison at Folsom, was charged with the crime of escaping from the surveillance of his guards while working on the public highway, and he contended in this court that section 106 of the Penal Code, as amended in 1921 (St. 1921, p. 77), upon which section the information in said case was based, was unconstitutional for this reason: That, while the amending act provides that it is a crime for a prisoner to escape, as well as to attempt to escape, from prison, the title thereof merely declares that the act is amendatory of section 106 of the Penal Code, "relating to attempts of prisoners to escape," there being no reference in the title to the act of escaping from prison. It was held by this court, upon the authorities considered and from principle, that the title of the act of 1921, amending section 106 of the Penal Code, sufficiently conformed to the constitutional requirement as to titles of legislative acts. And it is interesting to note that, in the French Case, the Attorney General—indeed, the very representative of that office who prepared the brief in the instant case—with characteristic force and vigor supported the construction of the constitutional provision which was given it by this court as in its application to the point made in said case; and we may pertinently observe that it is hardly necessary to go further than the brief prepared by the learned gentleman himself in opposition to the appeal in the French Case to secure most admirable support for the conclusion that the title of the act in question in the instant case is in perfect accord with the requirements of the constitutional provision under consideration. In said brief this most rational view of the intent and scope of the said constitutional provision is expressed and urged as follows:

> "A title of an act may seem to be narrow in language, but upon careful consideration appears to have reasonable reference to many minor and related subdivisions of the main subject mentioned in the title. This mere detail and incidental matter may be treated of in a (constitutional) statute, even though the title may appear narrow in language."

The idea of what is really intended by the constitutional provision in question could not be expressed in more pertinent and perspicuous language; and if it were necessary to look entirely to authority for the support of the position which we take with reference to the present case, it would be sufficient to accept the opinion of the Attorney General as expressed in the excerpt just quoted, and plant the conclusion herein arrived at squarely thereon. We are firmly of the opinion that no other conclusion could justly be announced in this case than that the title of the act of 1885 clearly satisfies the requirement of section 24 of article 4 of the Constitution.

The order appealed from is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

---

61 Cal. App. 801

PEOPLE v. CHEW HING. (Cr. 660.)

(District Court of Appeal, Third District, California. March 23, 1923.)

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Chew Hing was charged with a misdemeanor. From an order dismissing the information, the State appeals. Affirmed.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., (Frank B. Smith, of Los Angeles, of counsel), for the People.

Joseph D. Malloy, of Stockton, for respondent.

HART, J. The defendant was informed against by the district attorney of the county of San Joaquin for the crime of violating the so-called Medical Practice Act, in that on or about the 19th day of May, 1922, and before the filing of the information, in the city of Stockton, county of San Joaquin, he did willfully and unlawfully practice and attempt to practice and advertise and hold himself out as practicing a system or mode of treating the sick and afflicted, without having at the time of so doing "a valid, unrevoked certificate from the State Board of Medical Examiners of the state of California," as provided in said act. Stats. 1913, p. 722. At the time fixed for his arraignment, and when the case was called for that purpose, his counsel moved to dismiss the information on the ground that the superior court was without jurisdiction of the offense charged therein, the contention being that jurisdiction of said offense was exclusively in the police court of the city of Stockton. The court made an order granting the motion of dismissal, and the appeal is by the people from said order.

The specific ground upon which the motion was granted was that, under the statute of 1885 (Stats. 1885, p. 213), exclusive jurisdiction of the class of misdemeanors within which the one charged in the information falls is vested in the police court of the class of incorporated cities to which the city of Stockton belongs. This precise point was made in the case of the People v. Y. Wong (Cr. 659) 215 Pac. 409, in which an opinion affirming the order appealed from has this day been filed. The point thus made is the only one pressed by the people in both cases for the reversal of the orders appealed from. It is therefore unnecessary to consider the point in this case.

Upon the authority of the case of People v. Y. Yong (Cr. 659) the order herein appealed from is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

(191 Cal. 103)

TWOGOOD v. MONNETTE. (L. A. 7006.)

(Supreme Court of California. May 3, 1923.
Rehearing Denied May 31, 1923.)

1. Brokers 🔑63(1)—Producing purchaser ready, willing, and able to complete contract entitled to commission although owner unable or unwilling to complete sale.

In the absence of any contrary agreement, a broker has earned his commission when within the life of his contract, or any extension thereof, he has produced a person who is ready, willing, and able to purchase the property on terms satisfactory to the seller, and has obtained a binding and valid contract for a sale on the terms proposed by the seller, or has brought the seller and buyer together and thus enabled them to enter into a contract of sale, or has produced such a purchaser who has orally accepted the seller's terms and offered to enter into a written contract embodying the terms, and binding upon both parties; and the broker's commission accrues when the contract of sale is executed, or when the opportunity to make such contract is given the seller, and the broker becomes entitled to his commission even though the seller is unable or unwilling to complete the sale.

2. Brokers 🔑60—Written contract between seller and purchaser not essential to recovery of broker's commission where purchaser ready, willing, and able produced.

A written contract between the seller and the purchaser of property is not essential to the recovery of a broker's commission if he has produced to the seller a purchaser ready, willing, and able to purchase upon the terms proposed by the seller, and who has agreed to those terms and is willing and offers to enter into a binding written contract; and the broker has performed his duty and earned his commission regardless of whether a written contract is actually entered into, or whether the sale is ever consummated by the delivery of the property and the payment of the purchase price.

3. Brokers 🔑57(2)—Owner agreeing to modification of terms of sale with purchaser produced by broker liable for commission.

Where an agreement for the sale of oil stock between the owner and the broker required the broker to produce a purchaser for cash, and the owner after the purchaser was produced agreed to a modification of the terms of sale, he was liable for the broker's commission.

4. Brokers 🔑63(3)—Failure of written agreement to embody real terms of sale of oil stock held not to preclude recovery of commission.

Where a purchaser was produced, and the owner consummated an agreement with him to sell oil stock, and the purchaser's agent employed an attorney to draw up a contract of sale, the fact that such contract did not embody the real terms agreed upon afforded no ground for the refusal of the owner to pay the broker's commission upon his refusal to complete the deal on other grounds.

5. Brokers 🔑63(1)—Where seller voluntarily disabled himself from performing contract of sale, broker entitled to commission.

Where the owner of oil stock voluntarily disabled himself from performing a contract entered into with a purchaser of such stock produced by a broker, while the transaction was obviously approaching a speedy and satisfactory culmination, and where the purchaser produced by the broker was ready, willing, and able to take and pay for the stock on terms satisfactory to the owner, the broker was entitled to his commission.

In Bank.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by W. S. Twogood against M. J. Monnette. From a judgment for plaintiff, defendant appeals. Affirmed.

Donald Barker and William H. Neblett, both of Los Angeles, for appellant.

Newlin & Ashburn, of Los Angeles, for respondent.

KERRIGAN, J. Plaintiff in this action sued to recover the sum of $25,000 on a contract under which he was employed as a broker to find a purchaser for the capital stock of the Bankers' Oil Company. He alleged in his amended complaint that the contract of employment was made on November 4, 1919, and that on November 5th he produced a purchaser who was ready and able to make the purchase on the terms and conditions thereof. The jury returned a verdict for the plaintiff, fixing the amount of recovery at $15,000. From the judgment entered upon the verdict the defendant has appealed.

It is mainly contended on behalf of defendant that the evidence was insufficient to justify the verdict. Defendant insists that, admitting the contract of employment as claimed, and the correctness of the amount of the verdict under such contract, the evidence did not show that the plaintiff performed the obligations, on his part required, by producing a purchaser who was willing to make the purchase on the terms proposed by the defendant.

Prior to November 4, 1919, the defendant had represented to the plaintiff and his correspondents that he and other members of his family held more than half of all the issued stock of the oil company mentioned, and that the holders of the remainder of that stock had agreed to sell it whenever defendant sold that which he controlled, and that defendant could and would deliver, in consequence of such understanding, all of the issued stock of the oil company for the sum of $300,000. On November 4th he executed the following writing:

"This will certify that in case of sale of the Bankers' Oil Company by W. S. Twogood to any one of his clients, he and his associates are to receive the sum of twenty-five thousand

($25,000) dollars for bringing to me the parties to the deal."

At the same time he required plaintiff to agree that, in the event a sale was made of the corporate stock and the sum of $25,000 paid as commission, plaintiff would pay to defendant the sum of $10,000; in other words, divide his commission in that proportion. Plaintiff had, previous to the date of the commission agreement, been in touch with certain associates in San Francisco, and on the morning of the 5th of November he produced at the office of the defendant Alfred G. Wilkes, who was introduced as the proposed purchaser. The commission agreement contained no express statement of terms upon which the sale was to be made, and when Wilkes appeared in defendant's office he was advised by defendant that the price for the stock was $300,000 and the terms would be cash; i. e., that payment for its stock would be due upon its delivery. After some further negotiations, Wilkes suggested that he pay on that day, on account of the purchase price, the sum of $5,000, and the balance within 30 days in order to give him sufficient time to make an examination of the title to the property. To this defendant agreed. Wilkes at that interview stated that he was busy "and would like to adjourn the conference until two o'clock in the afternoon, when he would return and close the matter up"; that Wilkes stated that he would take the property on the terms last mentioned. At the noon hour Wilkes told C. G. Osborn that he had agreed to buy the stock from Monnette, and delegated to him the duty of calling on Monnette at two o'clock for the purpose of closing the deal in his behalf upon the terms stated. At two o'clock, in company with Twogood, Osborn called on Monnette and stated to him the terms of the sale as theretofore agreed upon with Wilkes, to which statement Monnette assented. Some further matters, such as taxes and oil on hand, were discussed and agreed to at that time by Monnette and Osborn, as had previously been done by Wilkes. Thereupon all terms of the sale having been expressly assented to by both sides, it was suggested by Osborn that the same be reduced to a written contract, and that he would have Guerney E. Newlin prepare the same and would return with it as soon as possible. To this Monnette likewise agreed. Newlin telephoned Monnette before he started the preparation of the contract and again during its preparation, and in the course of his conversation went over in detail the terms of the agreement which had been made between Monnette on the one hand and Wilkes and Osborn on the other, being the same terms above mentioned, and Monnette stated to Newlin that those were the terms to which he had agreed. The completion of the contract was delayed until about four o'clock that day. Meanwhile, and at about 3:30 o'clock, defendant, after conference with two callers, determined that he would not proceed with the deal. When he was informed by plaintiff that Osborn was ready to bring the contract over, he stated to plaintiff:

> "It will not be necessary for him to come up. I don't care to see him, as the deal so far as you and Mr. Wilkes and Mr. Osborn are concerned is off. I cannot make it. I cannot complete the deal."

Defendant further stated to plaintiff that he had just been informed by his recent callers that they had a written contract with the holders of the minority stock for the purchase of the same, and for that reason it was no longer possible for him to perform his contract. Some days later Osborn, acting under instructions from Wilkes, called upon defendant and offered to take whatever stock might be owned or controlled by defendant at a price proportionate to the total price of $300,000 agreed upon as the sale value of the whole amount of issued stock. Defendant refused to deal further with Osborn or Wilkes, and on the latter occasion admitted that he had given an option to other parties covering his own stock.

Do these facts make out a case where the broker has, during the life of his contract of employment, produced a purchaser ready and willing to buy the property offered to be sold at the price and on the terms fixed by his principal (no question of the ability of the proposed purchaser being involved)?

[1] In this state it is well established, in the absence of any specific agreement to the contrary, that a broker employed to sell real or personal property has earned his commission when, within the life of his contract, or any extension thereof, he has produced a person who is ready, willing, and able to purchase the property on terms satisfactory to the seller, and has obtained a binding and valid contract for a sale on the terms proposed by the seller, or has brought the seller and buyer together and thus enabled them to enter into a contract of sale, or has produced such a purchaser who has verbally accepted the seller's terms and offered to enter into a written contract embodying the said terms and binding upon both parties. In such cases the broker's right to commission accrues when the contract of sale is executed, or when opportunity to make such contract is given the seller; and the broker becomes entitled to his commission even though the seller is unable or unwilling to complete the sale. Ernst v. Ganahl, 166 Cal. 493, 137 Pac. 256; Gardiner v. McDonogh, 147 Cal. 313, 81 Pac. 964; Phelps v. Prusch, 83 Cal. 626, 23 Pac. 1111.

[2] It is also established law in this state that a written contract between the seller and the purchaser is not essential to the recovery of the broker's commission if he has produced to the seller a purchaser who is ready, willing, and able to purchase upon the terms proposed by the seller and who has

agreed to those terms, and is willing and offers to enter into a binding written contract. The broker has performed his duty and has earned his commission regardless of whether a written contract is actually entered into or whether the sale is ever consummated by the delivery of the property and the payment of the purchase price. Gunn v. Bank of California, 99 Cal. 349, 33 Pac. 1105; Merwin v. Shaffner, 31 Cal. App. 377, 160 Pac. 684.

[3] It is urged in behalf of the defendant that the broker did not establish his right to his commission for the reason that his contract required him to produce a purchaser for cash, whereas Wilkes insisted that he be given 30 days within which to pay. But the record also shows that the defendant, at his interview with Wilkes, agreed to this modification, if such it may be called. We say "if such it may be called," because in any event the obligation to pay the price was merely concurrent with that of the defendant to deliver the stock, much of which was not in the possession of the defendant, who required some time—which possibly might have been extended even beyond 30 days—to place himself in position to make delivery. But the modification of the terms having thus been agreed to by the seller, this departure from the terms of the agent's authorization affords no ground for refusal to pay him his commission. 4 R. C. L. § 52, p. 313.

[4] It is further contended by the defendant that the transaction never progressed beyond the stage of negotiation, and calls attention to the fact that the contract which was prepared by the attorney for Wilkes and Osborn, and which Osborn was proposing to submit on November 5th to defendant for his signature, was, in legal effect, a mere option, not binding Wilkes to complete the purchase. But the contract was drawn in this form without the knowledge of Wilkes, and with the reluctant consent of Osborn, upon the advice of the attorney and the latter's statement that if it was unsatisfactory to the defendant it could and would be readily changed into a contract of purchase. Without having seen the proposed contract, the defendant refused to proceed with the transaction. While we have no doubt that the contract as drafted by Wilkes' attorney did not embody the precise terms theretofore orally agreed to, and lends color to the contention of the defendant that the transaction was merely in a state of negotiation, it was in no sense conclusive evidence of the latter fact, and the jury was justified in concluding, as it doubtless did, that the drafting of the agreement in this form was merely an act of bad judgment on the part of the agent and attorney, and without legal effect in view of the subsequent turn of events.

[5] In conclusion it is to be noted that the defendant made no objection to Wilkes as a purchaser, to the terms of the proposed contract, or to the manner or the time within which plaintiff and Wilkes performed their respective parts. He based his refusal to proceed exclusively, both on that day and the day following when interviewed by Osborn and the plaintiff, upon the ground that he was not able to perform. And it is apparent from the record that he had on the 5th day of November voluntarily disabled himself from performing while in the midst of a transaction with Wilkes, which was obviously approaching a speedy and satisfactory culmination. The plaintiff did all that was required of him by the terms of his employment to entitle him to his commission; namely, he produced a bona fide purchaser, ready, able, and willing to take and pay for the stock on terms satisfactory to the defendant, his employer.

Judgment affirmed.

We concur: WILBUR, C. J.; LAWLOR, J.; LENNON, J.; WASTE, J.; SEAWELL, J.

(191 Cal. 194)

RUSSELL v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY et al.

(S. F. 10677.)

(Supreme Court of California. May 18, 1923.)

Grand jury ⚷44—Threat against grand juror for act committed as private citizen not interference with grand juror.

Where a grand juror as a private citizen has instituted proceedings for a search warrant for intoxicating liquor, a threat to prosecute him for perjury in swearing out the warrant is not an interference with a grand juror, and, as such, a contempt.

In Bank.

Application by Clifford A. Russell for a writ of prohibition, to be directed to Charles O. Busick, Judge of the Superior Court of Sacramento County. Writ granted.

J. R. Huges, Markham Johnston, and O. F. Meldon, all of Sacramento, for petitioner.

Ben P. Tabor, of Sacramento, for respondents.

PER CURIAM. The writ of prohibition was ordered issued from the bench for the reason that the complaint charging the petitioner with contempt failed to state an offense.

The petitioner was charged with threatening a grand juror with a prosecution for perjury in swearing out a search warrant for intoxicating liquor. It is conceded that the proceeding for a search warrant was instituted by the grand juror as a citizen, and not by virtue of his powers and duties as a grand juror, and for this reason petitioner's threat was not an interference with a grand juror, as such.

Writ of prohibition ordered issued.

All concur.

---

191 Cal. 161

In re McDONALD'S ESTATE.

McDONALD v. McDONALD et al.

(L. A. 7072.)

(Supreme Court of California. May 16, 1923.)

1. Wills 🔑55(1)—Finding of want of testamentary capacity sustained.

In a proceeding to set aside the probate of a will on the ground that testator did not have testamentary capacity, evidence *held* to support a finding for contestant.

2. Wills 🔑384—Admission of evidence, if erroneous, held harmless because of similar testimony previously introduced without objection.

In a will contest that one of the proponents testified that a ranch, which he, his mother, and contestant formerly occupied, stood in the name of his mother and had been deeded to her about a certain time, if erroneous, was rendered harmless because of similar testimony previously introduced without objection.

3. Wills 🔑164(5)—Evidence as to false representations to decedent tending to prejudice contestant in his eyes held admissible in will contest.

In a will contest, on the issue of fraud and undue influence, evidence as to whether certain representations made by one of the proponents to decedent were fraudulent *held* admissible as tending to show an attempt to prejudice contestant in the eyes of decedent.

4. Wills 🔑292—Property owned by parties to contest may not be shown on question of natural right to be object of decedent's bounty.

In a will contest it is error to admit testimony to show what property the parties to the contest owned as tending to prove which had the greater natural right to be the object of decedent's bounty.

5. Witnesses 🔑276—Executor and beneficiary properly examined as adverse party as on cross-examination, although he had not opposed contest of will.

In a will contest there was no error in permitting an executor and beneficiary to be examined as an adverse party as on cross-examination under Code Civ. Proc. § 2055, as added by St. 1917, p. 58, where he had not opposed contest, and as an heir he would receive more property on setting aside the will than under it, and where his testimony elicited would have been admissible under the general rules of evidence; the method of examining witnesses being largely discretionary.

6. Witnesses 🔑372(2) — Evidence on cross-examination as to hostility between contestant and proponent held admissible.

In a will contest evidence elicited on cross-examination as to whether proponent had called decedent, who was his father, a certain opprobrious name, *held* admissible in view of other evidence showing a feeling of hostility of the witness toward contestant.

7. Appeal and error 🔑730(1)—Assignment of error as to refusal of instructions properly stating the law must show wherein subject was not actually covered by instructions given.

It is not a sufficient predicate for a claim of error that instructions which properly state the law have been rejected, but the assignment must go further and point out wherein the subject of the instruction was not in fact covered by those actually given.

8. Wills 🔑329(5)—Instruction as to burden of proof in will contest held not erroneous as not based on evidence.

In a will contest an instruction on the burden of proof as to whether the will was prepared at the instance of the beneficiaries or proponents *held* not erroneous as not being based on evidence.

In Bank.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Proceedings by H. D. McDonald against Bert H. McDonald and others to set aside the probate of the will of James A. McDonald, deceased. Judgment for plaintiff, and defendants appeal. Affirmed.

H. A. Massey and Peyton H. Moore, both of Los Angeles, for appellants.

John C. Miles, of Los Angeles, for respondent.

LAWLOR, J. James A. McDonald died September 12, 1920, leaving a purported will dated August 20, 1920, which was duly admitted to probate. By it he bequeathed and devised the bulk of his property in varying amounts to his half-brothers, Dan C. Mulock and Will C. Mulock, and to his nephew, niece, and sister-in-law, Bert H. McDonald, Florence McDonald Fitzpatrick, and Lillie H. McDonald. The latter are the son, daughter, and wife, respectively, of decedent's brother, H. D. McDonald, to whom decedent left nothing. Bert H. McDonald and Will C. Mulock were named executors of the will. On December 20, 1920, H. D. McDonald instituted this proceeding to set aside the probate. The grounds of his contest were alleged unsoundness of mind of the decedent and undue influence and fraud exerted by Bert H. McDonald and others upon decedent which caused him to execute the will in question. Bert H. McDonald, Florence McDonald Fitzpatrick, and Lillie H. McDonald filed an answer to the petition in which they denied these allegations. Upon the trial the jury returned a special verdict in favor of contestant upon each issue save that of fraud, which was not submitted to them. From judgment rendered thereon proponents take this appeal.

1. It is claimed by appellants there was no evidence to support the verdict of the jury that decedent was of unsound mind at the time he executed the will or that he was induced to sign the will through undue influence. The evidence as to decedent's testamentary capacity consisted principally of the testimony of acquaintances and relatives, who described decedent's conduct, both as to his actions generally and with reference to his conduct on specific occasions, and gave their respective opinions that he was or was not sane. No expert witnesses were called. Inasmuch as it is our opinion there was sufficient evidence to support the finding of testamentary incapacity, an extended review of the evidence on behalf of appellants is unnecessary. The witnesses to the will, W. M. Northrop and H. S. Farrell, who were two attorneys having their offices together, both gave their opinion that decedent was rational and sane, as did their stenographer. Two grocers, a plant fumigator, and a bank teller with whom decedent had done business, several neighbors, an attorney who had examined decedent as a witness in a case some years before, and appellants Bert H. McDonald and Florence McDonald Fitzpatrick also testified to the same effect. These witnesses stated variously that decedent was able to carry on a connected conversation; that he talked intelligently about his crops, the care of his ranch, and other subjects, such as the work one witness was doing in a shipyard. They based their opinions that he was sane upon these grounds.

On the other hand, the witnesses for respondent were unanimous in declaring decedent to have been irrational and insane. From their testimony, which the jury apparently accepted, it appears that decedent lived alone on an orange ranch near San Marino which he owned; that he was in the custom of going about the place almost nude, often wearing only a pair of trousers; and that he was in the habit of bathing in his yard. When respondents and others attempted to get him to change his habits in this respect, the neighbors even threatening him with arrest, he informed them the ranch was his and that he would do as he pleased on it. He habitually talked to himself, often in an abusive manner, concerning some unidentified third person or some woman. His conversation was disconnected and he would suddenly change from one subject to another. He seemed unable to talk connectedly for any lenth of time on any particular subject. He talked foolishly, and one witness stated he "jumbled" in his talk. His memory was poor. He was under the impression his neighbors were trying to poison his horses and steal his fruit. Upon one occasion he refused to pay a Japanese who trimmed his orange grove on the ground that he had put poison on the trees to make the blossoms fall off so there would be no crop. Some years before his death respondent had had a cottage built on decedent's ranch and decedent refused to allow the ceiling to be plastered because the plastering would fall in the night and kill him. Before the house was built, decedent slept on a cot in the barn, and upon one occasion he attacked with a pitchfork a man who was working for him because, as decedent said he was piling bales of hay so they would fall on him and kill him while he was asleep. He attacked a neighbor with a shovel and called him and his daughter vile names because he claimed they were interfering with the water on his place. In none of these cases were his suspicions justified.

Decedent had refused to register to vote for school bonds because wherever there was a school "there was always a minister that bobbed up," and he refused "to be mixed up in any minister's doings." In addition, he said if he registered he would have to be on the jury, and then some one would come and steal his live stock and poison his horses. It appears he had owned some horses that had died, but respondent testified that some of them were shot because of glanders, and the rest died of old age and the way decedent cared for them. There was evidence of other similar irrational acts and statements.

These characteristics alone, although indicative of an unbalanced mind, not being shown to have affected the making of the will, might not be sufficient to establish the want of testamentary capacity. But it further appears that he entertained delusions respecting respondent which so seriously affected his relations with him that they might well have been found to have affected the making of the will. Before 1913 respondent handled decedent's crops for him and marketed them. In that year decedent accused respondent of robbing him of part of his crop and insisted his statement of the crop was not correct. From then on decedent accused respondent, although the latter left the statement with decedent for verification and heard nothing more about it. Respondent stated his account of the crop was true, fair, and honest. Before going to live alone on his ranch, decedent had lived with respondent and his family, but had left them because he thought they were trying to poison him. He accused respondent of stealing eggs, vegetables, and other things from his ranch and of coming down to his place at night, throwing stones on his house, bothering appellants Bert McDonald and Florence McDonald Fitzpatrick, and trying to get their property away from them. He further insisted he had given respondent the ranch the latter occupied. Respondent testified that none of these things was true. He also stated he had tried, without success, to convince decedent that his ideas were mistaken, asking him to come out and chase whoever was throwing rocks on his house, saying he would find respondent in bed at the time. Decedent replied that—

> "Bert says that you want to get me out of here, to kill me, coming down here throwing these stones to get me out here to kill me. That is it."

As further tending to show decedent's inability to understand his relations with those about him is the fact that in his will as executed he made a provision for his sister, Mary Mulock, in case she should leave a convent in which she was living. Will C. Mulock testified that Mary Mulock died in 1919, and that he told decedent of her death in the same year. That decedent had realized she was dead is shown by the fact that he informed respondent of her death before he made the will. Respondent testified decedent once told his mother she was not his mother, but that she had stolen him from some one else. She was unable to convince him he was mistaken.

Respondent and Will C. Mulock testified decedent did not attend to any business matters of any importance, although there is evidence that he bought groceries each week and was able to add the items to the extent of a few dollars. Before the dispute in 1913 over the statement of the crop, respondent took care of his property and crops. After that time Will C. Mulock tended to his affairs. Respondent and Will C. Mulock bought, sold, and leased his property and sold his crops, and Will C. Mulock testified decedent attended to practically no business unaided. He appears to have felt he must consult them about everything, including such matters as registering to vote on the school bonds, above referred to, and as to what attitude he should take on the matter of putting in a road which the community desired to have constructed. Will C. Mulock stated that at one time he sold a piece of decedent's property for $6,500 and tried to get decedent to invest the money in government bonds, which decedent refused to do on the ground the security was not good. Decedent told various persons his brothers handled his business affairs for him, and respondent testified decedent had no business capacity whatever. It also appears that shortly before his death appellant Bert H. McDonald made arrangements for having decedent's orchard fumigated. According to W. M. Northrop, who drew decedent's will, at the time he made it, the following conversation ensued:

> "'Now what other property have you, James?' [besides the ranch and some notes], and he said 'Why, some lots.' and I said, 'What else?' and he said, 'Nothing else.' I said, 'How about any money; do you have that?' 'Oh,' he said, 'I have sometimes some money in the bank, more or less.' I said, 'Then besides these notes that you are giving by the will, and your ranch, you have got the lots and the money; now, what do you want to do with those?' and he says, 'I hadn't thought of that.'"

[1] From the foregoing evidence, we are of the opinion the finding of the jury that decedent did not have testamentary capacity cannot be disturbed. Under the often quoted rule laid down in Estate of Motz, 136 Cal. 558, 69 Pac. 294:

> "If he is able to understand and carry in mind the nature and situation of his property and his relations to his relatives and those around him, with clear remembrance as to those in whom and those things in which he had been mostly interested, capable of understanding the act he is doing, and the relation in which he stands to the objects of his bounty, free from any delusion, the effect of disease, which might lead him to dispose of his property otherwise than he would if he knew and understood what he was doing, he has the capacity to make his will."

In the case at bar decedent's fixed attitude of hostility toward respondent, apparently unwarranted, his failure to realize that his sister was dead, and his belief that his mother was not his mother might have persuaded the jury that he did not have an understanding of his relation to the natural objects of his bounty. From the evidence that his brothers attended to all his property matters, the fact that he had no business capacity, his impression that he had given respondent the farm which respondent occupied, and his failure to think of his money when he made his will, the jury might have found he was unable to carry in mind the nature and situation of his property.

We are referred to Estate of Redfield, 116 Cal. 637, 48 Pac. 794, and other cases wherein it was held that lapses from the normal, hallucinations and delusions which do not affect the testamentary disposition are not sufficient grounds for setting aside a will. But, as already pointed out, the peculiarities of mind of the decedent herein were calculated to affect the making of the will and were such as the jury might have found did impair his testamentary capacity.

Appellants lay stress on the testimony of W. M. Northrop, who drew up and witnessed the will, as showing decedent was in possession of all his faculties at the time the will was signed. This testimony merely raises a conflict with that tending to show testamentary incapacity, and we cannot say the jury were bound to accept it as against the evidence offered on behalf of respondent. It is further claimed by appellants that the provision for decedent's sister in the will after decedent knew of her death shows nothing more than a lack of memory. But, in view of decedent's other mental aberrations, his delusions concerning respondent, and his erroneous ideas as to many past occurrences, such as the death of his horses, the jury might have attached greater significance to the provision for the sister than that it was a mere lapse of memory.

In view of our conclusion that the allegations of unsoundness of mind were sustained, it is immaterial whether or not the will was the product of undue influence, and it is unnecessary to discuss the evidence addressed to that issue. Estate of Baker, 176 Cal. 430, 437, 168 Pac. 881.

2. It is insisted the court erred in permitting appellants Bert H. McDonald and Florence McDonald Fitzpatrick to be examined on the subject of a property settlement between respondent and his wife as to the respective parcels and value of property owned by them and in attempting to show the relative wealth of respondent and appellants. The evidence shows that some years previous to decedent's death respondent and his family had become estranged; that respondent and his wife, Lillie H. McDonald, had separated; and that respondent had made a property settlement with her. In paragraph III of the second cause of action of the petition it was alleged that, pursuant to a conspiracy on the part of appellants to secure possession and control of the community property of respondent and his wife and of his separate property, respondent was prevailed upon to enter into the agreement, whereby he was forced to accept certain property in lieu of his interest in the community property; that he assigned to appellant Lillie H. McDonald approximately $150,000; and that he received under the agreement $5,000 worth of property and $75 per month. These allegations of the petition were stricken out on motion of appellants. Part of the evidence objected to consists of testimony of appellant Bert H. McDonald to the effect that the ranch which he, his mother, and respondent formerly occupied stood in the name of his mother and had been deeded to her about 1880 or 1884.

[2] Even if this evidence was irrelevant, appellants could not have been prejudiced by it. The only question objected to in the trial court was the one concerning who, at the time of the trial, was occupying the ranch which appellant Bert H. McDonald, his mother and father, occupied five or six years before, to which the witness replied that it stood in his mother's name. He had previously stated, without objection, that he had lived in Alhambra five or six years, and that prior to that time he had resided with his mother and father on the ranch "that my mother owns in San Marino." This answer was practically the same as that objected to and renders the error, if any, harmless.

[3] Further objection upon the same ground is made to certain testimony elicited from appellant Florence McDonald Fitzpatrick on cross-examination. This witness was called on behalf of the appellants, and on direct examination testified that she had told decedent they had given respondent about $50,000 in property and promissory notes, a life estate in four acres of land, and an allowance of $75 a month; that decedent thought $75 a month was too much money and that respondent should make a living off the four acres. The witness W. M. Northrop had also testified for appellants that decedent told him "Henry has enough" when asked whether he wished to make any provision for respondent in his will. The testimony of Florence McDonald Fitzpatrick, which appellants now insist was erroneously admitted, was brought out, according to a statement of counsel for respondent at the time it was offered, to show her consciousness of the falsity of the statement she made to decedent, as tending to prove the perpetration of a fraud on him. The court stated explicitly that the evidence was purely collateral as a showing of what property the various parties had, was relevant only to indicate the state of mind of decedent, and the jury was directed not to consider it for any other purpose. The testimony objected to was elicited after counsel for respondent asked the witness whether she remembered where and when she got the property she gave to her father. An objection to this question was sustained. Thereupon she was asked if she saw the $50,000 handed over to respondent, and she explained, over an objection, that the $50,000 consisted of three lots in the city of Alhambra, some shares of stock, and notes. She admitted the notes were executed by respondent and made payable to her mother; that until six years previously her father conducted the orange grove where the family lived; that her father and mother were not divorced. Upon her redirect examination she was shown a receipt, signed by respondent, for property purporting to amount to about $50,000, which was offered and received in evidence over respondent's objection as tending to prove the truth of her statement. On recross-examination she stated she did not think she was the owner of property that stood in her mother's name before 1915 or before 1910, but that she had received a conveyance of property from her mother. This testimony, to which the objection was directed, was brought out by counsel for respondent in an endeavor to show the falsity of the receipt; also what the witness knew about it.

[4] At the time this evidence was introduced the issue of fraud had not been withdrawn from the jury. Under that issue it was proper to receive evidence of false statements made to prejudice respondent in the eyes of decedent (Estate of Benton, 131 Cal. 472, 63 Pac. 775), although, as stated by the court, it would have been error to have admitted the testimony to show what property the parties owned, as tending to prove which had the greater natural right to be the object of decedent's bounty (Estate of Kaufman, 117 Cal. 288, 49 Pac. 192, 59 Am. St.

Rep. 179). In view of this circumstance we cannot say the court erred in admitting the testimony in question, which undoubtedly did tend to prove whether or not the representation which appellant Florence McDonald Fitzpatrick made to decedent was fraudulent.

[5] 3. The next assignment of error is to the action of the court in permitting Will C. Mulock, one of the executors and a beneficiary under the will, to be examined as an adverse party under section 2055 of the Code of Civil Procedure, as added by St. 1917, p. 58, he not having joined in opposing the contest. It is insisted that he should not be considered a party under that section, inasmuch as he was a half-brother of decedent and would receive more property if the will were set aside than he would under it, and that his interests therefore really lay with respondent. This witness was perfectly competent to testify in the case regardless of the provisions of section 2055 of the Code of Civil Procedure, and it is not shown by appellant that any evidence elicited by way of cross-examination under section 2055 would not have been admissible under the general rules of evidence, nor is it shown in what manner appellants were prejudiced, if at all, by this manner of examining the witness. The method of examining witnesses is largely in the control and discretion of the trial court, and, the evidence in question being relevant, it is not important how the examination was characterized. The appellant has shown no prejudicial error in the method of examining this witness.

[6] 4. The court reluctantly permitted the appellant Bert H. McDonald and Will C. Mulock to be asked if the former had not called his father a certain opprobrious name. The purpose of this evidence was to show the hostility of the witness Bert H. McDonald toward respondent, his feelings being a proper subject of inquiry upon cross-examination. In view of the fact that appellants' counsel admitted that such a feeling of hostility existed, and the fact that the record contains abundant evidence of appellant's bitterness toward his father, it cannot be held that proof of the use of the opprobrious term, even if erroneous, would be prejudicial. Restrictions upon the right of cross-examination in this regard result more from the necessity of confining the case to the issues on trial than because of the incompetence of evidence of specific acts of hostility.

[7] 5. Appellants complain of the refusal of the court to give a large number of instructions proposed by them relating to the subjects of insanity and undue influence. The jury was fully instructed on those subjects, and no defect in the charge given is pointed out in the respect covered by the instructions proposed and refused. It is not a sufficient predicate for a claim of error that instructions which properly state the law have been rejected. The assignment must go further and point out wherein the subject of the instruction was not in fact covered by those actually given.

[8] 6. The appellants' sixth assignment of error relates to an instruction with reference to the burden of proof. It is claimed that this instruction was erroneous because it assumed that the instrument was prepared at the instance of one or all of the beneficiaries or proponents, in which event it was declared that the burden was upon the proponents to show that the will was read to the deceased or that the deceased thoroughly understood its contents and that he had a clear conception of his act. The complaint made to this instruction is in the following language:

> "From the foregoing it will be seen that the trial court submitted to the jury the issue as to whether the will in question was prepared at the instance of one or all of the beneficiaries or proponents of the same. * * * This instruction was submitting to the jury an issue of which there was no testimony to support, and the giving of the same could not fail to be reversible error."

There is no merit in this contention. If, as appellants complain, the beneficiaries did not assist in the preparation of the will, the instruction by its own terms was to be disregarded by the jury. On the other hand, there was evidence, as respondent contends, which might have justified the jury in concluding that the will was prepared at the instance of the proponents and of the beneficiaries therein.

The judgment is affirmed.

We concur: WILBUR, C. J.; MYERS, J.; SEAWELL, J.; KERRIGAN, J.; LENNON, J.; WASTE, J.

---

191 Cal. 172

CITY AND COUNTY OF SAN FRANCISCO et al. v. BOYLE, Auditor.

(S. F. 10486.)

(Supreme Court of California. May 17, 1923.)

1. Contracts 🔑143—Principal consideration in construction is object to be attained.

In the construction of contracts, the principal factor for consideration is the object to be attained.

2. Health 🔑20—State's duty to protect public from communicable diseases such as tuberculosis.

It is the duty of the state, not only to provide for the care of indigent sick and dependent poor, but to protect the public from infectious or other communicable diseases, such as tuberculosis, special provisions for the care and treatment of persons suffering from which are made by Const. art. 4, § 22, and various statutes.

3. Mandamus 🔑80—Board of Supervisors' finding that zone outside county is preferable for treatment of tuberculosis patients binding on Supreme Court.

A finding by the Board of Supervisors of the city and county of San Francisco that a zone outside the city and county limits possess a more favorable climate and superior surroundings for treatment of tuberculosis patients is conclusive on the Supreme Court in mandamus proceedings to compel the city and county auditor to audit and approve a demand in favor of a neighboring county for preliminary costs and expenses incident to the proposed construction of additional hospital units for the care of such city and county's tuberculosis patients.

4. Evidence 🔑10(1, 12, 14)—Judicial notice of location of city hospital and county sanatorium as bearing on merits as places for treatment of tuberculosis patients.

The Supreme Court may take judicial notice of the geographical positions of the San Francisco General Hospital and the Arroyo Sanatorium, near Livermore, in Alameda county, with reference to their proximity to the sea, the influence of ocean winds on their climate, and the density of the population of each, as bearing on their respective merits as places for the treatment of tuberculosis patients.

5. Hospitals 🔑2—City and county held not inhibited by statute from contracting for care of tuberculosis patients in neighboring county sanatorium.

A city and county might contract to provide for the care of their tuberculosis patients in a neighboring county sanatorium by proceeding under Act July 29, 1921 (St. 1921, p. 542), providing for the joint exercise of powers by counties, cities or both, notwithstanding Act Aug. 2, 1921 (St. 1921, p. 1641), providing for the joint construction, ownership and management of tuberculosis hospitals, to be approved by the state bureau of tuberculosis, as a condition precedent to receiving state aid.

6. Mandamus 🔑172—City's ability to meet future liabilities under proposed construction contract not considered on application for writ to compel auditor's approval of sum set aside for payment of preliminary expenses.

On application for writ of mandate to require the auditor of the city and county of San Francisco to audit and approve a demand for a sum set aside by such city and county for the payment of architect's fees and other expenses incurred by a neighboring county in the preparation of plans and specifications for additional hospital units for the care of the city's tuberculosis patients, pursuant to an agreement under which the city, on approving the construction contract, was to advance the total cost, from which such neighboring county might deduct 4 per cent. annually for depreciation, the question as to the city's ability to meet any future liability or indebtedness under the contract in excess of the revenue provided for the year in which it accrued as required by Const. art. 11, § 18, and City and County Charter, art. 3, c. 3, § 13, cannot be decided, in the absence of any showing that the construction contract had been executed; there being no presumption that the city would not be prepared to meet its future obligations or would not keep within the law.

7. Municipal corporations 🔑871—City's contract to advance cost of additional county hospital units for care of city's tuberculosis patients held not invalid as loan of city's credit.

A city's contract to advance to a neighboring county the total cost of building additional county hospital units for the care of the city's tuberculosis patients, to be held in a special fund, from which the county was to deduct an annual allowance for deterioration, *held* not in violation of Const. art. 4, § 31, inhibiting loans of money or credit, pledges of credit, or gifts by the city; no debt being created by establishment of a fund from which certain definitely stated sums are to be disbursed for a purpose provided by law.

8. Municipal corporations 🔑63(1)—Whether city's contract is improvident and unwise does not concern courts.

Whether a city's contract, in the exercise of legislative or discretionary powers conferred on it by the Legislature, is improvident or unwise, is of no concern to the courts.

9. Hospitals 🔑2—That sum set aside for hospital construction under contract with neighboring county may be wholly consumed on expiration of contract term does not invalidate contract.

That a gross sum set aside by a city to cover the cost of construction and deterioration of additional hospital units to be constructed by a neighboring county for the care and treatment of the city's tuberculosis patients as provided by a contract between the city and county may be wholly consumed on expiration of the contract term, would not be conclusive proof of a bad bargain and does not invalidate the contract; the presumption being that the city governing body, whose judgment is conclusive in the absence of a showing of want of jurisdiction, bad faith, gross extravagance, or some fact sufficient to vitiate the contract, considered the wisdom and policy of the whole plan in the light of the objects to be attained.

10. Hospitals 🔑2—City may contract for care of tuberculosis patients in hospital constructed and maintained by neighboring county.

A city may contract for the care and treatment of its tuberculosis patients in a hospital constructed and maintained by a neighboring county, where deemed necessary by its governing body in the interest of public health, whether or not the plan adopted could be improved on.

11. Hospitals 🔑2—Contract to advance money to neighboring county for construction of additional hospital units for care of city's tuberculosis patients not invalid because county retained supervisory control.

A city's contract to advance money to a neighboring county for the construction of additional hospital units for the care and treatment of the city's tuberculosis patients, *held* not invalid because the county retained supervisory control of the entire hospital, including the right to reject or remove patients, there being no presumption that unreasonable rules will be adopted or arbitrary authority exercised.

12. Hospitals 🔑2—City held authorized by charter amendment to contract for care of tuberculosis patients in neighboring county sanatorium.

A contract by the city and county of San Francisco, to advance money to a neighboring county for the construction of additional hospital units for the care and treatment of the city's tuberculosis patients, *held* within the power conferred on the city by the charter amendment adopted November 7, 1922, approved by the Legislature in January, 1923, and ratified by the board of supervisors, to provide by contract for the maintenance and care of tuberculosis patients in hospitals outside the city and county limits, and hence valid, whether or not the general powers of the city with reference to hospitals are alone sufficient to justify it.

13. Mandamus 🔑172—City and county auditor's inability to certify as to sufficiency of balance of appropriation to pay estimated expenses of executing contract not considered on application for writ to compel approval of money appropriated for expenses preceding execution.

On application for writ of mandate to compel the auditor of the city and county of San Francisco to audit and approve a demand for a sum set aside for the payment of architect's fees and other expenses incurred by a neighboring county in preparing plans and specifications for additional hospital units for the care of the city's tuberculosis patients, pursuant to the city's agreement to advance the total cost of construction, on approving the plans and specifications, and the construction contract, where no estimate had been made of the cost and the tentative agreement made provision for the contingency of the parties' being unable to agree on the amount, the auditor's objection that he would not be able to indorse on the contract his certification that there remained a balance of the appropriation or funds applicable to the contract sufficient to pay the estimated expenses of executing it, as required by City and County Charter, c. 1, art. 3, § 10, cannot be considered.

In Bank.

Application by the City and County of San Francisco and the County of Alameda for writ of mandate requiring Thomas F. Boyle, as Auditor of the City and County of San Francisco, to audit certain demands for expenses incurred under an agreement between such City and County and the County of Alameda. Writ granted.

George Lull, City Atty., of San Francisco, for city and county of San Francisco.

Ezra Decoto, of Oakland, for county of Alameda.

Edward F. Moran, of San Francisco, for Auditor Boyle.

SEAWELL, J. This is an application for a writ of mandate to compel Thomas F. Boyle, as auditor of the city and county of San Francisco, to audit and approve a demand allowed and approved by each board and officer of said city whose approval was necessary to its allowance, existing in favor of the county of Alameda in the sum of $5,000 on account of costs and expenses incurred by said county in the preparation of plans and specifications and for the payment of architect's fees incurred for designing and planning certain proposed units to be added to the tuberculosis hospital maintained by the county of Alameda and known as the Arroyo Sanatorium, situate near Livermore, for the use and benefit of the city and county of San Francisco in the care, maintenance, and treatment of its patients affected with tuberculosis, as provided by the terms of an agreement entered into March 8, 1922, between said city and county, a municipal corporation, operating under a freeholders' charter, party of the first part, and the county of Alameda, a political corporation, party of the second part. The auditor claims that said agreement is invalid, and therefore refuses to audit or approve said demand drawn in favor of Alameda county. This proceeding is designed to test the validity of the agreement.

By said agreement the city and county of San Francisco proposes to further obligate itself to make certain payments to the county of Alameda for annual deterioration of said units and to also compensate said county for the care, maintenance, and treatment of its said tubercular patients as will hereafter fully appear. The controversy, which is between the city and county of San Francisco and the county of Alameda joined on the one side, and Thomas F. Boyle, as auditor of said city and county of San Francisco, on the other, is submitted on an agreed statement of facts as provided by sections 1138–1140, Code of Civil Procedure.

In the agreement said city and county is designated "city" and said county of Alameda, "county." We adopt these designations, omitting quotation marks.

It is admitted that every preliminary proceeding required by law to be taken by said city and said county and by the officers of each or both, whether formal or jurisdictional in character, was accordingly taken, and said proceedings are regular and sufficient in every respect, and there was and is sufficient money in the general fund available to pay said demand. In brief, it is conceded that petitioners are entitled to have said writ issue against said auditor, provided said city and county are permitted by law to enter into such an agreement as is here attempted to be enforced.

In a statement of the substance of the agreement which follows, much of its phraseology will be preserved. It recites by way of preamble that the city maintains within its corporate limits a general hospital wherein its sick and disabled inmates are cared for, including a large number affected with tuberculosis. The surroundings within the zone in which said Arroyo Sanatorium is situated are admittedly more favorable to the recovery of persons so afflicted than is the climate of said city. It was therefore the judgment of the city that approximately 60 of its tubercular patients should be cared for in the sanatorium of said county. An agreement was accordingly entered into between said parties by the terms of which said county agrees to construct additional units to its sanatorium for the care of said patients. The city agrees to advance said county a sum of money equal to the total costs of constructing said additional units of sufficient size and capacity to properly care for 60 patients, including fees of architect, superintendence, and construction. The sum so advanced is to be held in a special fund from which said county may deduct each year during the life of the agreement an annual allowance for depreciation and obsolescence of 4 per cent., computed on the total cost of the construction of said units, including the cost of superintendence, inspection, and architect's fees. Immediately upon the execution of the contract, the city shall advance to the county the sum of $5,000, to be held by said county as a fund to cover the costs of the architect's fees for preparing plans and specifications for said additional hospital units, and the county on its part agrees upon payment thereof to immediately cause to be prepared plans and specifications for the construction of said units for the accommodation of approximately 60 patients, and it is to submit said plans and specifications with an estimate of the cost of constructing said units to said city for its approval. Upon approval of said plans and specifications by said city, the county agrees to enter into a contract for the construction of said units in accordance with said plans and specifications, which contract shall also be submitted to said city for its approval. Upon the letting of the contract after approval by said city, the latter is to advance and to pay to the county the amount of money necessary to completely construct said units in accordance with the plans and specifications, including the total amount of architect's fees and costs of superintendence and inspection. No changes or alterations are to be made in the plans and specifications after contract let except with the mutual consent of both parties. If changes be agreed which increase the contract price, said increase is to be borne by the city and paid for upon completion of the contract. If said changes decrease the contract price, the amount of decrease shall be returned by the county to the city upon completion of said contract. Thereupon an adjustment shall be made of the estimated fees paid to the architect and of the moneys paid for superintendence and inspection by the city. Should the estimated amount paid by the city exceed the cost of such services the excess shall be repaid by the county to the city. Should the said estimated amount be less, the city shall pay the difference to the county. It is further agreed that if the parties should be unable to agree on the plans or specifications or the contract, the county shall in no event be required to return to the city any part of said sum of $5,000 paid to it to be applied on account of the architect's fees, to the extent that it has actually incurred a liability for such purposes. The county agrees that it will wholly equip said units at its own cost and expense, and board, maintain, and care for such tubercular patients as the city may send to said sanatorium, not exceeding 50 in number at any one time; the city on its part agrees to pay for the board, maintenance, and medical care of said patients at the rate of $2.87 per day per patient, subject to such modification at the end of each fiscal year as the parties may agree to make and upon failure to agree said rate of $2.87 per patient per day shall remain in full force and effect during the life of the agreement or until otherwise changed by mutual agreement. All payments for maintenance and care of such patients are to be made monthly during the life of the agreement.

The contract is to continue in force and effect for a period of 25 years, unless sooner terminated by mutual consent or by the act of either party thereto by giving one year's notice to the other of its intention to terminate it. The right of either party to terminate is expressly reserved. Upon the termination of said contract by either party prior to the expiration of its full term, the county will return to the city the full amount of money advanced to it to cover the architect's, superintendence, and inspection fees, and the total costs of construction of said units less the annual deduction of 4 per cent. to cover depreciation and obsolescence on the entire cost, including architect's fees, etc.

The administration and control of said sanatorium is to remain exclusively with the county of Alameda, and the city agrees to comply in every way with the rules and regulations of said sanatorium and to conform to the standard of admission adopted by the governing body of said sanatorium. The city agrees to remove any patients whose removal may be requested by the superintendent of said institution, and the patients shall be amenable at all times to the rules and regulations prescribed by the superintendent or governing body thereof. Said rules shall have a uniform application to patients of both parties to the contract. It is also a part of the contract that any sums of money received from the state of California for the care of such tubercular patients as the city may send to said sanatorium may be retained by the city, and if such moneys should be paid by the state to the county the amounts so received shall be credited as payments made from said city for the care of such patients. This concludes a statement of the substance of said contract.

[1-4] The object to be attained is, of course, the principal factor for consideration in the construction of contracts. To make provision for the care of indigent sick and dependent poor is a duty of state and society, so well understood and thoroughly recognized that time devoted to a discussion of the subject would be but little better than wasted. A duty equally as great rests upon the state to protect and guard the health of the public from infectious or other communicable forms of diseases, one of the most widely prevalent of which is tuberculosis. Article 4, § 22, of our state Constitution, and various statutes, make special reference to and provisions for the care and treatment of persons suffering from this dreaded disease. The board of supervisors of the city and county of San Francisco in dealing with the question found as a fact that the zone in which it proposes to maintain and care for its patients affected with tuberculosis possesses a more favorable climatic condition and superior surroundings for the successful treatment of the disease than is possessed by said city and county. Without such a finding of fact, which is conclusive on us, we would be permitted to take judicial notice of the geographical position of the two localities with reference to proximity to the sea and the influence of ocean winds on the climate of each and also the density of the population of each considered relatively in respect to areas. In the treatment of pulmonary forms of tuberculosis the main reliance for improvement or cure rests largely upon the accessibility of the patient to pure, fresh air such as altitude and open areas afford. Rest and quiet are other essentials. From recitals found in the agreement the board of supervisors was unquestionably induced or influenced to enter into said contract by a proper consideration for the comfort and welfare of the affected patients, as well as the discharge of a duty which is cast upon it to protect the health of the public.

We shall not discuss the objections made by petitioner in seriatim order inasmuch as many of them are included within or are incidental to the major questions of law which must control the decision.

[5] The authority under which the city justifies its right to make the contract is statutory and became effective July 29, 1921. Stats. 1921, p. 542. The act is brief and is here set out in full, including its title:

> "An act providing for the joint exercise of powers by counties, by municipalities or by municipalities and counties. * * *
>
> "Section 1. Two or more counties, two or more municipalities or one or more municipalities and one or more counties, by agreement entered into respectively by them and authorized by their legislative bodies, may jointly exercise any power or powers common to the several contracting parties.
>
> "Sec. 2. Such agreements shall state the purpose of the agreement or the power to be exercised and provide for the method by which the purpose sought shall be accomplished or the manner in which the power shall be exercised.
>
> "Sec. 3. The parties to such agreement may provide that contributions from the treasuries may be made for the purpose for which the agreement was entered into or payments of public funds shall be made to defray the cost thereof which funds may be made to and disbursed by such agency as may be agreed upon; provided, however, that the method of disbursement shall agree as far as the same is practicable with the method provided by law for the disbursement by the parties to such agreement. Strict accountability of all funds and report of all receipts and disbursements shall be provided for.
>
> "Sec. 4. Such agreements may be continued for a definite term or until rescinded or terminated and may provide for the method by which the same may be rescinded or terminated by any of the parties thereto.
>
> "Sec. 5. Such agreement shall provide for the disposition, division or distribution of any property acquired as the result of such joint exercise of powers, and the return of any surplus moneys on hand after the purpose thereof shall be completed in proportion to the contributions made."

It is also a claim of the auditor that the act above set out was superseded by a more elaborate and comprehensive act passed at the same session of the Legislature but at a later date, which act provides for the construction of hospital buildings by groups or cities, counties, or cities and counties, and for the management, maintenance, support, and care of persons affected with tuberculosis. Its title in full is as follows:

> "An act to amend sections two and three of an act entitled 'An act to provide for the establishment and maintenance of a bureau of tuberculosis under the direction of the state board of health; defining its powers and duties; providing for the granting of state aid to cities, counties, cities and counties and groups of counties for the support and care of persons affected with tuberculosis; making an appropriation therefor, and repealing certain acts of the Legislature of the state of California,' approved June 12, 1915, as amended." In effect August 2, 1921. Stats. 1921, p. 1641.

Under the plan outlined by this act the board of supervisors representing each respective county forming said group is empowered to appoint one of its said members as a delegate to represent it. The delegates from the several counties shall constitute a central committee which is given certain powers, acting with other committees of its creation, to superintend the construction of the building, approve the bills, and do the usual things required of a building committee. The central committee constitutes the governing body of the hospital and may make appropriate rules for its government and management. By conforming with the provisions of the statute providing for organization and management every city, county, city and county, or group of counties, which is a member thereof, is entitled to receive from the state the sum of $3 a week for each person suffering from tuberculosis cared for therein at public expense who is unable to pay for his support and has no relative legally liable and financially able to pay for his support and who has been a bona fide resident of the state for one year; provided, that no city, county, city and county, or group of counties shall be entitled to receive state aid unless a tuberculosis ward or hospital conforms to the regulations of and is approved by the state bureau of tuberculosis.

In short, it is the claim of the auditor that cities, counties, cities and counties, desiring to join in a group as provided by said act must conform to the provisions thereof and that such provisions furnish exclusive and, in fact, the only source of authority for legal existence. With this contention we are unable to agree. The acts before us are separate and distinct and provide different methods for the accomplishment of some of the objects common to both. The subjects treated therein are not wholly identical and the more elaborate machinery provided for the operation of one plan or scheme is not appropriate or necessary for the operation of the other. Neither are the acts coextensive in scope. We think, therefore, that each authorizes the adoption of a plan and procedure independent of the other, and that neither one was intended to be exclusive in its operation. By conforming with the regulations approved by the state bureau of tuberculosis as provided by the more recent act, any group of counties organized thereunder is entitled to receive state aid. The evident purpose of said act is not alone to provide for the joint ownership of buildings and real property and the joint management of hospitals by the members of the group who have contributed money to that end but also to place said institution in a limited sense under the supervision of the state board of health. Such a plan of ownership and management does not suit the purposes of the parties to the contract before us. The city, for reasons sufficient to itself, does not purpose or desire to construct buildings or purchase real estate, jointly or at all. Perhaps neither party desires to be placed under state supervision. The city finds that it will be to the advantage of its patients affected with tuberculosis and also to itself to place said patients for care and treatment in a neighboring county. The statute under which the city assumes to act was undoubtedly designed to meet the exigencies of the situation found to exist by the legislative body of said city. We have not been pointed to any authority which inhibits the city from bringing itself within the provisions of the statute under which it desires to operate, and we know of no reason why it should be prevented from doing so.

[6] By the admission of the auditor that the sum of $5,000 is available for and has been set aside for the payment of the architect's fees incurred for the preparation of plans and specifications, the question as to the ability of the city to meet any future liability or indebtedness growing out of said contract in excess of the revenue provided for the year in which said liability accrues as provided in article 11, § 18, State Constitution, and article 3, c. 3, § 13, Charter of the City and County of San Francisco is removed from the case. Whether the city will be able to meet the payment of an undetermined sum equal to the total cost of the construction of the hospital units to fall due on a day in futuro is a question prematurely presented and cannot be decided in this controversy. It has not been made to appear that a contract of any kind has yet been entered into between said city and county for the construction of said units at an agreed price or at all. The contract before us provides for the adjustment of the rights of the parties in case of failure of the parties to agree on plans and specifications and on other essential matters which are to be the subjects of a future contract, but in no event would we be justified in presuming, in the absence of a showing to the contrary, that the city would not be amply prepared to meet its future obligations or that it will not keep within the law in respect to charter and constitutional restrictions. We are not at liberty to condemn in advance of its preparation and execution the contract to accomplish the general purposes outlined by the agreed statement of facts on suspicion that the city, in carrying it to completion, may incur an indebtedness or liability in any one of the years through which it may extend in excess of the revenue provided for such year without the assent of two-thirds of the qualified voters thereof voting at an election to be held for that purpose, etc., as inhibited by article 11, § 18, State Constitution, and by similar provision of the city charter. The objection urged by the auditor against municipalities engaging in contracts providing for installment payments extending through a series of years and the general constitutional question here raised is elaborately discussed in McBean v. City of Fresno, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191. The city of Fresno entered into a contract with McBean by which he agreed to care for and dispose of the sewage of the city for a period of five

years for the sum of $4,900 per annum, payable quarterly. The contract was complied with for a period of three years but before its completion the city refused to further perform. In construing the city's charter provisions and the constitutional inhibition, this court said:

> "In the case of contracts extending over a period longer than one year, it may be readily seen that the municipality is abundantly protected, and that it is the contractor therewith who subjects himself to peril and risk of loss. If there are not revenues for any given year sufficient and available for the payment of his claims for that year, those claims become waste paper, and are not carried over as a charge against the income and revenue of a succeeding year. * * * When it is come to consider the contractual relations between the city and appellant, it is at once seen that the city cannot be liable in any one year for more than four thousand nine hundred dollars, an amount far within the revenue derived from the sewer fund; and, further, that it cannot become liable for this amount at all until faithful service rendered by the contractor each year. If the city in any one year should fail to collect into its sewer fund moneys sufficient to pay the just claims of the contractor, then, as above said, it would be the contractor's loss, the city would be chargeable with no financial responsibility therefor, and the result at the most, so far as it was concerned, would be a failure upon the part of its officers to observe good faith in their dealings. * * * We base our views upon the conviction that, at the time of entering into the contract, no debt or liability is created for the aggregate amount of the installments to be paid under the contract, but that the sole debt or liability created is that which arises from year to year in separate amounts as the work is performed."

The court adopts the language of Chief Justice Field in State v. McCauley, 15 Cal. 429, where the question is elaborately argued and fully considered. Article 8 of the Constitution, as it then stood, inhibited the Legislature from creating any debts or liabilities in any manner which would exceed the sum of $300,000 except under certain specified contingencies within which the contract there considered could not be brought. The state made a contract for the care of its prison, for convict labor, etc., for the period of 25 years, agreeing to pay therefore the sum of $10,000 per month. Chief Justice Field, delivering the opinion of the court, said:

> "The unconstitutionality of the act is asserted on two grounds: (1) That it appropriated the sum of six hundred thousand dollars, and thus created a debt or liability against the people of the state exceeding the limit prescribed by the eighth article of the Constitution. * * * The contract provides for the payment of $10,000 a month, and the act appropriates this sum per month. The appropriations are to take effect, and the services are to be rendered, in future. Until the services are rendered there can be no debt on the part of the state. The lessee could not have claimed, at any time after the making of the contract, the aggregate of all the monthly installments, because the state never owed him that amount. The state only became indebted as the services were each month performed. * * * The eighth article was intended to prevent the state from running into debt, and to keep her expenditures, except in certain cases, within her revenues. These revenues may be appropriated in anticipation of their receipt as effectually as when actually in the treasury. The appropriation of the moneys when received meets the services as they are rendered, thus discharging the liabilities as they arise, or rather anticipating and preventing their existence. The appropriation accompanying the services operates, in fact, in the nature of a cash payment."

Continuing, the court said:

> "This interpretation, after further consideration and argument, was reaffirmed in McCauley v. Brooks, 16 Cal. 1, and again in Koppikus v. State Capitol Com'rs, 16 Cal. 248. In People v. Arguello, 37 Cal. 524, it is said: 'A sum payable upon a contingency is not a debt, or does not become a debt until the contingency has happened.'"

See, also, Coulter Dry Goods Co. v. Wentworth, 171 Cal. 509, 153 Pac. 939; Doland v. Clark, 143 Cal. 181, 76 Pac. 958; Fresno etc. Co. v. McKenzie, 135 Cal. 497, 67 Pac. 900; Higgins v. San Diego, 131 Cal. 298, 63 Pac. 470; Higgins v. San Diego Water Co., 118 Cal. 524, 45 Pac. 824, 50 Pac. 670; San Francisco Gas Co. v. Brickwedel, 62 Cal. 642.

[7] The objection that the contract permits of the loaning of the credit of the city in violation of article 4, § 31, of the Constitution, is not supported by the facts of this case. There is no loan of either money or credit, or the pledging of the credit, or the making of any gift within the inhibition of said section. The setting aside, of a fund by the city equal to the building cost of a hospital for the city's use and benefit in its construction, and the annual allowances for deterioration is but conforming to the usual course of business in estimating allowances for inevitable loss occasioned by usage and the elements. Included in the allowance for obsolescence was considered, no doubt, the right of enjoyment of the occupancy of said hospital by the city's patients. It may be said with equal force as it was said in Veterans' Welfare Board v. Jordan, etc. (Cal. Sup.) 208 Pac. 284, 22 A. L. R. 1515, that as no debt whatever is created there can be no loan of credit. The city proposes merely to establish a fund from which certain, definitely-stated sums are to be disbursed for a purpose provided by law.

[8] The argument that the agreement is an improvident and unwise one for the city to make is one often heard in opposition to municipal contracts. It is effectually answered by a restatement of the rule that—

> "When the Legislature has committed to a municipal body the power to legislate on given subjects or has committed to it judgment

or discretion as to matters upon which it is authorized to act, courts of equity have no power to interfere with such a body in the exercise of its legislative or discretionary functions. That the power conferred on the board of supervisors by law relative to the purchase of land for a hospital site, the erection of hospital buildings and their equipment, is both legislative and discretionary in character is not open to dispute. The law cast upon the board the duty of determining whether in its judgment the public necessity required that the county should acquire a new county hospital and conferred upon it the power necessary to accomplish this if it should so determine. * * * Whether, in the exercise of legislative powers a board acts wisely or unwisely is no concern of the courts." Nickerson v. San Bernardino, 179 Cal. 522, 177 Pac. 467.

See, also, 7 Cal. Jur. § 42, pp. 450, 451; Stockton Railroad Co. v. City of Stockton, 41 Cal. 147, 168; Los Angeles County v. Dodge, 51 Cal. App. 492, 197 Pac. 403.

[9] The fact that any gross sum which the city may set aside for said uses may be wholly consumed upon the expiration of the full term of said contract was no doubt fully considered and weighed by both parties, together with all matters pertinent to their engagements. Such a result would not of itself be conclusive proof of a bad bargain on the part of the city. The fund may become depleted at the expiration of the contract term and still substantial benefit may have accrued to both parties thereto. In forming its judgment it must be presumed that the city considered the wisdom and policy of the whole plan in the light of the objects to be attained. The answer to adverse criticism is that the judgment of the city is conclusive, in the absence of a showing of want of jurisdiction on the part of the city or a showing of bad faith on the part of its officers or gross extravagance or the existence of some fact sufficient to vitiate the contract.

[10, 11] We find nothing in the organic or statutory law of this state forbidding the use of public buildings belonging to one county by another for administrative purposes. Direct authority can be found permitting it in cases of emergency or necessity. The board of supervisors of the city and county of San Francisco determined it to be necessary in the interest of public health that a limited number of its patients, affected with tuberculosis, should be transferred to a hospital or sanatorium of a neighboring county. Whether the plan adopted could be improved upon is not a question for our determination. Any method or system devised would be subject to criticism. However, this may be, we are unable to see any legal objection to the plan proposed. Neither has it been made clear that the proposed plan should be declared invalid for the reason that the county retains supervisory control of the hospital. Any institution designed for treatment of persons affected with tuberculosis must from necessity be under the direction and management of skilled, efficient persons. There doubtless exist good reasons for protecting persons who are suffering in the incipient stage from those who are suffering in the more advanced stages, thus requiring rules of classification according to the stages of the disease. There may also be good reasons for the rejection or removal of patients whose reception or retention would endanger the welfare of others. Reasonable rules and regulations are highly essential to the successful management of a sanatorium. It cannot be presumed that unreasonable rules will be adopted or that arbitrary authority will be exercised in any respect. The agreement expressly provides that all rules to govern the institution shall operate uniformly upon the patients of both parties to the contract. It is to be expected that a sanatorium or hospital maintained for the care and treatment of persons affected with tuberculosis would require a different kind of skill in administering treatment, in superintendence and management than would be required by a county institution for the care of persons suffering from ordinary ailments.

[12] Since the execution of the agreement before us a charter amendment was adopted by the voters of the city and county of San Francisco, authorizing the city to—

> "provide by contract for the maintenance and care of such tubercular patients in hospitals outside the limits of the city and county owned, operated or maintained by other cities, counties or cities and counties, or may by contract with other cities, counties or cities and counties provide for the joint ownership, operation, maintenance and control of a hospital or hospitals for the treatment of persons suffering from tuberculosis."

The amendment above referred to was adopted by the voters of said city and county November 7, 1922, and approved by the Legislature in January, 1923. The board of supervisors of the city have since ratified the contract, and thus have exercised the power conferred upon the city by the charter. The contract is thus clearly within the power thus conferred, and we need look no further, although it is contended that the general powers of the city with reference to hospitals was sufficient authority to justify the contract without the amendment to the charter.

[13] The objection made by the auditor that he will not be able to indorse upon said contract his certification that there remains unexpended and unapplied a balance of the appropriation or funds applicable to said contract sufficient to pay the estimated expenses of executing the same, as required by section 10, art. 3, c. 1, of the City's Charter, is not a question now before us for decision. No estimate has yet been made of

the cost of the construction of said, units, inasmuch as the contemplated project has not progressed to that stage. The plans and specifications, when prepared, will furnish the city with the necessary information, to wit, the amount necessary to be set aside for the construction of said units. It may be great or small. Possibly the parties will be unable to agree upon the amount and such a contingency as this is provided for by the tentative agreement.

Upon a full consideration of the questions presented we are of the opinion that the writ of mandate should issue commanding said auditor to approve and allow said demand for the sum of $5,000, to be used for the purpose described in the petition.

The writ will accordingly issue.

We concur: WILBUR, C. J.; MYERS, J.; LAWLOR, J.; LENNON, J.; KERRIGAN, J.; WASTE, J.

---

61 Cal. App. 645

RODRIGUEZ v. SEVERINI. (Civ. 2603.)

(District Court of Appeal, Third District, California. April 11, 1923.)

1. Assault and battery 🔑40—Damages for personal injuries held inadequate.

Where plaintiff, a man of 80 years, by reason of assault and battery by defendant, had incurred hospital expense in the sum of $115, doctor's bill in the sum of $128, and drug bills in the sum of $22.40, a verdict awarding him $128 for physician's service and $9.25 for drugs was clearly inadequate; the evidence showing that as a result of his injuries plaintiff, who had been receiving $75 a month as janitor, had become partially paralyzed, and permanently incapacitated from work.

2. Appeal and error 🔑979(5)—Granting of new trial on conflicting evidence not disturbed unless clearly wrong.

An order granting a new trial for inadequacy of verdict for damages will not be disturbed where the evidence was conflicting on material issues, unless the court can clearly find that a verdict favorable to the moving party would not have found sufficient legal support in the evidence adduced.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Joe Rodriguez against Simone Severini. Verdict was rendered for plaintiff in an insufficient amount, and from an order granting to plaintiff a new trial, defendant appeals. Affirmed.

W. H. Carlin and W. P. Rich, both of Marysville, for appellant.

Crofton & Wetmore, of Marysville, for respondent.

FINCH, P. J. This is an appeal by defendant from an order granting plaintiff's motion for a new trial. The complaint alleges that the defendant "wrongfully, unlawfully, maliciously, and violently assaulted plaintiff, and struck him in the face, and knocked him down upon said sidewalk, severely and permanently injuring said plaintiff"; that by reason thereof the plaintiff incurred hospital expenses in the sum of $115, doctor's bills in the sum of $128, and drug bills in the sum of $22.40 and was otherwise damaged in the sum of $10,000. The jury returned a verdict in favor of plaintiff for "$128 special damages for physician's services," and "$9.25 special damages for drugs."

[1] At the time the injury was inflicted the plaintiff was 80 years of age and the defendant was "an able-bodied, vigorous man in middle age." While in conversation with a third man on the street, the defendant accidentally stepped on plaintiff's foot, whereupon the latter remonstrated, and, in an altercation which followed, the blow was struck of which complaint is made. Defendant's blow caused the plaintiff to fall to the sidewalk, his face striking the pavement. Either from the blow or the fall the plaintiff was rendered unconscious. The attending physician testified that plaintiff was partially paralyzed as a result of the injury, and that his injuries are permanent. He was receiving $75 a month as janitor of a bank, and the physician testified that, in his opinion, plaintiff would never be able to work again. It is apparent that, if plaintiff was entitled to recover, the damages awarded are inadequate.

The defendant testified that when the blow was struck the plaintiff was endeavoring to strike him, and that he struck the plaintiff to prevent the latter from striking defendant, and that he did not strike plaintiff with his closed fist. He and another witness illustrated the manner in which the blow was struck, but the character of the illustration does not appear in the record. The plaintiff's condition at the trial was such that he could not give an intelligible account of the encounter.

From the testimony of other witnesses it appears that, when the plaintiff fell to the sidewalk, the defendant walked rapidly away; that he made some resistance when arrested shortly thereafter by an officer, so that the latter found it necessary to strike defendant on the head with a billy; that he admitted to the officer that he struck plaintiff, and when the officer asked why he did so the defendant replied, "It is none of your damned business," and that, on being taken before the police court, the defendant entered a plea of guilty to a charge of battery upon plaintiff.

[2] The evidence was such as to warrant a verdict for either party.

"We may not disturb such an order where there was a conflict of evidence upon material issues unless we may say that a verdict in favor of the moving party would not have found sufficient legal support in the evidence adduced at the trial." Empire Investment Co. v. Mort, 169 Cal. 732, 736, 147 Pac. 960, 962.

The order is affirmed.

We concur: BURNETT, J.; PLUMMER, Judge pro tem.

54 Cal. App. 730

PICKWICK STAGES, NORTHERN DIVISION, v. BOARD OF TRUSTEES OF CITY OF EL PASO DE ROBLES et al. (Civ. 3611.)

(District Court of Appeal, Second District, Division 1, California. Oct. 29, 1921.)

1. Damages ⚿87(2)—Party whose judgment for actual damages is reversed cannot recover exemplary damages.

Under Civ. Code, § 3294, allowing exemplary damages only in addition to actual damages, a defendant, whose judgment for compensatory damages on cross-complaint was reversed, could not recover exemplary damages, there being no existing judgment for actual damages.

2. Damages ⚿87(1)—Whether exemplary damages should be awarded is within discretion of jury or court.

Under Civ. Code, § 3294, as to exemplary damages, it is the exclusive province of the jury, or court sitting as a jury, to say whether or not punitive damages should be awarded, even on the clearest and most conclusive proof of oppression, fraud, or malice, or where the existence of such facts are found by the jury or court itself.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by Pickwick Stages, Northern Division, a corporation, against the Board of Trustees of the City of El Paso De Robles, San Luis Obispo county, Cal., and others. From a judgment in an insufficient amount for defendant J. E. Price on his cross-complaint, he appeals. Affirmed.

S. V. Wright, of San Luis Obispo, and Alex. Webster, of Paso Robles, for appellant.

Fogel & Beman, of Los Angeles, for respondent.

SHAW, J. Upon a cross-complaint filed by defendant Price in the above-entitled action, he, in default of an answer filed by plaintiff, had judgment for compensatory damages in the sum of $3,500. The court made an omnibus finding that "each and every allegation, part, and paragraph of defendant's cross-complaint is true in every particular." In paragraph 12 of the cross-complaint it was alleged:

"That the further sum of $5,000 is a reasonable sum to be allowed to this cross-plaintiff herein as exemplary damages herein, by way of example and as a punishment for the oppression, fraud, and malice practiced, shown, and inflicted by cross-defendant upon and toward cross-plaintiff, and hereinbefore particularly set forth and described."

[1] The contention of appellant is that, inasmuch as the court found that $5,000 was a reasonable sum to be allowed to cross-complainant as exemplary damages, he was therefore entitled, upon such finding, to a judgment for said sum, instead of which the court, in rendering judgment against plaintiff and for cross-complainant, restricted the same to the actual damages sustained from the conduct and acts, of plaintiff of which he complained. The statute (section 3294, Civil Code) provides that, *in addition to actual damages*, a plaintiff, for the breach of an obligation not arising from contract, and where the defendant has been guilty of oppression, fraud, or malice, may recover exemplary damages by way of punishment of a defendant. Concededly there could be no recovery of exemplary damages in the absence of a showing that actual damages had been suffered. While cross-complainant Price, as stated, had judgment for $3,500 compensatory damages, such judgment was, on an appeal therefrom by plaintiff, reversed by this court in an opinion filed on the 28th day of October, 1921. By reason of such reversal it follows there is no judgment for actual damages, in *addition* to which appellant could be entitled to punitive damages.

[2] We may further suggest that, conceding facts to have been established under which there might have been a judgment for punitive damages, nevertheless cross-complainant was not entitled thereto as a matter of right. Even upon the clearest and most conclusive proof of oppression, fraud, or malice practiced by plaintiff, or where the existence of such facts are found by a jury, or a court trying the facts, it is still the exclusive province of the jury or the court sitting as a jury to say whether or not punitive damages shall be awarded. Lewis v. Hayes, 165 Cal. 527, 132 Pac. 1022, Ann. Cas. 1914B, 148; Davis v. Hearst, 160 Cal. 143, 116 Pac. 530. So, conceding the finding to be one of fact (as to which, however, we entertain grave doubt), and establishing the existence of fraud, malice, and oppression practiced by plaintiff in the breach of an obligation not arising upon contract, nevertheless, since such damages are not a matter of right, the court was fully warranted as a conclusion of law in withholding an award thereof.

Upon the record presented, the judgment, in so far as it fails to award punitive damages to cross-complainant Price, is affirmed.

We concur: CONREY, P. J.; JAMES, J.

61 Cal. App. 803

HILDEBRAND et al. v. MARTIN et al. (Civ. 4063.)

(District Court of Appeal, First District, Division 2, California. April 10, 1923.)

Appeal and error 🔑1195(4)—Judgment restraining sale under alias execution reversed as in conflict with Supreme Court's decision directing sale under original execution.

Where the Supreme Court, in a case involving the same parties, subject-matter, and legal situation, directed the trial court to order a sale of the property involved under execution, a judgment restraining a sale under an alias execution, which the Supreme Court expressly decided should not have issued, will be reversed, though apparently of no effect as against appellants, who are at liberty to proceed under the original execution.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Suit by Ernest H. Hildebrand and another against George J. Martin and others. Judgment for plaintiffs, and defendants appeal. Reversed.

John H. Crabbe, of San Francisco, for appellants.

Stoney, Rouleau, Stoney & Palmer and Paul A. McCarthy, all of San Francisco, for respondents.

LANGDON, P. J. This appeal is from a judgment on the pleadings, which judgment perpetually enjoined the defendants George J. Martin and Thomas F. Finn, as sheriff of the city and county of San Francisco, from selling, under an execution previously issued, certain real property located in the city and county of San Francisco and described in the complaint herein.

The facts appearing from the pleadings are the identical facts considered by our Supreme Court in the recent case of Martin v. Hildebrand (S. F. No. 9802), decided January 31, 1923, and reported in 212 Pac. 618. The conclusions reached in said case conclusively dispose of the appeal in the instant case. It was decided in the said case of Martin v. Hildebrand, supra, which involved the same parties, the same subject-matter, and the same legal situation, that an order directing a sale of the said property under execution should have been made by the trial court, and said court was directed to make such order. The present judgment granting a perpetual injunction against the defendants from proceeding with such sale is therefore erroneous.

The oral argument made by respondents upon the hearing of this case in this court, to the effect that the decision of the Supreme Court in the case of Martin v. Hildebrand, supra, is inapplicable here because the sale herein restrained is a sale under the alias execution issued in January, 1921, and not a sale under the original execution issued in September, 1920, is without merit. This is because the decision in Martin v. Hildebrand, supra, expressly decides that the alias execution was not issued upon the motion of the present appellants, and should not have issued, and that the appellants herein are entitled to proceed under the original execution levied in September, 1920, before the transfer of the property by the judgment debtors. As the judgment in the present case merely restrains a sale by the sheriff under the alias execution issued in January, 1922, and the order issuing said alias execution made by the trial court has been reversed by our Supreme Court, it would appear that the judgment in the instant case, restraining a sale thereunder could be of no force and effect as against the appellants herein, and that they are at liberty to proceed under the original execution issued in September in accordance with the decision in Martin v. Hildebrand, supra. However, to avoid all confusion, and keep the record clear, it is perhaps advisable that the judgment herein be reversed in accordance with the principles enunciated in Martin v. Hildebrand, supra. It is so ordered.

We concur: NOURSE, J.; STURTEVANT, J.

---

61 Cal. App. 577

SHANK v. BLACKBURN et al. (Civ. 4118.)

(District Court of Appeal, Second District, Division 2, California. April 6, 1923.)

1. Appeal and error 🔑356 — Appeal taken after expiration of period allowed must be dismissed.

An appeal taken more than 2 years after expiration of the 60 days allowed by the Code must be dismissed.

2. Appeal and error 🔑14(2)—No appeal from "amended judgment," in words of original judgment as amended and affirmed on appeal.

No appeal lies from an "amended judgment," which is the same as the court's original judgment as amended and affirmed by the District Court of Appeal.

3. Appeal and error 🔑801(4)—Record examined, on motion to dismiss appeal, where mere inspection shows no relief can be given appellant.

While the appellate court will not ordinarily entertain a motion to dismiss an appeal, if it involves examination of the record in advance of the hearing on the merits, it will make such examination, to save unnecessary delay and expense to litigants, where a mere inspection of the record shows that no relief can be given appellants.

4. Appeal and error 🔑14(2)—Parties not appealing in time cannot appeal from "amended judgment," which is merely original judgment, as modified and affirmed on appeal.

Where the appellate court, instead of directing the lower court to enter an amended judgment, makes its own judgment and thus ends the litigation, parties not appealing from the original judgment within the time allowed cannot appeal from an "amended judgment," which is merely the original judgment, as modified and affirmed on appeal.

5. Appeal and error 🔑356—Where appeal is not taken in time, appellate court cannot reverse, even if record fails to show that lower court acquired jurisdiction of appellants.

Where an appeal is not taken in time to confer jurisdiction on the appellate court, it cannot reverse the judgment, even if the record fails to show that the lower court acquired jurisdiction of appellants' persons.

6. Appeal and error 🔑662(2)—Judgment reciting appearance of attorneys for defendants shows jurisdiction of all defendants, notwithstanding failure to serve some with summons and absence of answer or demurrer.

A judgment reciting that certain named attorneys appeared for "the defendants" showed that the court acquired jurisdiction of the persons of all the defendants, notwithstanding failure to serve two of them with summons and absence from the record of any answer or demurrer by them.

Appeals from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by William Shank against P. C. Blackburn and others. Judgment for plaintiff amended and affirmed on appeal (53 Cal. App. 620, 200 Pac. 762) in which defendants O. V. Blackburn and another did not join, and they appeal from both the original and amended judgment. Appeals dismissed.

Turner & Grainger, of Los Angeles, for appellants.

Frank C. Hill and George S. Hupp, both of Los Angeles, for respondent.

FINLAYSON, P. J. This is a motion to dismiss the appeals of the defendants O. V. Blackburn and Fredericka Blackburn, who have appealed from the original judgment, entered May 10, 1920, and likewise from what purports to be an amended judgment, entered August 24, 1922. Their appeals were taken September 15, 1922.

The action is one of claim and delivery in which several persons besides O. V. Blackburn and Fredericka Blackburn were made parties defendant. On May 10, 1920, a judgment was entered against all of the defendants; the lower court adjudging that the plaintiff "recover of the defendants and each of them" the possession of the personal property sought to be replevied, and in case a delivery cannot be had that he "recover of said defendants and each of them" the sum of $1,499, the value of the property. The defendants P. C. Blackburn, Howard A. Kline (sued as John Doe), and Bertha E. Kline (sued as Jane Doe) took an appeal from that judgment within 60 days from its entry. Neither of the two defendants whose appeals respondent is now moving to dismiss joined in that appeal. The appeal so taken by P. C. Blackburn and the Klines was heard by Division 1 of the District Court of Appeal for this district, and was determined by that court on July 21, 1921; its judgment being as follows:

> "The judgment [of the superior court] is hereby modified as of the date of entry thereof by striking out the words 'fourteen hundred ninety-nine ($1,499.00) dollars,' and substituting therefor the words 'twelve hundred fifty and 57/100ths dollars ($1,250.57).' As thus amended, the judgment is affirmed." 53 Cal. App. 620, 200 Pac. 762.

On August 24, 1922, there was entered in the judgment book kept by the clerk of the superior court a document, signed by one of the judges of that court, which purports to be an amended judgment. The preamble to this second judgment by the superior court recites the judgment of the District Court of Appeal. Then follows what purports to be the amended judgment, which, word for word, is the same as the superior court's original judgment as the same had previously been amended and affirmed by the District Court of Appeal.

[1] The motion to dismiss the appeals must be granted. The appeal from the original judgment was not taken by these appellants until long after the time provided by law. It was taken more than 2 years after the expiration of the 60 days allowed by the Code for an appeal from a judgment.

[2] No appeal lies from what purports to be the amended judgment of the superior court, entered August 24, 1922. As we have pointed out, these appellants did not join in the appeal from the original judgment, which was taken by their codefendants on September 27, 1920. When the original judgment of the superior court was modified by the District Court of Appeal, and affirmed, as modified, the litigation was over, and the case was ended. Heinlen v. Beans, 73 Cal. 240, 14 Pac. 855.

[3, 4] The rule that this court will not ordinarily entertain a motion to dismiss which involves an examination of the record in advance of the hearing on the merits is but a rule of convenience, to expedite the dispatch of business; and where a mere inspection of the record discloses that no relief can be given to the appellant, this court, to save unnecessary delay and expense to litigants, will not hesitate to make the necessary examination. Hibernia Sav. & L. Soc. v.

Doran, 161 Cal. 118, 118 Pac. 526. A mere cursory inspection of the record before us suffices to show that the so-called amended judgment which the superior court undertook to enter on August 24, 1922, is precisely the same as that which had been made by the District Court of Appeal, when that court modified the original judgment, and affirmed it as modified. The time for appeal from the original judgment having expired, and the judgment of the District Court of Appeal having ended the litigation, the right to appeal could not be revived by the simple expedient of entering what purports to be an amended judgment, but which is nothing other than the original judgment, as previously modified and affirmed on appeal. See Heinlen v. Beans, supra.

Appellants have cited us to authorities in which the appellate court, instead of modifying the judgment, and affirming it, as modified, sent the case back, with directions to the lower court to make and enter a new or amended judgment in accordance with the directions. An appeal may be taken from such new or amended judgment for the reason that there may be a question whether it was made by the lower court as directed. But here the lower court was not directed to enter a new or amended judgment. The appellate court, instead of giving directions to the lower court to enter an amended judgment, made its own judgment, and thus ended the litigation.

[5] The record before us, consisting of the judgment roll only, fails to show either the issuance or the service of summons. It also fails to show that any answer or demurrer was filed by either of these appellants. Indeed, respondent has stipulated that, as a matter of fact, no summons ever was served upon either appellant. Wherefore it is claimed that the judgment appears, on the face of the roll, to be void as to these appellants for want of jurisdiction of their persons. It further is argued that, where the judgment is void on the face of the roll, it may be reversed on appeal at any time. In effect, appellants' contention is tantamount to the claim that, if a judgment be void on its face, there is no limit to the time for taking an appeal. The basis for this position, if we rightly understand appellants' argument, is substantially this: An appeal from a judgment is a direct attack thereon (Eichhoff v. Eichhoff, 107 Cal. 42, 48, 40 Pac. 24, 48 Am. St. Rep. 110); in a direct attack upon a judgment the record must sustain it (Sichler v. Look, 93 Cal. 600, 29 Pac. 220); if the judgment is void on the face of the roll, it may be set aside at any time and in any appropriate mode (People v. Greene, 74 Cal. 400, 16 Pac. 197, 5 Am. St. Rep. 448).

[6] Without doubt one who has succeeded in conferring jurisdiction upon the appellate court by taking an appeal in time may successfully attack the judgment on such appeal, if the record fails to show that the lower court acquired jurisdiction of his person. But here the appeal was not taken in time to confer upon this court jurisdiction of the appeal. We therefore are without power to reverse the judgment, even if it be true that the record fails to show that the lower court acquired jurisdiction of the persons of these appellants. But as a matter of fact the record before us does not fail to show that the lower court had acquired jurisdiction. Although it does not show that either appellant was served with summons, or that either of them filed an answer or demurrer, and although it is conceded by respondent that no summons was in fact issued or served, nevertheless it is expressly recited in the judgment that certain named attorneys appeared for "the defendants"—which, of course, means *all* of the defendants. An appearance by these appellants could have been made by written notice. But a notice of appearance is not a part of the judgment roll. Hence the failure to serve these appellants with summons and the absence from the record of any answer or demurrer by them is not inconsistent with the fact, recited in the judgment, that "the defendants" appeared by certain named attorneys. Brown v. Caldwell, 13 Cal. App. 29, 108 Pac. 874 See, also, Estate of Pendergast, 143 Cal. 135, 139, 76 Pac. 962.

If, in fact, jurisdiction of the persons of O. V. Blackburn and Fredericka Blackburn was not acquired and if for that reason the original judgment, as modified and affirmed by the District Court of Appeal, or the so-called amended judgment, which was entered in the superior court on August 24, 1922, was void as to those defendants, then they are, of course, entitled to relief from such void judgment or judgments. But, for the reasons which we have stated, no relief can be given to them on these appeals.

The appeals are dismissed.

We concur: WORKS, J.; CRAIG, J.

61 Cal. App. 630

Ex parte HADELER. (Cr. 1120.)

(District Court of Appeal, First District, Division 1, California. April 11, 1923.)

Licenses 🔑15(1) — City of San Francisco cannot require payment of sanitary inspection fee by grocerymen.

In view of San Francisco City and County Charter, art. 2, c. 2, § 1, subd. 15, prohibiting the imposition of license taxes on persons selling or manufacturing goods, etc., at fixed places of business, except such as require permits from the board of police commissioners under chapter 3 or article 8, c. 4, § 7, an ordinance requiring grocerymen to pay a sanitary inspection fee before issuance of certificates by the board of health is invalid, notwithstanding Const. art. 11, § 11, authorizing counties, cities, etc., to make and enforce local sanitary regulations not in conflict with general laws.

Application by William Hadeler for writ of habeas corpus directed to the Sheriff of the City and County of San Francisco. Writ granted, and petitioner discharged.

Costello & Costello and E. R. Hoerchner, all of San Francisco, for petitioner.

Maurice T. Dooling, Jr., Asst. City Atty., of San Francisco, for respondent.

RICHARDS, J. The petitioner herein was convicted of a violation of Ordinance No. 5398, New Series, as amended by Ordinance 5490, New Series, of the city and county of San Francisco. The petitioner conducts a grocery store in the city and county of San Francisco. Under the above-mentioned ordinances any place used for the handling, manufacturing, or sale of foodstuffs in said municipality is required to be inspected by the board of public health to determine whether it is sanitary and in order to do business is required to have issued to its proprietor a certificate by the said board of health upon such inspection, which certificate must be annually renewed. Section 2 of the amended ordinance provides that—

> "For the purpose of defraying the cost of making such inspection and issuing the certificate provided for in this ordinance, a fee of five dollars is hereby imposed and shall be collected by the Board of Health prior to the issuance of such certificate."

The petitioner, having failed and refused to pay said inspection fee, was arrested, tried, and convicted of a violation of said ordinances as above stated. The sole question presented upon his application for this writ is as to the power of the board of supervisors of the city and county of San Francisco to impose upon those who engage in the grocery business the license tax, fee, or charge provided for in these ordinances, and which the petitioner has refused to pay.

In support of his contention herein the petitioner directs our attention to the case of Rapp & Son v. Kiel, 159 Cal. 702, 115 Pac. 651, wherein the provisions of the charter of the city and county of San Francisco relating to the power of the board of supervisors in the matter of the imposition of license fees and taxes were the subject of review. Subdivision 15 of section 1, chapter 2, article 2 of said charter provides that the board of supervisors shall have power "to impose license taxes and to provide for the collection thereof; but no license taxes shall be imposed upon any person, who, at any fixed place of business in the city and county, sells or manufactures goods, wares or merchandise, except such as require permits from the board of police commissioners as provided in this charter." It is conceded that the keepers of grocery stores are not within the enumerated list of persons who are required to obtain permits from the board of police commissioners under the provisions of chapter 3 or of section 7 of chapter 4 of article 8 of said charter and hence do not come within the exception in the above-quoted subdivision. The case of Rapp & Son v. Kiel, supra, is in that respect parallel to the case at bar. In construing the meaning to be given to the phrase "license tax" as used in said subdivision of the charter, the Supreme Court held that said phrase as used therein included both regulatory and revenue charges, and further held that it was the intention of the charter makers in the adoption of the foregoing subdivision "to make it very clear that no license charges, fee, or tax of any kind should be imposed on any person selling or manufacturing goods, wares, or merchandise at a fixed place of business in the city and county, unless the business to be conducted by such person was one which they considered it necessary to regulate by charter provision requiring the consent of the police commissioners as a condition precedent to the doing of business." Under this interpretation of the scope and meaning of the foregoing subdivision of the charter, we are constrained to hold that the board of supervisors of the city and county of San Francisco have no power to impose the license charge or fee upon the petitioner as a condition of engaging in the grocery business in said municipality, and that said ordinances, in so far as they attempt so to do, must be held to be void. The respondent, however, makes the contention that notwithstanding the direct inhibition of subdivision 15 of said charter above set forth the board of supervisors had power to adopt the ordinances in question under and by virtue of section 11 of article 11 of the state Constitution, which provides that—

> "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

In support of this contention our attention is called to the case of Odd Fellows Cemetery Ass'n v. San Francisco, 140 Cal. 226, 73 Pac. 987. That was a case wherein the question arose as to the power of the board of supervisors of the city and county of San Francisco to pass an ordinance prohibiting the interment of dead bodies within the limits of said municipality, and the point at issue was as to whether the board of supervisors possessed such power in the absence of an express charter provision granting such power to it; and in passing upon this question the Supreme Court held that under and by virtue of the foregoing clause in the state Constitution the board of supervisors had been invested, by virtue of its police powers, with power to pass the ordinance in question in that case.

Our attention is further directed by the respondent to the case of In re Pfahler, 150 Cal. 71, 88 Pac. 270, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911, in which the question arose as to the power of the city of Los Angeles to adopt and enforce an initiative ordinance prohibiting, except within certain defined limits, the killing or slaughtering of animals within said city, the flesh of which was to be sold or offered for sale, or eaten. It was contended that inasmuch as the city charter had invested the council with the legislative power of the city and had in so doing enumerated certain matters as the proper subjects of police regulation, it had by so doing limited its power through initiative legislation to deal with the subject covered by the initiative ordinance under review. The Supreme Court, however, held that the city possessed, under the direct grant of the state Constitution above referred to, the full power to pass such legislation, notwithstanding the limitations of the city charter and in so doing approved and applied the doctrine laid down in the case of Odd Fellows Cemetery Ass'n v. City and County of San Francisco, supra. Both of these decisions of the Supreme Court were prior to its decision in the case of Rapp & Son v. Kiel, supra, and in deciding said last-named case the court makes no reference to the Odd Fellows Cemetery Case and only a passing and somewhat obscure reference to the Pfahler Case. In the later case, however, of In re Montgomery, 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130, the Supreme Court gave its consideration to all three of these prior cases and undertook to differentiate between them. In the last-cited case the question arose as to the power of the city council of Los Angeles to pass and enforce an ordinance prohibiting the erection and maintenance of a lumber yard within the residence district of said city, and the contention of the petitioner therein was that the enumeration in the charter of Los Angeles of certain trades, callings, and occupations, which may be prohibited by ordinances of the city council, constituted a limitation upon the power of said legislative body to pass ordinances prohibiting or restricting the location within said city of any other classes of business than those embraced within such enumeration. It was argued that the makers of the charter, by specifying certain occupations which might be prohibited or restricted, withheld from the city council the power to prohibit any others not within such specification. The Supreme Court, however, held that under the constitutional provision above referred to, the legislative body of said city was not limited in the exercise of its police power to the enumeration contained in said charter. In arriving at this conclusion the court reviewed and distinguished its foregoing decisions and in so doing pointed out that in the case of Rapp & Son v. Kiel, supra, the court was passing upon the place of lodgment of the power of the city and not upon the limitation of the power itself, and was discussing the power of the board of supervisors to impose a certain restriction which under the limitations placed upon said board as a legislative body it was not authorized to enact. In commenting upon the Pfahler Case, supra, and upon its approval therein of the Odd Fellows Cemetery Ass'n Case, the court called attention to the fact that it was not therein deciding that the charter of a city might not by express provision limit the powers which its legislative body might exercise, but was only intending to decide that a charter provision could not limit or cut down the constitutional power of a city itself to enact police regulations under the direct grant of the state Constitution. It will thus be seen that the case of Rapp & Son v. Kiel, supra, was shown to be not inconsistent either with the two earlier decisions of said court or with its ruling in the Montgomery Case. It must therefore be held that the case of Rapp & Son v. Kiel, supra, remains as a controlling authority, binding upon this court and as holding that in the face of the express prohibition contained in subdivision 15 of section 1, chapter 2, art. 2, of the San Francisco Charter, the board of supervisors was not invested with, but on the contrary was expressly denied, the power to pass ordinances imposing license taxes, fees, or charges for purposes of either revenue or regulation, upon those classes of business not coming within the exception provided for in said subdivision.

It follows that the application of the petitioner must be granted and the petitioner discharged, and it is so ordered.

We concur: TYLER, P. J.; ST. SURE, J.

61 Cal. App. 582

SETRAKIAN v. NAFTZGER et al.
(Civ. No. 4433.)

(District Court of Appeal, First District, Division 2, California. April 9, 1923.)

1. Evidence 🔑53—No presumptions in California except those enumerated in Code.

There are no presumptions in California except those enumerated in its Code of Civil Procedure.

2. Master and servant 🔑405(4)—Evidence held not to show compensable injury to night watchman.

Facts and circumstances surrounding an attack on a night watchman after he crossed the street to a pool hall to get matches to light his lantern *held* to warrant a finding by the Industrial Accident Commission that his injury did not arise out of his employment.

Proceeding under the Workmen's Compensation Act by Levon S. Setrakian, claimant, opposed by the California Peach & Fig Growers, employer. Compensation denied by the Industrial Accident Commission, and claimant applies for a writ of review to annul such order. Order sustained.

Chester H. Warlow, of Fresno, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

LANGDON, P. J. This matter comes before us upon a writ of review. Appellant seeks to annul an order of the Industrial Accident Commission made herein, denying him compensation for an injury suffered by him.

The Industrial Accident Commission found that the evidence was insufficient to establish the fact that such injury arose out of the employment. The correctness of this finding is the only question presented to us upon this record. The facts are practically undisputed. Appellant was employed at Fresno, Cal., as a night watchman by the defendant California Peach & Fig Growers, a corporation. That corporation had owned a packing plant in the city of Fresno, which had been partially destroyed by fire. In the ruins were figs and other salvage. Appellant and another man were engaged to patrol the plant during the night, and to see that none of the property of the corporation was carried away. On the evening of April 10, 1922, according to the testimony of the applicant before the Industrial Accident Commission, he left the premises of his employer about 8 o'clock in the evening, and went to a nearby store to purchase coal oil for his lantern. This was one of his customary duties. He returned to the packing plant with the coal oil and found that neither he nor the other watchman had any matches with which to light their lantern. He thereupon crossed the street to a pool room to secure matches. The street in front of the pool room was well lighted, and there were a number of persons about. The following is an account of the attack upon appellant, told in his own language:

"Q. Had you gone to the pool hall and got the matches? A. No; I had not left the sidewalk. I looked around and saw the four guys standing there. I walked to the front of the pool hall, but the fellow was busy fixing the balls for the boys for pool, so I stood there a minute to see if these fellows came out and to see if I could get my matches, but there was nobody there, and when I was going to make my turn to go back I felt some one in back of me. I stopped a minute, and I looked to see if the guys came out. I was going to the back of the plant again, and at the same time some guy strike me and jar me one side. I turned around to strike, and I see blood on my face. I run clear to the corner after him from the pool hall. When I run after him he run into another man. By the time I got to the corner I ask the man if he see the other man, and he said no, not his face, and the fellow run around the alley."

Upon examination, it was found that a gash had been cut in appellant's cheek, from his ear to his chin.

Appellant's position before us is that, upon proving he was a night watchman, he brought himself within a special rule of law requiring the defendant to prove that the injury did not arise out of the employment, and that it was not the duty of appellant to prove that it arose out of his employment. In other words, it is maintained that, because of the nature of the duties of a night watchman, and his special exposure to felonious attacks, there is a presumption in his favor that any attack upon him arises out of his employment, and that presumption must be met by the defendant with affirmative proof that the injury did not arise out of the employment. It is contended that, as such proof was not made by the defendants, the unrebutted presumption warrants a finding in favor of appellant on this subject.

[1, 2] There are no presumptions in this state except those enumerated in our Code of Civil Procedure. Davis v. Hearst, 160 Cal. 143, 176, 116 Pac. 530. It is, of course, the rule that, in the absence of positive proof that such an injury as we are considering here arose out of the employment, the Industrial Accident Commission might, in certain cases, reasonably infer from the nature of the employment of the applicant and the facts and circumstances surrounding the attack that the injury occurred as the result of an attack made upon applicant in his capacity as an employee, and arose out of the employment. Where such an inference would be a reasonable one from the facts and circumstances and the nature of the employment, a finding based thereon could not

be disturbed by this court, for we are bound by findings of fact made by the Industrial Accident Commission whenever there is any substantial evidence to support the same. But the present case, in all respects, presents a different situation. The facts and circumstances surrounding the attack furnish no basis for a reasonable inference that appellant was attacked because he was a night watchman, nor that his injury arose out of his employment, within the meaning of that phrase as repeatedly defined in this state, and the finding of the Industrial Accident Commission is that it did not so arise. There is neither evidence nor reasonable inference from the facts presented before the said Commission to warrant a different finding upon this vital question.

The order of the Industrial Accident Commission denying plaintiff compensation must be sustained. It is so ordered.

We concur: STURTEVANT, J.; NOURSE, J.

(61 Cal. App. 611)

PEOPLE v. WILSON. (Cr. 931.)

(District Court of Appeal, Second District, Division 1, California. April 10, 1923.)

1. Homicide 🔑228(1)—Evidence held sufficient to establish corpus delicti.

In a prosecution for murder, evidence *held* sufficient to establish the corpus delicti as against claim of suicide.

2. Homicide 🔑253(1)—Evidence held sufficient to sustain conviction.

Evidence *held* sufficient to sustain a conviction of murder in the first degree.

3. Criminal law 🔑371(12)—Evidence of motive admissible, though showing charge of another crime.

Where the question of motive exists, and evidence is offered which has a tendency to establish the existence of a motive for the commission of the alleged crime by the defendant, the fact that such evidence tends to prove that defendant was charged with the commission of another crime does not make the evidence inadmissible for the stated purpose relating to motive.

4. Homicide 🔑338(4)—Error in admission of evidence cured by striking out testimony.

Error of the court in overruling objections to part of testimony relating to conduct of defendant at a time when accusations for other crimes were made against him—that is, that he remained silent—was cured by an order striking out the testimony and an instruction to disregard it.

5. Criminal law 🔑407(1)—Accusatory statements not competent, where accused promptly denies charge.

Ordinarily, when a defendant, under conditions which fairly afford him an opportunity to reply, stands mute in the face of an accusation of crime, the circumstance of his silence may be taken against him as evidence indicating an admission of guilt, but if he promptly and fully denies the charge, the accusatory statements, standing alone, are not in any sense competent evidence of the defendant's guilt, and should be excluded from the consideration of the jury.

6. Criminal law 🔑407(1)—Statement of accused held admissible.

Where accused, in reply to accusation, went further than a denial of his guilt, and stated, "He killed himself," the fact that he made such statement was properly admitted in evidence.

7. Criminal law 🔑407(2)—Implied confession by silence inadmissible in view of threats.

An implied confession by mere acquiescence or silence is not admissible, where at the time accusations were made, accused was menaced by a number of deputy sheriffs heavily armed and was being cursed, threatened, and intimidated.

8. Criminal law 🔑656(8)—Remark of court held not invasive of province of jury.

A query by the court as to what defect there was in the proof as to the corpus delicti *held* not invasive of the province of the jury as an indication what court thought about the facts at the time, in view of a declaration by the court that it had no opinion on the subject.

9. Witnesses 🔑277(4)—Cross-examination as to matter not included in direct, improper.

Cross-examination of accused as to matters not included in direct examination was improper, even though the questions asked tend to show motive, in view of Pen. Code, § 1323.

10. Criminal law 🔑1186(4)—Improper cross-examination held not prejudicial.

Examination of accused as to matters not included in the direct examination *held* not reversible error under Const. art. 6, § 4½.

11. Criminal law 🔑834(2)—Accused not entitled to dictate precise terms of instructions.

Not even the defendant in a criminal action is entitled to dictate the precise terms of instructions to the jury.

12. Criminal law 🔑822(16)—Instruction on reasonable doubt held sufficient as amended.

Where the court substituted the phrase "beyond a reasonable doubt" for the phrase "to a moral certainty beyond a reasonable doubt" in an instruction as tendered, objections of the accused to such change are hypercritical, where the court had given to the jury the usual well-accepted definition of the doctrine of reasonable doubt, including the use of the words "to a moral certainty," in defining that state of mind wherein a "reasonable doubt" exists.

13. Criminal law 🔑761(12)—Instruction held not to assume facts.

An instruction "that, in determining the intention of the defendant at the time of the transaction complained of, it is important to consider the means used to accomplish the killing," etc., *held* not subject to the complaint that court assumed that accused killed the deceased; the instruction concluding with the words: "Therefore, if you are satisfied beyond a reasonable doubt that the defendant did," etc

14. Criminal law ⟹829(12)—Court need not repeat instructions.

Where the court, at defendant's request, charged that "consciousness of guilt, if such is to be inferred in this case, is not sufficient of itself, standing alone, to warrant or sustain a conviction. If such inference is drawn in this case, it is a circumstance to be considered by the jury." It did not err in also refusing to charge: "Consciousness of guilt is an inference which may or may not be drawn from evidence introduced in the record. Whether such inference shall or shall not be drawn from the evidence in the case is a question solely for the jury. Another inference cannot legally be drawn from such an inference."

15. Criminal law ⟹834(1)—Instruction held substantial compliance with request.

Where defendant requested the court to give an instruction to the effect that, if defendant refused or failed to deny any accusations made in his presence, such fact must not be used against him, unless the circumstances and surroundings of the defendant were such that he was "in perfect freedom to make denial," court substantially complied therewith by substituting for the phrase "in perfect freedom to make denial" the phrase "free to make denial."

16. Criminal law ⟹829(12)—Requested instruction as to mere preponderance of evidence held covered.

When a jury is instructed that accused must not be convicted unless the facts which establish his guilt have been proved beyond a reasonable doubt that the burden of proof is upon the prosecution, and that, "if upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal," the proposition that a mere preponderance of the evidence will not justify a verdict of guilt is necessarily included, and it is not error to refuse to so instruct.

17. Criminal law ⟹723(3)—Remarks of counsel held not improper.

Argument of district attorney to jury, "You, ladies and gentlemen, have it within your power to encourage every criminal within the confines of this county. You have it within your power, by stern, rugged devotion to duty, to encourage every officer of the law and to discourage every criminal," etc., *held* not improper.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Hebert Wilson was convicted of murder in the first degree, and he appeals. Affirmed.

Schenck & Kittrelle, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

CONREY, P. J. By information the defendant was charged with the crime of murder in that on the 9th day of April, 1922, he did kill and murder one Herbert Cox. He was found guilty of murder in the first degree and sentenced to imprisonment for life. He has appealed from the judgment and from an order denying his motion for a new trial.

Departments 17 and 18 of the superior court of Los Angeles county are located on the second floor of a building known as the Hall of Justice. The county jail and the Hall of Justice are separated by an alley 20 feet wide. For convenience in conveying prisoners between the jail and the courts a bridge spans this alley connecting with the jail on the south and the Hall of Justice on the north. This bridge is somewhat above the ground, its floor and sides are of cement, and its roof is flat. The bridge is on the level of the jail door. On coming out of the jail one crosses the bridge and then ascends a short flight of steps to the floor of the court building. The passage there leads to the left through a door in which there is a wicket covered by bars and a screen. Through this door one passes into a vestibule in the rear of the two courtrooms. Herbert Cox received his death wound while on the bridge at a time when he and the defendant Wilson, together with one O'Brien, were attempting to escape from the jail.

Appellant contends that the evidence is insufficient to establish the corpus delicti; that is, to show that the deceased came to his death as a result of criminal agency as distinguished from suicide or accident. Appellant further contends that the evidence is insufficient to warrant or sustain his conviction.

For the purposes of the present discussion, we shall assume with counsel for appellant that the evidence of motive of the defendant, which might have led him to attack the deceased, does not form any part of the proof of the corpus delicti; also that there was testimony of sundry witnesses that Cox had made statements to them, variously, to the effect that a man is better off dead than in jail; or that he was going to have his liberty or die; or that if he did not succeed in escaping, he would kill himself. The other incidental questions under this head relate to the nature of the wound and the possession of the gun with which, as the evidence strongly tends to prove, the wound was inflicted.

The circumstances in evidence are such that, if Cox did not kill himself, it becomes probable that he was murdered by another. There was no opportunity for a chance shot from the outside. On this branch of the case the principal contention of appellant, therefore, is that the evidence is not sufficient to prove that Cox did not commit suicide.

A few days prior to April 9th arrangements were made by Cox with a turnkey that for the sum of $1,000 to be paid to the turnkey, the door leading from the jail into the bridge would be left unlocked. On the 9th day of April the defendant gave $1,000 to the turnkey and asked "if the arrangements made by Cox were O. K.," and was told that they were. The turnkey reported these facts to his superior officer. At the time of the expected jailbreak, deputy sheriffs Wright and Bright took their stations in the courtroom of department 17, and Deputy Sheriffs Manning and Fox in department 18. Other deputies were stationed at various points outside the buildings. The jail door was left unlocked. O'Brien, Cox, and Wilson came out, crossed the bridge, and ascended the stairs. By the use of some tools they succeeded in removing the bars and screen over the wicket in the door leading into the vestibule. O'Brien, who was very small, was then pushed through the wicket into the hallway, and all of them then worked together trying to open the door. After this had continued for some time, Fox and Manning fired their Winchester rifles, the bullets striking near O'Brien, but without touching him. The four deputies came into the hall where O'Brien stood with his hands up. At this time they heard a "muffled shot" which seemed to come from down in the bridge. After the door leading from the vestibule to the bridge had been unlocked and opened, some of the deputies went to the head of the stairs and looked down upon the bridge. Cox was lying on the floor and Wilson was leaning over him. Upon examination it was found that Cox had received the wound by reason of which a few minutes later he died.

We will now consider the evidence of the nature of the wound as related to the question of suicide. The autopsy surgeon stated that the bullet entered the left side of the chest about 2 inches above the nipple, about 4 inches from the midline in front. It passed horizontally backward and slightly inward, penetrating the third rib, both lobes of the left lung, and passed out of the back through the sixth rib at a point about 2 inches from the midline of the back. The entrance wound showed a very narrow margin of burned powder and a few punctate powder marks around the wound. The embalmer testified that around the wound he saw a small ring of powder burns. This ring made a complete circle around the wound. The pistol, or "gun," with which, under the evidence, the shooting must have been done, was found on the floor near the body of Cox. The pistol had been in the possession of Cox while in the jail, and there is abundant evidence that when the prisoners came out from the jail to the bridge Cox brought the pistol with him. Bright testified that when he looked down the stairs he saw Cox lying on his back with his head toward the jail and that Wilson was leaning over him; that a coat was folded up and lying somewhere near Cox's head; that he picked it up "and the gun fell out, wrapped in a handkerchief, which was tied around with a string." Cox was wearing a coat. Wilson was in his shirt sleeves. The handkerchief was wrapped around the gun in such manner that the left side of the gun was closed next to the trigger guard and the right side was open. Bright further testified that upon examining the gun he found that it was loaded, except that there was one empty shell. It was proved by the mother of Cox, and also by his wife, that he was right-handed. His wife had seen him fire several shots from a pistol, all with the right hand, never with the left hand.

[1] The evidence of these facts, if believed by the jury, was sufficient to warrant the jury in believing that the fatal shot was not fired by Cox. This evidence tended to prove that in shooting he would not have used the left hand; that, if he had been shooting with that pistol at that time with the right hand, he could not have pressed the trigger with the thumb of that hand, and that it would be extremely difficult for a man, with his right hand, to have fired that weapon so that the bullet, entering his breast where this bullet actually did, would range inward horizontally and come out 2 inches nearer the center line of the back. It is our conclusion that the evidence is sufficient to establish the corpus delicti.

[2] Appellant next contends that the evidence is insufficient to sustain the conviction. There is testimony to the effect that in November, 1921, Wilson had been informed by officers, in the presence of Cox, that Cox had accused Wilson "of the post office robbery, the Hale store robbery, and other jobs." There is also testimony that after the "muffled shot" had been heard, and when the officers looked down the stairway, there was no one on the bridge with Cox, except Wilson, who was leaning over Cox. Manning testified that at that time Wilson was choking Cox—or, as the same witness had said at the coroner's inquest, "seemed to have him by the throat." Bright said that when he looked down there he saw Cox lying on the floor, on his back, and Wilson kneeling over him. Wilson himself, besides denying that he shot Cox, says that when he came down to the bridge he found Cox lying on the floor; that he put his coat under the head of Cox, and loosened his collar. But if certain testimony of the witness Hornbuckle is true, it becomes very certain that Wilson was down on the bridge with Cox before Cox was shot. Hornbuckle, who at that time was a prisoner in the county jail, was at work in the jail kitchen. In the north side of the kitchen there is a window located a few feet above and easterly from the bridge. Hornbuckle testified that at the time of the shooting he was sitting near this window. What he claims to have heard is stated as follows:

> "It seemed like there was a scuffle first, and Cox was saying something or other to Herb.

He said, 'Don't do that, Herb. You are wrong. Don't do that.' And then the shot taken effect, and that is the last I ever heard. Then the officers run in," etc.

The cook, Lombardo (who was a county employee and not a prisoner), in his testimony confirms the fact that Hornbuckle was in the kitchen at that time, but he claims that both he and Hornbuckle were five or six feet away from the kitchen window. He heard the shot and some one moaning. Also at about that time he heard somebody say (the voice coming from outside the building), "Don't do that." According to Lombardo, it was after hearing the shot that he heard these words spoken, whereas Hornbuckle claims to have heard them before the shot was fired. There is also the difference that Lombardo does not identify the voice, whereas Hornbuckle testified that he had heard Cox speak before, and that it was Cox speaking.

On behalf of appellant it is argued that the testimony of Hornbuckle was impeached in various ways, and that the character of the witness was shown to be such that he is wholly unreliable. Granting that the character of the witness and some inconsistencies in his testimony were such that his statements should have been weighed with great caution, nevertheless it was very possible that he told the truth about the particular circumstances to which his testimony referred as above stated. It was for the jury to consider and determine the question.

Concerning the events which occurred immediately following those last above mentioned, we have the testimony of the numerous deputy sheriffs and of the defendant, as well as of certain jail prisoners. Summarizing in short form, there is evidence that Wilson was ordered to put up his hands and go up to the head of the stairs, and that shortly afterwards he was taken into the jail; that sundry statements and questions were directed to Wilson; that when Manning asked him what he shot the man for, Wilson replied, "I didn't shoot him. He shot himself."

There is also voluminous testimony tending to prove that after the death of Cox, and in connection with Wilson's defense to the present charge, Wilson attempted to obtain certain false statements which would tend to prove that he was not on the bridge at the time of the shooting of Cox. The record containing this evidence is filled with sundry matters of contradiction in testimony and impeachment of witnesses. Under the able guidance of counsel for appellant, who, in their brief, have very extensively explored the record, we have examined much of this testimony. In addition to that part of the evidence which tends to exclude the theory of suicide or accidental death, there is abundant evidence in the circumstances to which we have referred, which is sufficient to have justified the jury in finding that the killing was done by appellant. It is difficult to understand how it could have been done by any one else. Some of these circumstances are sufficient to suggest a motive of revenge or interest as the cause for the crime; others show opportunity in that these two men were alone on the bridge, and one of them had a gun in his possession. Assuming that the gun was brought there by Cox, and that prior to the very minute of the shooting it had remained in his possession, this does not exclude the opportunity of Wilson to have obtained it, by violence or otherwise, immediately before the shooting occurred. Since the jury determined—and, as we think, reasonably determined—that there was no suicide and no accident, we are driven to the conclusion upon the whole case as shown by the evidence, that it is sufficient to justify the verdict of guilty of murder in the first degree.

There remain for consideration numerous specifications of error wherein it is claimed that prejudicial erroneous rulings were made by the court at the trial in the reception of evidence and in the matter of giving and refusing instructions to the jury.

[3] Overruling objections of the defendant, the court permitted a witness to give testimony to the effect that several months prior to the homicide, the defendant, who was then being held in jail on a charge pending before the United States District Court, was taken to the federal building, and that there, in the presence of several officers and of the said Cox, Wilson was informed that Cox had accused Wilson of sundry robberies. In reply to the objections made, the district attorney stated to the court that the evidence was offered as relating to "the question of motive." In support of their contention that this evidence was erroneously admitted, counsel for appellant refer to People v. Ayhens, 16 Cal. App. 618, 117 Pac. 789; People v. Lapara, 181 Cal. 66, 183 Pac. 545. These cases are not in point. Neither one of them relates to the admission of testimony concerning circumstances having relation to the existence of a motive for commission of the crime charged in the case then on trial. Where the question of motive exists, and where evidence is offered which has a tendency to establish the existence of a motive for commission of the alleged crime by the defendant, the fact that such evidence tends to prove that the defendant was charged with the commission of another crime does not make the evidence inadmissible for the stated purpose relating to motive. People v. Argentos, 156 Cal. 720, 724, 106 Pac. 65.

[4] The same objection was urged to the admission of similar testimony of the witnesses Cellar and Grant. Each of these witnesses also testified to the effect that Wilson did not make any reply to those

accusations, or, in one instance, replied that he had nothing to say. The testimony of these witnesses Cellar and Grant was stricken out by the court. The jury was instructed to disregard all evidence so stricken out. Conceding that the court had erred in overruling the objections to that part of the testimony of these witnesses relating to the conduct of Wilson at the time when said accusations were made in his presence, but further taking into consideration that the accusations themselves related to matters unconnected with the present case, we are of the opinion that it was within the power of the court to cure such error, and that it was so cured by the order striking out the testimony and the instruction to disregard such testimony.

[5, 6] Deputy Sheriff Bright testified to a conversation with the defendant in the sheriff's office in the presence of Manning, Dewar, and Biscailuz. This conversation occurred less than an hour after Cox had been shot. To the question, "What did you say to Mr. Wilson in their presence?" the defendant objected. The district attorney explained to the court that he expected to show "a lack of response." Objection overruled. The answer was: "I said to Wilson, 'You made a mistake in shooting this man. He didn't double-cross you.' He said, 'I didn't shoot him; he killed himself.' " A motion to strike out this testimony, on the ground that it was not within the rule under which it was admitted, was denied. Appellant now contends that the court erred in overruling the objection and in denying the motion. Ordinarily, when a defendant, under conditions which fairly afford him an opportunity to reply, stands mute in the face of an accusation of crime, the circumstance of his silence may be taken against him as evidence indicating an admission of guilt. But if he promptly and fully deny the charge, the accusatory statements, standing alone, are not in any sense competent evidence of the defendant's guilt, and should in such a contingency be excluded from the consideration of the jury. People v. Lapara, 181 Cal. 66, 71, 183 Pac. 545. In one particular, Wilson's answer was more than a denial of guilt, for he further stated, referring to Cox, "He killed himself." If the jury believed (as we have said that the evidence authorized it to believe) that Cox did not kill himself, then the affirmative statement by the defendant declaring that Cox killed himself, was a false statement relating to the very matter in issue; and, being more than a mere denial of that part of the question which concerned himself, the fact that he made such statement was properly admitted in evidence. People v. Cole, 141 Cal. 88, 74 Pac. 547.

There were some other instances of similar character to the above-mentioned testimony of Bright wherein the testimony showed that, in response to questions asking Wilson why he had killed Cox, Wilson made no response, or simply responded, "I have got an attorney that will do my talking for me." In so far as the silence of Wilson, or his reply, did not constitute a denial of the charge, and if he was free from constraint, the evidence was admissible. People v. Lapara, supra; People v. Graney, 48 Cal. App. 773, 192 Pac. 460.

[7] But appellant further contends that the evidence concerning the statements made by Wilson, or his silence when accused, as shown by the testimony of the said witnesses, should have been excluded because the record shows that at the time of the accusations "the accused was menaced by half a dozen or more deputy sheriffs, each heavily armed. He was being cursed, threatened, and intimidated. Two rifles were placed against his body, accompanied by the most vile epithets and threats of immediate death, and such like." According to the testimony now under consideration, other than that of Bright, the accusations were made at the top of the stairs immediately after Wilson, under threatening orders of the officers, had come up there. A direct confession made under such circumstances might well have been excluded. People v. Fowler, 178 Cal. 657, 662, 174 Pac. 892; People v. Miller, 135 Cal. 69, 67 Pac. 12. The same is true of an implied confession by mere acquiescence by silence.

Referring to the testimony of sundry witnesses to facts occurring subsequent to those constituting the res gestæ of the alleged crime, it is contended that the court erred in overruling the objection that there was no prima facie showing or proof of the corpus delicti. For reasons which have been sufficiently indicated, we think there is no merit in this contention.

[8] At the time when the defendant's attorney was presenting an objection to a question asked of the witness Wright, defendant's attorney asked permission to argue the matter outside the presence of the jury; in other words, that the jury be excused pending such argument. The court inquired whether the point presented related to the "hypothesis that the corpus delicti has not been shown." On receiving an affirmative reply, the court said to defendant's attorney, "What is the defect in the proof as you see it? Where is the proof insufficient?" Defendant's attorney replied that the court should not have asked such a question in the presence of the jury, and asked that the jury be instructed to disregard it; asserting that it was an indication of the judge "as to what he thinks about the facts at this time," to which the court replied, "No, it is not. The court has not expressed itself on that subject and declines to do so. Any argument you have I will now hear in the presence of the jury." Thereupon counsel refused to argue the question in the presence of the jury,

and the objection was overruled. It is now contended that the court by the proceedings and statements above noted, indicated to the jury an opinion that the corpus delicti had been proved, and thereby invaded the province of the jury, which is the exclusive judge of the facts. We are of the opinion that the court did not go beyond what was necessary in ruling upon the objection. The only implication in the remarks of the court was that there was sufficient evidence relating to the corpus delicti to authorize reception of the further evidence then being offered to the court. Moreover, the court at the time disclaimed any expression of opinion on the subject, and this was followed by an appropriate instruction when the case was submitted to the jury.

Next we have twelve assignments of error (designated H to H11) predicated upon the cross-examination of the defendant after his direct examination as a witness on his own behalf. The point that the cross-examination, as conducted, was improper, is presented in several aspects, with numerous illustrations from the record, all of which have been examined. The main contention is that the cross-examination was permitted to extend to matters not touched upon in the examination in chief, and that they were elicited solely to prejudice the defendant, and not for any legitimate cross-examination purpose.

The first contention of this group relates to a question which was asked and, after objection and discussion, withdrawn. The asking of the question is assigned as misconduct in that the district attorney knew that the fact could not be proved and did not ask the question in good faith. After reading the discussion, as shown in the record, we conclude that the district attorney, at the time of asking the question, believed that he had a right so to do.

The other points of this group relate to conversations and other descriptions of fact which had not been touched upon in the direct examination. The witness was asked whether in December, 1921, he had been confronted by Cox and told that Cox had told everything. The witness replied that he was not. The witness was asked whether at the time, while Cox was prostrate on the bridge, he asked Cox what was the matter. The witness replied, "I said, 'For God's sake, Herb, what's wrong?'" The witness was asked whether while on the bridge he made any statement as to how Cox met his death. The witness replied, "I was asked as to the condition of Mr. Cox." He was then asked, "You didn't make any statement concerning it, whether you were asked or not?" to which the witness answered, "No, sir." He was asked whether his previous relations with Cox had always been friendly and cordial, to which the witness answered, "Yes, sir." He was asked whether he had any feeling of animosity toward Cox. This he denied. He was asked if there was any fact known to him upon April 9th to cause him to wish Cox to be out of the way, to which he replied, "None whatever." He was asked whether he had received any information prior to that time which caused him to regard Cox as being a menace to his own safety. This he denied.

[9, 10] The subject-matter of these questions had not been included in the direct examination. The objections should have been sustained. The fact that the answers to the questions might have tended "to show motive," or to affect the credibility of the witness, is no justification for an extension of the cross-examination to a point where it conflicted with the right of the defendant to be exempt from such cross-examination beyond the scope of the matters about which he was examined in chief. Pen. Code, § 1323. It is true, however, that the answers were not such as could have seriously injured the defendant. If, in the face of his denials, the jury believed that he knew that Cox had made accusations charging him with criminal acts, or that he had a motive for wishing Cox to be out of the way, or that he had said that Cox shot himself, they would have reached the same conclusions without the testimony thus given by the defendant. If these erroneous rulings injured the defendant at all, it would be for the reason that, disbelieving these answers, the jury would be less willing to believe the other parts of his testimony. This, it must be conceded, is of some importance, and will be taken into consideration when we come to the question whether or not, upon "the entire cause including the evidence," there has been a miscarriage of justice. Cal. Const. art. 6, § 4½.

Appellant further assigns misconduct of the district attorney and errors of the court in connection with the cross-examination of the witnesses Cronin and Baker. (One of these, as the record shows, was in the cross-examination of the witness Glaze, and not of Cronin.) These appear to be of minor importance. If the district attorney erred in asking any of these questions, that alone does not, in the instances noted, amount to misconduct, and we do not think that the court erred in any of the said rulings.

[11] The defendant requested a certain instruction concerning the duty of a juror to render his verdict in accordance with his individual opinion and not to be influenced in rendering a verdict of guilty "for the single reason that a majority of the jurors, or even all the other jurors, should be in favor of a verdict of guilty." In giving this instruction, the court struck out the words "a majority of the jurors or even all the," so that the clause read, "for the single reason that other jurors should be in favor of a verdict of guilty." Reading the instruction in full, we find that it fully expresses the principle upon which the defendant relied in requesting the instruction. Not even the defendant in a criminal action is entitled to dictate the precise terms of instructions to a jury. His right is that the court correctly and fairly state the law governing the subject-matter of his defense.

[12] In several instances where the court was making application of the doctrine of reasonable doubt to the issues of this case, the instruction as tendered to the judge contained the phrase "to a moral certainty beyond a reasonable doubt," and the court substituted therefor the phrase "beyond a reasonable doubt." Also the court in one or more places struck out from instructions requested by the defendant certain language disclaiming any intention of the judge to express an opinion upon questions of fact. None of these changes in the instructions furnish a reasonable ground of complaint. The court had given to the jury the usual well-accepted definition of the doctrine of reasonable doubt, including the use of the words "to a moral certainty," in defining that state of mind wherein a "reasonable doubt" exists; and the court had further fully and completely disclaimed any intention to express or to have expressed an opinion upon any question of fact, and had informed the jurors that they were the sole and exclusive judges of the facts as the same must be determined from the evidence, and from the evidence alone. Under these conditions, such objections are hypercritical.

[13] It is claimed by appellant that in certain of its instructions the court erroneously assumed that in fact appellant did kill the said Herbert Cox. Thus, the court said: "You are instructed that in determining the intention of the defendant at the time of the transaction complained of, it is important to consider the means used to accomplish the killing," etc. That the court did not by these words assert that in fact the killing was done by the defendant clearly follows from the concluding words of the instruction: "Therefore, if you are satisfied beyond a reasonable doubt that the defendant did," etc. With one slight difference, this is the same instruction set forth in People v. Jones, 160 Cal. 358, at pp. 369–370, 117 Pac. 176.

The same objection that the court erroneously assumed the commission of the homicide by the defendant is presented concerning an instruction given in the language of section 1105 of the Penal Code. Properly understood, this instruction does not intimate or state that the commission of the homicide had been proved. The same point was passed upon by this court in People v. Caballero, 41 Cal. App. 146, 152, 182 Pac. 321, where the substance of the Supreme Court decisions on the same point is stated.

[14] Because the prosecution was emphasizing its effort to show conduct upon the part of the defendant indicating consciousness of guilt, the defendant requested, and the court gave, the following instruction:

> "Consciousness of guilt, if such is to be inferred in this case, is not sufficient of itself, standing alone, to warrant or sustain a conviction. If such inference is drawn in this case, it is a circumstance to be considered by the jury."

Appellant now complains that the court did not also give to the jury the following instruction, which he at the same time requested:

> "Consciousness of guilt is an inference which may or may not be drawn from evidence introduced in the record. Whether such inference shall or shall not be drawn from the evidence in the case is a question solely for the jury. Another inference cannot legally be drawn from such an inference."

We perceive no error in the refusal of the court to give both forms of this instruction. The jury had been emphatically told that all questions of fact in the case were to be determined by the jury alone.

[15] The defendant requested the court to give an instruction which was to the effect that if the defendant refused or failed to deny any accusations made in his presence, such fact must not be used against him unless the circumstances and surroundings of the defendant at that particular time were such that he was in perfect freedom to make denial. Complaint is now made because the court, in giving that instruction, substituted for the phrase "in perfect freedom to make denial" the phrase "free to make denial." We think that this was a substantial compliance with the request. Immediately following the words above mentioned, the instruction closed as follows:

> "If at that time he was under menace or threat of any one, or was at that time subject to the brandishment of weapons, then his refusal or neglect to make a denial of any accusation must not be used against him."

[16] Appellant complains that the court refused to instruct the jury that it was not sufficient that "the greater weight or preponderance of evidence support the allegations of the indictment," and refused a further request that the jury be told that "the defendant in this case cannot be convicted unless his guilt is established by more than a preponderance of evidence." It is contended that the court erred in this, and that nowhere in the instructions were the jury told that a preponderance of evidence was not sufficient. It is a sufficient answer to say that when a jury in a criminal case is instructed that the defendant must not be convicted unless the facts which establish his guilt have been proved beyond a reasonable doubt, that the burden of proof is upon the prosecution, and

that, "if upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal," the instructions thus given necessarily include the proposition that a mere preponderance of the evidence will not justify a verdict against the defendant.

[17] In the course of his closing argument to the jury the district attorney said:

> "You, ladies and gentlemen, have it within your power to encourage every criminal within the confines of this county. You have it within your power, by stern, rugged devotion to duty, to encourage every officer of the law and to discourage every criminal. * * * I seek a conviction only to the end that the law may be upheld, that justice may prevail, and that there may be taken from the city of Los Angeles the reproach of having, with one-sixth of the population of London, more homicides annually than the latter."

On hearing these statements, counsel for the defense assigned as error and misconduct the making of these statements, and asked that the court admonish the jury to disregard them. The court denied this request. Defendant further requested the court to instruct the jury that they should not be led to convict the defendant "solely for fear that a crime may go unavenged, or for the purpose of deterring others from the commission of like offenses." Arguing that the making of these statements by the district attorney was prejudicial misconduct and that the court erred in refusing the requested instruction, appellant relies upon People v. Hail, 25 Cal. App. 342, 143 Pac. 803, where numerous pertinent decisions are cited. In that case it appeared to the Court of Appeal, although the evidence was held to be technically sufficient to support the verdict, that there was grave doubt that the defendant was guilty of any crime. Defendant was convicted of manslaughter. In his argument to the jury, the district attorney, having first stated that if the jury should acquit this man, they would be allowing a cold-blooded murderer to go unwhipped of justice, then made this statement: "Should you do it, you would be afraid to go out on the street and meet your fellowmen." We fail to discover any close parallel between the case just now mentioned and that now before us. There is a broad difference between a palpable attempt to intimidate or influence the jury, through fear of consequences to the jurors, to return a verdict of conviction regardless of their views as to the effect of the evidence, and an appeal to the jury to render a verdict that will uphold the law and establish justice.

We summarize the remaining points concerning refusal of the court to give instructions requested by the defendant by saying that as to those matters we discover no prejudicial error. In some instances where counsel insist that the statement of law as requested was not covered by other instructions given, we find that the same propositions are sufficiently covered by the instructions as given, and we cannot agree with counsel for appellant that the court, in effect, informed the jury that they might disregard the testimony of the defendant or any other witness upon mere caprice or whim. The jury was fully instructed concerning the presumptions in favor of innocence and the burden of proof laid upon the prosecutor, and that upon any fact in issue "the evidence must establish the truth of the fact to a reasonable and moral certainty," etc.; and that the jurors have the right to determine from the character and conduct of the witnesses and from various other circumstances (stated in the instruction) the degree of credit to be given to the testimony of those witnesses.

We have reached the conclusion that the evidence abundantly justifies the verdict, and that the defendant has had the benefit of a fair and impartial trial. While we have held that the court erred in some of its rulings upon objections made by appellant to certain offered evidence, we are satisfied that those errors, when considered in connection with the entire case as presented, were, in fact, not seriously prejudicial to the rights of the defendant, and have not resulted in a miscarriage of justice.

The judgment and order are affirmed.

We concur: HOUSER, J.; CURTIS, J.

61 Cal. App. 647

CRAWFORD v. DUNCAN. (Civ. 4036.)

(District Court of Appeal, Second District, Division 2, California. April 12, 1923. Hearing Denied by Supreme Court June 7, 1923.)

1. Limitation of actions 🔑27—Two-year statute held applicable to patient's action against physician for breach of oral contract not to leave permanent scars.

In an action by a patient against a physician for breach of an oral contract, whereby defendant warranted that his radium treatments would not leave a permanent scar, and that such scars as resulted would heal up within a reasonable time, the applicable statute of limitations was the two-year provision under Code Civ. Proc. § 339, subd. 1, and not the one-year provision under section 340, subd. 3.

2. Trial 🔑165—On motion for nonsuit, view of evidence most favorable to plaintiff must be taken.

On a motion for nonsuit, that view of the evidence must be taken which is most favorable to plaintiff, all contradictory evidence being disregarded; and, if either of several inferences may reasonably be made, that one must be adopted which is most favorable to plaintiff.

3. Physicians and surgeons 🔑18(9)—Existence of oral contract warranting against permanent scars held for jury under evidence.

In an action by a patient against her physician for breach of an oral contract whereby defendant warranted that his radium treatments would not leave a permanent scar on plaintiff's neck, evidence as to the making of the contract *held* to make a jury question.

4. Limitation of actions 🔑46(6)—In personal actions for violation of contract, statute runs from breach, and not from date of damages caused thereby.

In all personal actions for the violation of an express or implied contract, the statute of limitations begins to run from the date of the breach, and not from the date of the damages caused by it.

5. Limitation of actions 🔑46(1)—No cause of action accrues on warranty relating to future event until such event occurs.

Where a warranty relates to a future event by which it will be ascertained whether it would be breached or not, no breach occurs, and consequently no cause of action accrues until the happening of such future event.

6. Limitation of actions 🔑46(1)—Statute runs on warranty against permanent scar from radium treatment when it appears that such scar had developed.

In an action by a patient against her physician for breach of an oral contract whereby defendant warranted that his radium treatments for the swelling of a gland in plaintiff's neck would leave no permanent scars, and that whatever scars resulted would completely disappear within a reasonable time, probably in a year or two, and it appeared that after two years a permanent scar remained, the warranty related to a future event, and was broken when a reasonable person circumstanced as plaintiff was would know with reasonable certainty that a permanent scar had developed as a result of the treatments, and the statute of limitations would begin to run from that time.

7. Physicians and surgeons 🔑18(7)—Subsequent conversations admissible as explaining oral contract warranting against permanent scars from radium treatment.

In an action by a patient against her physician, whereby defendant warranted that his radium treatment would not leave permanent scars, and that whatever scars resulted would disappear in a reasonable time, statements made by defendant in conversations subsequent to the making of the contract were admissible in so far as they threw light upon the original understanding and intention of the parties.

8. Limitation of actions 🔑199(1)—Whether reasonable time for disappearance of scars following radium treatment had elapsed within warranty against permanent scars held for jury.

In a patient's action against her physician for breach of an oral contract whereby defendant warranted that no permanent scars would result from his radium treatments, and that whatever scars resulted would disappear within a reasonable time, whether such reasonable time as was contemplated by the warranty had elapsed more than two years before the commencement of the action which was the statutory period of limitations *held* for the jury.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Dora G. Crawford against Rex D. Duncan, for damages for breach of contract. Judgment for defendant, and plaintiff appeals. Reversed.

John L. Richardson, T. E. Parke, and Anderson & Anderson, all of Los Angeles, for appellant.

W. H. Dehm, of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action against a physician to recover damages resulting from the breach of an oral contract whereby he warranted that his radium treatments of plaintiff would not leave a permanent scar on her neck. Defendant pleaded the statute of limitations, averring that the action was barred by subdivision 3 of section 340 of the Code of Civil Procedure, and by subdivision 1 of section 339 of that Code. The latter section, in subdivision 1, provides in substance that an action upon an oral contract is barred in two years. At the close of her evidence plaintiff was nonsuited upon the ground that the statute of limitations had run. Judgment for defendant was entered accordingly, and from that judgment plaintiff appeals.

The complaint alleges in substance that in 1917 defendant, who was consulted by plaintiff with reference to swollen glands on the right side of her neck, undertook to treat the swelling with radium, at the same time orally agreeing and warranting that no permanent scar of any kind would result from the treatment; that any scar which might result would disappear within a reasonable time, and that a reasonable time for its disappearance would probably be a year, or possibly a year or two, from the date of treatment; that plaintiff, relying upon such warranty, submitted herself to defendant's radium treatments, with the result that large and disfiguring scar was left upon her neck; that, a reasonable time for its disappearance having elapsed, the scar has proved to be permanent, and has caused plaintiff great humiliation. Wherefore she alleges that she has suffered damages, for which judgment is prayed.

[1] The action was commenced July 8, 1920, which was more than two years after the termination of the treatments, but less than two years from the expiration of the time within which, as plaintiff claims, it was to be ascertained whether the disfigurement would prove to be permanent or merely transitory. This is not an action of tort; that is, it is not an action for malpractice based upon negligence. It is an action for the breach of an alleged oral agreement whereby defendant warranted that his radium treatments would not leave a permanent scar. It is subdivision 1 of section 339 of the Code of Civil Procedure, therefore, and not subdivision 3 of section 340 of that Code, which is applicable; and the statute of limitations did not run until the expiration of two years from the time when plaintiff's cause of action accrued.

[2] On a motion for nonsuit that view of the evidence must be taken which is most favorable to the plaintiff. Not only must all the evidence in favor of the plaintiff be be taken as true, and all contradictory evidence, if any has been given, be disregarded, but, if either of several inferences may reasonably be made, that one must be adopted which is the most favorable to the plaintiff.

[3] The evidence adduced by appellant, considered, as it must be, in the light most favorable to her, was sufficient to make out a case for the jury, both as to the existence of the oral contract of warranty and the accrual of the cause of action within the two-year period. Upon the issue respecting the existence of the contract there was not only the testimony of the appellant herself, but likewise that of one of her witnesses—a woman who accompanied her to respondent's office on the occasion of the first conversation respecting the treatments, and who testified unequivocally that upon that occasion "Dr. Duncan gave the absolute promise that the treatments would not scar her neck."

[4-6] The only serious question in the case is that which is concerned with the time when appellant's cause of action accrued and the statute of limitations commenced to run. The general rule undoubtedly is that in all personal actions for the violation of an express or implied contract the statute begins to run from the date of the wrong—the breach of the contract—and not from the date of the damages caused by it. The question therefore is: When was the contract of warranty broken? Where a warranty relates to a future event by which it will be ascertained whether it will be breached or not, no breach occurs, and consequently no cause of action accrues, until the happening of such future event. Thus, where a seller warrants that fruit trees will bear a certain kind of fruit, or that a carpet when laid will not develop grease spots, the warranty is breached and the statute commences to run only when the trees begin to bear fruit or the spots develop in the carpet. Allen v. Todd, 6 Lans. (N. Y.) 222; Ingalls v. Angell, 76 Wash. 692, 137 Pac. 309; Firth v. Richter, 49 Cal. App. 545, 196 Pac. 277; Carpet Co. v. Dornan, 64 Mo. App. 17. So here the warranty related to a future event—the possible future development of a permanent scar—and the contract of warranty was broken when a reasonable person, circumstanced in all respects as appellant was, and who had received such warranty as was given here, could know with a reasonable degree of certainty that a permanent scar had developed as a result of the treatments.

Before consulting Dr. Duncan appellant had sought the advice of a Dr. Smith, who sent her to respondent. She testified as follows concerning her first conversation with respondent:

> "I said that I wanted him to look at my neck; that I had a small swelling in the right side of my neck. Dr. Smith had taken it up with him, and had informed me that Dr. Duncan was very successful in treating small swellings and glands of that description without leaving a scar of any kind. I told him that; and Dr. Duncan looked at my neck, and said, 'Yes,' that he had been very successful in treating glands of that kind without leaving a scar of any kind—that that was what they used radium for, so there would not be any scars, and in fact that they used radium to eliminate scars. He explained as he went on that they removed birthmarks with radium, and at that time he * * * was treating a small child who had fallen in a bonfire; he was treating it successfully with radium to remove all these shriveling effects that the burn had left on the child's face, and bringing it back to the natural shape. * * * I * * * told him that Dr. Smith had thought that I should be operated upon, but the doctor [Smith] had told me that he didn't want to operate upon my neck because by operating upon it it would

leave a knife scar, and rather than leave a knife scar on my neck, because he knew I had gone out socially, that he would rather turn my case over to Dr. Duncan and not have a scar on my neck. That is what I told Dr. Duncan. Dr. Duncan told me 'Yes;' that he was very successful in operating upon these cases without leaving a scar. He brought out pictures in a book that showed cases that he had treated of goiters where it would show quite a large goiter and that it was successfully removed by radium without leaving a scar of any kind. He showed me a picture * * * of a gentleman who had been operated upon * * * with a knife operation, leaving, as he termed it, shriveled in scars, where after it was treated with radium left the skin absolutely clear and free from any scar of any kind. * * * He said, aside from the little kernel that might be in my neck, that I would never know that my neck had been operated upon; and, of course, I asked him if I would suffer any inconvenience from this treatment, and he said 'No; none whatever,' that after the radium had been applied my neck would get just like a sunburn, he said, just as if I had gone to the beach and gotten my neck sunburned, and, of course, that I would have to give that time to pass away, and when it did that my neck would resume its natural shade, and be free from any mark whatever; and he says 'I am going to say that, aside from a little kernel that you will feel for the time, you will never know that your neck has ever been operated upon.' I said to him at that time, 'Well, * * * I know I won't be scarred with radium.' And he says, 'That I do know; that is why we use radium, so there will be no scar.' And I said to him, 'Well, I think I might just as well take the chance with radium. Then if it does not do the work and does not relieve the gland, I can then be relieved by the surgical operation.'"

[7] Throughout the treatments, and even after they had ceased, respondent frequently assured appellant that any disfigurement which might result from his use of the radium would disappear with the lapse of time. It may be that nothing which was said by the parties after the termination of the treatments could alter the terms of the contract of warranty which had been made in the course of their first conversation; but statements made by respondent in subsequent conversations may be considered in so far as they throw upon the original understanding and intention of the parties. Such subsequent conversations are in some respects interpretative of the original undertaking.

It is a fair inference from all of the conversations of the parties that it was their understanding of the warranty that a year, or possibly two years, should be allowed to elapse after the cessation of the treatments before it would be advisable to decide definitely whether appellant's neck was permanently scarred. The treatments commenced in the latter part of May or the early part of June of 1917, and ceased about the first of the following month of September. When they came to an end appellant had a deep running sore on her neck, caused by the treatments. When she paid respondent his fee on October 1, 1917, he said to her: "Mrs. Crawford, you don't need to worry; your neck is going to be all right. It might take a year or so for that neck to heal, but don't worry; just give it time." And when the last treatment was given, about September 1, 1917, respondent told appellant that her neck would become "normal" if she "gave it time to heal."

It does not appear when the running sore on appellant's neck healed. Respondent, assuming that it had completely healed more than two years before the action was commenced, and further assuming that appellant necessarily must have been aware as soon as the sore healed that her neck was permanently scarred, earnestly insists that the cause of action must have risen more than two years before the suit was brought. But appellant, who presumably had no more knowledge of such matters than the ordinary layman possesses, and who had intrusted herself to respondent's care, doubtless deferred to the doctor's judgment, based on his years of professional experience in the use of radium as a therapeutic agent. She was justified in assuming that his judgment on such matters was probably correct, if not infallible. There is justification for the inference that the contract which respondent led appellant to understand was the measure of her rights and of his obligations was a contract to the effect that, if a scar made its appearance, time should be allowed to pass in order to ascertain whether or not it was to be a permanent disfigurement. He told her that if she would give her neck time to heal it "would absolutely become normal"; also that "when the blood supply came back to the scar tissue" the neck "would resume its normal shade; that the flesh then would be * * * normal." She was justified in relying upon these repeated assurances of her professional adviser.

[8] Whether such reasonable time as was contemplated by the warranty had elapsed more than two years before the commencement of the action was a question which should have been submitted to the jury, guided by proper instructions from the court.

Our conclusion is that the nonsuit was improperly granted, and that the judgment should be reversed. It is so ordered.

We concur: WORKS, J; CRAIG, J.

191 Cal. 187

TABOADA et al. v. SOCIEDAD ESPANOLA DE BENEFICENCIA MUTUA et al.
(S. F. 10170.)

(Supreme Court of California. May 18, 1923.
Rehearing Denied June 14, 1923.)

1. Beneficial associations 🔑5(2)—Constitutional provision permitting amendment of constitution or statutes does not permit amendment of by-laws requiring trial of members sought to be expelled.

A section of the constitution of a mutual benefit society permitting amendment of the constitution and statutes does not permit amendment of by-laws requiring trial of members sought to be expelled.

2. Beneficial associations 🔑10(4)—Cannot expel members without trial.

The rule that no man can be condemned or prejudiced in his rights without an opportunity to make his defense is not confined to courts and strictly legal tribunals, but is applicable to every tribunal having power to adjudicate questions involving legal consequences, such as a mutual benefit society, which, in acting on the expulsion of members, is a quasi judicial body, conducting a quasi judicial hearing, involving a substantial, enforceable right.

3. Beneficial associations 🔑10(4)—Members cannot be deprived of right to trial before expulsion by suspending by-laws providing for trial.

Members sought to be expelled from a mutual benefit society cannot be deprived of their right to a notice of hearing and an opportunity to be heard in their own defense by temporarily suspending sections of the by-laws providing for trial, though other sections permit suspension thereof.

4. Appeal and error 🔑1170(3)—Overruling demurrer for misjoinder of parties held not reversible error.

Under Code Civ. Proc. § 475, and Const. art. 6, § 4½, error, if any, in overruling a demurrer for misjoinder of parties plaintiff in mandamus proceedings by persons expelled as a body from a mutual benefit society, is not a ground for reversal, in the absence of any showing that defendants were deceived or placed at a disadvantage in preparing and presenting their defense, though the complaint alleges no facts showing a causal connection between the various plaintiffs' causes of action; no miscarriage of justice having resulted.

5. Stipulations 🔑7—Stipulation that petitioners were members of defendant's society held sufficient showing of good standing when petition filed.

A stipulation by opposing counsel that petitioners for a writ of mandate commanding defendants to enroll them as members in good standing of a mutual benefit society were members in good standing on the date of their attempted expulsion and had since tendered their dues, which were refused, *held* a sufficient showing, in the absence of a contrary showing, that they continued to be members in good standing and were entitled to restoration of their privileges as such when the petition was filed, though the insufficiency and illegality of the expulsion proceedings were not alleged, the burden of showing that they had been legally expelled being on defendants (Code Civ. Proc. § 1869).

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Application by Rogelio Taboada and others for writ of mandate directed to Sociedad Espanola De Beneficencia Mutua, a corporation, and others. From a judgment granting the writ, defendants appeal. Affirmed.

Russell P. Tyler and Arthur Brand, both of San Francisco, for appellants.

O. M. Goldaracena and J. J. Paulsell, both of San Francisco, for respondents.

LENNON, J. This is a proceeding in mandamus, wherein the plaintiffs sought and secured a writ of madate directed to and commanding the defendants, the appellants here, to permit the plaintiffs, respondents here, as members in good standing of the Sociedad Espanola De Beneficencia Mutua free access to all of the meetings of said society, and further directing and commanding that the said defendants placed upon the roster of membership of said society the names of said plaintiffs as members in good standing and entitled to all of the rights and privileges of such members.

The pleaded and practically undisputed facts of the case are these:

The plaintiffs were at one time members in good standing of the fraternal organization hereinbefore mentioned. The said organization is a mutual benefit society carrying the usual fraternal features of death and sick benefits, organized, created, and existing as a corporation under the laws of the state of California. Each of the defendants named herein is an officer of the said society. Said plaintiffs were prevented by force, at the hands of the defendants, from attending and being present at the meetings of said society, and the names of said plaintiffs were expunged from the membership roll of said society. The plaintiffs later applied for reinstatement as members in good standing of said society, but were refused, and there is no tribunal, board, nor committee of said society to which the plaintiffs may appeal for the redress of their grievance.

Upon the hearing in the court below, the defendants introduced in evidence an entry made in the minutes of a meeting held on June 24, 1921, which was to the effect that pursuant to the provisions of section 72 of the constitution, by two-thirds vote of the members present, the by-laws were suspended, and thereupon, without hearing, the plaintiffs were, by a viva voce vote, ordered expelled from membership in the society.

The governing rules and laws of the organization are embodied in a constitution, by-laws, and statutes. Sections 24, 26, 27, and 28 of the by-laws, which, it is claimed by defendants, were suspended "pursuant to the provisions of section 72 of the constitution," provide for the trial of members of the society charged with having violated any of the rules of the society, and the method of determining and imposing the penalty. Briefly stated, these sections provide that every charge against a member shall be made in writing setting out precisely the nature of the offense with which he is charged; that he shall be furnished with an exact copy of said accusation; that the accusation shall be referred to a committee of five members, who shall be elected by the society, and which shall issue summons and proceed to try the case. It is further provided that the accused shall have two weeks to prepare for his defense; that during all of the proceedings he shall be entitled to have a member of the society represent him as his attorney and that if the penalty is provided in the constitution and by-laws the president shall enforce the same, but if the penalty is not designated, the society itself shall decide upon it by secret ballot, and the penalty of expulsion cannot be imposed unless a majority of two-thirds vote for that penalty.

[1] Section 72 of the constitution prohibits any amendment of the constitution and statutes except in cases of necessity, and in that event only at a meeting and by a vote of two-thirds majority of the members present. Obviously, this provision of the society's constitution having reference, as it does, only to an amendment of the constitution and statutes has no relevancy to the right to amend the by-laws. It is in the by-laws that the provisions providing for a trial of the members, hereinbefore set out, are contained. The right to amend the by-laws, therefore, if any such right be provided, must be found in some other provision of the governing rules of the society.

Section 37 of the by-laws provides that—

> "the by-laws may be altered or amended by giving one week's notice in writing of the alteration or amendment proposed, except that any of the by-laws or any part of them may be suspended by a vote of two-thirds of the members present."

At first blush this section furnishes the authorization necessary and renders proper the procedure followed by the society in the instant case. But this section does not and cannot have, we think, the efficacy claimed for it by the defendants.

Undoubtedly the purpose of sections 24, 26, 27, and 28 of the by-laws, attempted to be suspended under the authority of section 37 of the by-laws, was to protect and preserve the rights of the members against arbitrary action, and to preclude the rights of the members being jeopardized by passion and prejudice.

[2, 3] This purpose cannot be circumvented by the easy device of suspending the by-laws providing such safeguards. This right to a fair and impartial trial, contemplated and seemingly guaranteed by these sections, is not a mere pretense or shadow, but a real substantial, enforceable right. It is a fundamental principle of justice that no man may be condemned or prejudiced in his rights without an opportunity to make his defense. This rule is not confined alone to courts of justice and strictly legal tribunals, but is applicable to every tribunal which has the power and authority to adjudicate questions involving legal consequences. And a society acting upon the expulsion of a member is a quasi judicial body, and its hearing is a quasi judicial hearing. Otto v. Tailors' P. & B. Union, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156. The proceedings of the society, in order to be regular and legal, in effect, must therefore provide for notice to the accused and afford him an opportunity to be heard. Fay v. Supreme Tent, Knights of the Maccabees of the World, 38 Misc. Rep. 427, 77 N. Y. Supp. 994, 996.

Indeed, it has been held that even though the by-laws expressly provide for the expulsion of a member without a trial such a provision is void, and an expulsion in pursuance of such a by-law is not binding. Ludowiski v. Benevolent Society, 29 Mo. App. 337; People ex rel. Schmitt v. Saint Franciscus Benevolent Society, 24 How. Prac. (N. Y.) 216, 221; Berkhout v. Supreme Council Royal Arcanum, 62 N. J. Law 103, 43 Atl. 1. And, surely, if a member is entitled of right to a notice of hearing and an opportunity to be heard in his own defense, a right of which he cannot be deprived, notwithstanding the fact that a by-law of the society provides for the expulsion of a member without trial, the same result cannot be accomplished by the simple device of temporarily suspending those sections of the by-laws which provide for a trial.

It has been held that, in the absence of by-laws covering the subject, a member is entitled to a fair trial after due notice, and that the procedure in such cases is to be analogous to ordinary judicial proceedings so far as necessary to render substantial justice. People v. Alpha Lodge, 13 Misc. Rep. 677, 35 N. Y. Supp. 214, 218; Wachtel v. Noah Widows' & Orphans' Ben. Soc., 84 N. Y. 28, 38 Am. Rep. 478; Simmons v. Syracuse, 56 Hun, 645, 10 N. Y. Supp. 293, 294; Fritz v. Muck, 62 How. Prac. 69, 74. In Von Arx v. San Francisco Gruetli Verein, 113 Cal. 377, 379, 45 Pac. 685, 686, this court said:

> "Where there are no * * * by-laws, a court will inquire whether or not an expelled member has had a reasonable notice of the proceeding which resulted in his expulsion, and a fair opportunity of presenting his defense in

accordance with general principles of law and justice."

Upon the suspension of the by-laws, the society in the instant case was temporarily in the situation of being without by-laws covering and controlling the action which they were about to take, and this situation being identical with those cases in which no by-laws had been provided is to be governed by the same rules.

The minutes of the society introduced in evidence show that the plaintiffs did not have a fair trial, or any trial at all. In the absence of such a trial and opportunity of being heard, the plaintiffs herein were not legally expelled.

[4] Even though it be conceded that the demurrer should have been sustained upon the ground of misjoinder of parties plaintiff in this: That no allegation appears in the complaint of any fact or facts showing or tending to show the slightest causal connection between the causes of action of any of the plaintiffs, nevertheless, the facts developed upon the trial of the case showed that all of the plaintiffs were, as one joint body, by one joint vote, as one joint act, expelled from the society. Upon the validity and binding effect of that one act, therefore, depends the right of each of the plaintiffs to the relief sought. The case was tried upon this theory, and this point put in issue by the evidence is determinative of the rights of all of the petitioners. It does not appear that the defendants were deceived by the claimed defect in the pleading, nor that they were thereby placed at a disadvantage in preparing and presenting their defense. It is clear that a right result was reached, and under the provisions of section 475 of the Code of Civil Procedure and the requirements of the provisions of section 4½ of article 6 of the Constitution, no miscarriage of justice having resulted, the error, if any, of the trial court in overruling the demurrer, cannot be availed of to secure a reversal of the judgment. Atlas Development Co. v. National Surety Co. (Cal. Sup.) 212 Pac. 196.

In Pleasant School Tp. v. Fultz (Ind. App.) 137 N. E. 60, the court, applying a statute similar in effect to the provisions of the above-cited sections of the Code and Constitution, held that "no objection taken by demurrer and overruled shall be sufficient to reverse the judgment if it appear from the whole record that the merits have been fairly tried and determined." And in Davis v. Hunter (Ind. App.) 138 N. E. 785, the same court held that wherever a complaint might have been amended, on motion in the trial court, so as to conform to the evidence admitted without objection, the court would on appeal deem the amendment to have been made.

[5] Before the plaintiffs were entitled to the relief prayed for, it was incumbent upon them to prove that they were, on the date of the filing of their petition, members in good standing in the society. On the trial it was stipulated by the opposing counsel that the petitioners were members in good standing on June 24, the date of the attempted expulsion, and that they had thereafter tendered their dues, which had been refused. This, in the absence of a contrary showing by defendants that they had forfeited their rights, was a sufficient showing that the plaintiffs had continued to be members in good standing, and were on the date of the filing of the petition entitled to a restoration of the privileges appertaining thereto. It was not necessary that petitioners should anticipate the defense of the defendants by alleging the insufficiency and illegality of the expulsion proceedings. Nuckolls v. College of Physicians, etc., 7 Cal. App. 233, 94 Pac. 81. The sufficiency and legality of the purported expulsion proceedings were matters of defense. The burden of the evidence showing that the plaintiffs had been legally expelled was upon the defendants. Section 1869, Code Civ. Proc.; Melone v. Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127. This defendants failed to do.

It follows from what has been said that plaintiffs are entitled to the writ of mandamus restoring them to their privileges in the society.

Judgment affirmed.

We concur: WILBUR, C. J.; SEAWELL, J.; MYERS, J.; WASTE, J.; LAWLOR, J.; KERRIGAN, J.

---

191 Cal. 195

BERKOVITZ v. AMERICAN RIVER GRAVEL CO. (Sac. 3206.)

(Supreme Court of California. May 19, 1923.)

1. Municipal corporations ⟹705(4)—Ordinary care excuses not having lighted tail lamp on motor vehicle.

While driving a motor vehicle at night with the red tail lamp unlighted, in violation of statute or ordinance, is presumptively negligence and conclusively so till rebutted, ignorance of the fact of it not being lighted, where ordinary care has been exercised to have it lighted, is a sufficient excuse.

2. Municipal corporations ⟹706(6)—Freedom from negligence in not having lighted tail lamp on motor truck question for jury.

Testimony of the driver of a motor truck with the rear of which an automobile collided, that three or four blocks back he looked and saw his red tail lamp was burning, if believed, would authorize the jury in concluding that he was not negligent, even if the light was out at the time of the collision.

3. Negligence 🔑56(1)—Proximate cause of injury sufficient.

To render one liable, his negligence need not be proved to be the "direct" cause of the injury, but it is enough that it was the "proximate" cause, which may be indirect.

4. Appeal and error 🔑882(12)—Error in instruction for plaintiff not mitigated by defendant's erroneous request.

That refusal of defendant's requested instruction—that unless defendant failed to use reasonable or ordinary care to keep the tail lamp of his motor truck lighted, and such failure directly and proximately caused the collision, plaintiff cannot recover—was justified by the word "directly," does not mitigate the error in giving plaintiff's instruction, stating, unconditionally, that defendant was negligent if its truck was being driven at night without such lamp being lighted.

5. Trial 🔑210(1)—Instruction as to calling adversary as witness not required by circumstances.

Where, after plaintiff had rested, it was stipulated that defendant might later call her for further cross-examination, and she was thereafter called "for further examination," and examined by defendant, it must be assumed, and the jury must have understood, that this further examination was conducted pursuant to the stipulation; so there was no error in refusing defendant's requested instruction embodying Code Civ. Proc. § 2055, as added by St. 1917, p. 58, as to calling and examining an adverse party and the effect thereof.

6. Appeal and error 🔑1033(5)—Favorable instruction may not be complained of.

Though the testimony showed only that plaintiff was employed during the fourth month preceding her injury, the amount she earned not appearing, and that she thereafter helped her mother with the housework for a time and then took a vacation, giving plaintiff's instruction, authorizing the jury in estimating the damages to consider the moneys which she would have earned had she not been injured, was not error; it being more favorable to defendant than an approved instruction, given under similar facts that one of the elements of plaintiff's damage was the value of her time during the period when she was disabled by the injury.

7. Trial 🔑228(1)—Good practice to adhere to approved instructions.

It is good practice to adhere to approved instructions.

8. Evidence 🔑514(2)—Distance required for stopping auto subject for expert testimony.

The distance within which a Dodge car going 20 miles an hour can be stopped is not a matter of such common knowledge as to preclude admission of expert testimony.

9. Evidence 🔑529—Whether injury to truck could have been caused by auto at certain speed subject for expert testimony.

Whether the injury to a moving truck by collision of Dodge car following it could have been caused by the car if traveling only 20 miles an hour is a subject for expert testimony.

10. Evidence 🔑380, 474(1)—Foundation for admission of photograph.

Testimony that a photograph is a correct representation of the object sought to be shown is sufficient foundation for its admission; and this need not be given by the photographer, but may be given by any one having sufficient knowledge of the object to say that the photograph is a faithful representation thereof.

In Bank.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Virginia Berkovitz against the American River Gravel Company. Judgment for plaintiff, and defendant appeals. Reversed.

Irving D. Gibson, of Sacramento, for appellant.

J. M. Inman and Downey & Downey, all of Sacramento, for respondent.

KERRIGAN, J. This case was ordered transferred to this court after decision by the District Court of Appeal of the Third Appellate District. Upon further consideration we are satisfied that the conclusion of that court is correct, and we adopt the following portions of its opinion, prepared by Mr. Presiding Justice Finch, as the opinion of this court:

"The plaintiff recovered judgment for damages alleged to have been sustained through the defendant's negligence. The only negligence alleged consisted in driving a motor truck on a public highway at night without a 'tail light or any light whatsoever on the rear of said truck.'

"At 2 o'clock a. m. September 3, 1919, plaintiff and another woman and two men were traveling westerly on J street, Sacramento, in a Dodge touring car, the plaintiff riding in the front seat with one of the men, who was driving. Near Thirty-Third street they crashed into the rear end of a five-ton Peerless truck loaded with gravel and traveling in the same direction. The man riding in the rear seat of the Dodge car was killed and the plaintiff was seriously injured. The automobile was wrecked beyond repair. The truck, with its load, weighed about 13 tons. The left rear wheel of the truck was struck with such force as to bend the 3x4 inch steel axle three inches out of alignment. The truck was traveling at a speed estimated by the witnesses at from 8 to 12 miles an hour; the Dodge car at from 20 to 40 miles an hour. In estimating the force of the impact, the velocity of the truck must be deducted from that of the automobile. Reasoning back from effect to cause, the damage to the two machines justifies the inference that the Dodge car was exceeding the lawful speed limit. The street was lighted by arc lights of 400 candle power spaced 269 feet apart. The headlights of the automobile were adjusted to comply with the state law.

"The evidence was sharply conflicting as to whether the tail light on the truck was burning at the time of the accident. It was a coaloil lamp of the type used for tail lights. Several witnesses who overtook and passed the truck a short time prior to the accident testified that the tail lamp was not lighted. Two witnesses testified that defendant's truck pulled their truck over Brigton crossing, a few miles from the scene of the accident, and that the tail light on defendant's truck was then burning. The driver of the truck testified that he got off at Fifty-Sixth street on J and observed that the tail light was burning and that he looked back three or four blocks from the scene of the accident and saw the reflection of the tail light on the street.

[1-3] "Defendant's proposed instruction No. 14, which was refused by the court, among other things, stated: 'Unless you believe from the evidence that defendant failed to use reasonable or ordinary care to keep said lamp [the tail light] lighted, and that said failure, if such you believe there was, directly and proximately caused or contributed to the collision; the plaintiff cannot recover. The court gave instruction No. 5, proposed by plaintiff, as follows: 'You are instructed that the law of this state required at the time of the collision every motor truck while on the public highway during the period from one-half hour after sunset of one day to one-half hour before sunrise of the next day to carry at the rear a lighted lamp exhibiting a red light. If you believe from all the evidence in this case that the motor truck belonging to the defendant was being driven by the agent of the defendant in the course of his employment during this period of time without such a lighted lamp, then the defendant was guilty of negligence, and if you believe that the plaintiff, Virginia Berkovitz, was, without fault on her part, injured by reason hereof, your verdict should be in favor of the plaintiff.' Instruction No. 5 is a correct statement of the law in most cases where the violation of a statute is charged. By the exercise of ordinary care, the driver of a motor vehicle at night would always know whether the headlights were burning and in such a case instruction No. 5 would be strictly accurate. The tail light, however, is not in the immediate view of the driver, whose attention is ordinarily directed ahead, and it cannot be the intention of the law that a watchman must be maintained over the rear light to observe whether it is constantly burning. It is well known that with the best of care coaloil lights, as well as electric lights, sometimes go out. If one drives a motor vehicle in the night time when he knows, or in the exercise of ordinary care ought to know, that the tail light is not burning, he is guilty of negligence. While ignorance of the law is no excuse, ignorance of the fact, where ordinary care has been exercised, is a sufficient excuse. Violation of an ordinance 'is presumptively an act of negligence and conclusively so until rebutted by evidence that it was justifiable or excusable under the circumstances.' Mora v. Favilla, 186 Cal. 199, 199 Pac. 17; Gooding v. Chutes Co., 155 Cal. 622, 102 Pac. 819, 23 L. R. A. (N. S.) 1071, 18 Ann. Cas. 671; Cragg v. Los Angeles Trust Co., 154 Cal. 667, 98 Pac. 1063, 16 Ann. Cas. 1061; Baddeley v. Shea, 114 Cal. 6, 45 Pac. 990, 33 L. R. A. 747, 55 Am. St. Rep. 56. 'The only question remaining open on this point is whether conclusive proof of the violation of such a statute or ordinance is also conclusive proof of negligence. Some courts have held that it is, and some that it is not. But the true rule is perfectly plain. The violation of such a law, left without explanation or excuse, is conclusive of negligence, but it may be excused. * * * If some good excuse appears which would be a sufficient defense to an action for the penalty imposed by the law * * * then the law is not really violated. * * * We find but few cases in which this is clearly stated; but they deserve to take precedence of all the others, as they reconcile the principle upon which the others were actually decided.' Shearman & Redfield on Neg. § 467. The defendant was entitled to an instruction embodying, as did this one, the substance of the rule as herein stated. If the jury believed the testimony of the driver to the effect that the tail light was burning three or four blocks east of the place of the accident, they might have concluded, under proper instructions, that he was not guilty of negligence even though the light was out when the collision occurred.'

[4] "It may be noted in passing that instruction No. 14, considered in the abstract, is erroneous in that it calls upon the plaintiff to prove that defendant's negligence was the *direct* cause of her injuries, whereas the law requires that it be the *proximate* cause, which may be indirect. Merrill v. L. A. C. & E. Co., 158 Cal. 499, 503, 111 Pac. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134; Schneider v. Chicago, Milwaukee & St. Paul Ry. Co., 99 Wis. 378, 75 N. W. 169. It may be conceded that the trial court was justified in refusing this instruction, but this does not mitigate the error in giving plaintiff's instruction No. 5.

[5] "The court refused defendant's proposed instruction No. 29, embodying the provisions of section 2055 of the Code of Civil Procedure, as added by St. 1917, p. 58. Counsel for appellant states in his brief that defendant called and examined plaintiff as a witness. He does not call attention to anything in the record to support such statement and nothing to that effect has been discovered. After plaintiff had rested, it was stipulated that the defendant might later call her for further cross-examination. She was thereafter called 'for further examination' and examined by counsel for defendant. It must be assumed, and the jury must have understood, that this further examination was conducted pursuant to the stipulation.

[6, 7] "Complaint is made of the court's refusal to give other instructions proposed by the defendant. It would unduly lengthen this opinion to analyze them all. It is sufficient to state that they either contain inaccurate statements of the law or are covered by other instructions given.

"The giving of plaintiff's instruction No. 19 is assigned as error in that it authorized the jury in estimating the damages to take into consideration 'the moneys which she would have earned had she not sustained the injuries complained of, if any.' The testimony shows that the plaintiff was employed during the month of May preceding the accident, the amount she earned not appearing, and that she thereafter helped her mother with the housework for a time and then took a vacation. Under a somewhat similar state of facts, an instruction was approved which told the jury that one of the elements of the plaintiff's damage was 'the value of his time during the period when he was disabled by the injury.' Storrs v. Los Angeles Traction Co., 134 Cal. 91, 92, 66 Pac. 72; Melone v. Sierra Railway Co., 151 Cal. 113, 115, 91 Pac. 522. The difference between the two instructions is rather shadowy, but the one here complained of seems more favorable to the defendant than the other. However, it is good practice to adhere to approved instructions.

"The court sustained objections to questions asked by defendant for the purpose of proving that the plaintiff was married and for that reason could not maintain the action as to certain elements of damage claimed. It is sufficient to say that the answer raised no issue to which such evidence was pertinent.

[8] "Objection was improperly sustained to a question asked an expert witness as to the distance which a Dodge car going 20 miles an hour can be stopped. The fact sought to be shown is not a matter of such common knowledge as to preclude the admission of expert testimony. The objection sustained was as follows: 'Objected to as not a subject of expert testimony. Irrelevant, immaterial, and incompetent. For the jury.' The question was not objectionable on the grounds stated. Howland v. Oakland C. Ry. Co., 110 Cal. 513, 521, 42 Pac. 983; Withey v. Fowler Co., 164 Iowa, 377, 145 N. W. 923; Johnson v. Quinn, 130 Minn. 134, 153 N. W. 267; Blado v. Draper, 89 Neb. 787, 132 N. W. 410; Reaves v. Maybank, 193 Ala. 614, 69 South. 137; Bishop v. Wight, 221 Fed. 392, 137 C. C. A. 200.

[9] "The court erroneously sustained a similar objection to expert testimony as to whether the damage to the truck as shown by the evidence could have been caused by the Dodge car traveling at a speed of 20 miles an hour. Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 715, 103 Pac. 190; Yaeger v. Southern California Ry. Co., 5 Cal. Unrep. 870, 51 Pac. 190; Dow v. City of Oroville, 22 Cal. App. 215, 226, 134 Pac. 197; People v. Sampo, 17 Cal. App. 135, 149, 118 Pac. 957; Young v. Dunlap, 195 Mo. App. 119, 190 S. W. 1041, 1044; Posener v. Harvey (Tex. Civ. App.) 125 S. W. 356.

[10] "Some controversy arose as to the proper foundation for the admission of photographs of the wrecked automobile in evidence. The rule is quite simple. Testimony that a photograph is a correct representation of the object sought to be shown is a sufficient foundation for its admission. Such testimony need not necessarily be given by the photographer who took or finished the photograph, but may be given by any witness having sufficient knowledge of the object to say that the photograph is a faithful representation thereof. People v. Ah Lee, 164 Cal. 350, 352, 128 Pac. 1035; People v. Durrant, 116 Cal. 179, 212, 48 Pac. 75.

"Numerous other objections are made to the rulings of the court, but they do not appear to be of substantial merit. In view of the contentions made as to the sufficiency of the pleadings in certain particulars, the trial court is directed to permit either party to amend if so advised."

The judgment is reversed.

We concur: WILBUR, C. J.; LENNON, J.; MYERS, J.; SEAWELL, J.; LAWLOR, J.; WASTE, J.

---

191 Cal. 152

McBRIDE et al. v. FREEMAN et ux.

(L. A. 7052.)

(Supreme Court of California. May 15, 1923.)

1. Covenants 🔑79(3)—Purchaser of lot in restricted tract cannot enforce restriction against other grantees.

One buying property with the understanding that it is restricted, and in reliance on existence of a general plan of improvement for the whole tract, does not have a right to enforce the restriction against another grantee who takes with full knowledge and notice of the restriction; the covenants being a part of each and every deed to lots in the tract, and the deed showing that a uniform plan must have been in existence.

2. Deeds 🔑145—To avoid forfeitures conditions construed as covenants.

In the construction of a conveyance, ordinarily, to avoid forfeiture, conditions will be construed as covenants when this can reasonably be done.

3. Injunction 🔑118(2)—Complaint to enjoin violation of building restriction lacked averment that restrictions were intended for benefit of entire tract.

In action to enjoin construction of a building not permitted under restriction in a deed, where complaint lacked averment that the restrictions were intended by both parties thereto to be for benefit of all the lots in the tract, or that defendants purchased their lots with knowledge of such intention or agreement, it stated no cause of action.

4. Injunction 🔑123—Complaint tendered no issue to which offered parol evidence of intention to parties relevant.

In action to enjoin construction of a building not permitted under restriction in a deed, where the complaint contained no allegation as to intention of grantees in the deeds, it tendered no issue to which parol evidence to establish intention of the parties was relevant.

5. Covenants 🔑49—Restricted rights in real property created only by written instrument between parties.

Where parties desire to create mutual rights in real property in respect to building construction, the rights must be declared within the written instruments exchanged between them.

In Bank.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action for injunction by A. N. McBride and another against H. Freeman and wife. Judgment for defendants, and plaintiffs appeal. Affirmed.

Charles E. Millikan and Lloyd Wright, both of Los Angeles, for appellants.

C. E. Spencer and W. A. Freeman, both of Los Angeles, for respondents.

MYERS, J. Plaintiffs appeal from a judgment in favor of defendants in a suit to enjoin defendants from proceeding with the erection of a building in violation of a uniform building restriction. The sole question presented upon the appeal is whether the complaint states facts sufficient to constitute a cause of action. It is alleged in the complaint:

That one Allen, who was the owner of a large parcel of land, caused a map thereof to be recorded, subdividing the same into a large number of lots, and then proceeded to sell and convey said lots by reference to said map to various persons, including the predecessors in interest of plaintiffs and defendants, "and in accordance wtih a general plan or scheme for the improvement of said tract the said owner inserted in each and every deed conveying said lots, or any of them, restrictions and conditions in words and figures as follows: 'Subject to following building restrictions: No offices, stores, flats, lodging or apartment or any business building of any description to be erected, kept or maintained on said property, but a residence, same when erected to cost not less than three thousand ($3,000.00) dollars on lots 48, 49, 50, 51, 52, 53 and south 30 feet of lot 47; to cost not less than thirty-five hundred ($3,500.00) dollars on lot 44 and north 15 feet of lot 43; to cost not less than four thousand ($4,000.00) dollars on north 90 feet of lot 47; and all to be placed at a uniform distance of forty-two and one-half feet from front property line on Willard Ave.' That all of the lots in said tract have been sold or are being offered for sale in accordance with said general plan or scheme, and subject to said restrictions and conditions, and that said restrictions were imposed and said general plan or scheme adopted for the general benefit of all lots in said tract, and that the respective lots owned by plaintiffs, and each of them, and the lot now owned by defendants, and the other lots in said tract sold and conveyed as aforesaid, were each and all conveyed by a common grantor, to wit, the said E. L. Allen, and subject to the restrictions and conditions aforesaid and pursuant to and in accordance with the aforesaid general plan or scheme for the improvement of said tract and the several groups of lots shown on said map." That by mesne conveyances, each containing the same restrictions, plaintiffs received title to their respective lots and defendants received title to their lot. That the plaintiffs or their predecessors in interest purchased their respective lots in reliance upon said general plan or scheme and upon said restrictions and conditions, and that each of the plaintiffs has erected upon his lot a residence in compliance with said restrictions, and that defendants are now proceeding with the erection of a building on their said lot which is in violation of said restrictions.

[1] The question thus presented is stated by appellants as follows:

> "Does one grantee who buys his property with the understanding that it is restricted, and in reliance upon the existence of a general plan of improvement for the whole tract of which his lot forms a part, have a right in equity to enforce the restriction against another grantee who takes with full knowledge and notice of the restriction, the covenants being a part of each and every deed to lots in the tract and the deeds showing that a uniform plan must have been in existence?"

This precise question was answered adversely to appellants' contentions in the case of Werner v. Graham, 181 Cal. 174, 183 Pac. 945. Appellants contend that what was there said upon this subject was dictum, for the reason that the restrictions there under consideration were cast in the form of a condition, and that what was there decided should be held inapplicable to restrictions, as in the instant case, which are cast in the form of covenants. This contention cannot be sustained. Viewing the restrictions under consideration in the Werner Case as conditions, no substantial question was presented by that appeal. The court disposed of that question in the following words:

> "If the provisions are in fact conditions and not covenants, the defendants are not entitled to enforce them against the plaintiff, for the reversion clause runs in favor of Marshall [the common grantor], his heirs and assigns, and does not include the defendants, since by 'assigns' must be meant in this state assignees of the reversion or right of re-entry."

[2] It is well settled that—

> "In the construction of a conveyance, ordinarily, to avoid forfeiture, conditions will be construed as covenants, when this can reasonably be done." 9 Cal. Juris, p. 336, and cases cited.

In recognition of this rule the court then proceeded to consider and decide that case upon the assumption that the restrictions therein, though in form of conditions, were, in fact, covenants, and what was there decided, in that view of the case, can in no sense be regarded as dictum.

Appellants suggest, in effect, that Werner v. Graham should be overruled, and assert that it is contrary to the great weight of authority from other states. The latter may be conceded, but presents in itself no sufficient reason for a departure at this time from the rules there enunciated. After a careful reconsideration of the questions there involved, we are satisfied with the validity of the conclusions there stated, and with the soundness of the reasoning by which they were reached. The rules there enunciated are rules of property, and have stood unchallenged and unquestioned for more than three years. That case has since been cited as authority by this court in Los Angeles, etc., Co. v. Marr, 187 Cal. 126, 200 Pac. 1051, and Mapel v. Canady (Cal. Sup.) 208 Pac. 280, and the conclusions there reached were clearly forecasted by previous decisions of this court over a long period of years. In Los Angeles, etc., Co. v. Muir (1902) 136 Cal. 36, 50, 68 Pac. 308, 313, the court said:

> "In the absence of any words in the deed to this effect, or any reference to a plan showing a general scheme of improvement, the grantees took their estate without any notice, express or constructive, that the restriction was intended for the benefit of the adjoining estate"—citing cases.

In Hunt v. Jones, 149 Cal. 297, 86 Pac. 686, (1906), the court recognized the rule that, where a proper case is presented, equity will enforce a personal covenant or agreement relative to land as effectually as would a court of law had the covenant been one clearly running with the land, and the covenant in that case, having been made expressly for the benefit of plaintiff's land, was held enforceable in equity as against an assignee of the covenantor who took with notice thereof. Bryan v. Grosse, 155 Cal. 132, 99 Pac. 499, is to the same effect. In Long v. Cramer Meat & Packing Co. (1909) 155 Cal. 402, 101 Pac. 297, the court, in an equity case, refused to enforce such a covenant, which rested in parol, saying:

> "While it is true that, in a proper case, equity will enforce against the covenantor's grantee a personal covenant imposing restrictions upon the use of land contained in the grant thereof [citing cases], yet equity will do so only in a proper case, and would certainly withhold its hand where such a restriction *is not imposed by grant, but is sought to be created by parol.* The same is true of the *attempt to erect out of this agreement some servitude.*"

In Berryman v. Hotel Savoy (1911) 160 Cal. 559, 117 Pac. 677, 37 L. R. A. (N. S.) 5, the court said:

> "The intention of the parties should be 'determined by *a fair interpretation of the grant* or reserve creating the easement.' [Citing cases.] 'It seems to us that in all these cases it is better to get at the intention of the grantor from the *language of the deed,* interpreted in the light of the attending circumstances, than to conjecture the intent from the circumstances, and then to make the language of the deed bend to that.'"

Alderson v. Cutting (1912) 163 Cal. 503, 126 Pac. 157, Ann. Cas. 1914A, 1, involved a case of uniform building restrictions wherein "each of said deeds declared that the conditions stated should, as to each owner of any other lot in the tract, his heirs, successors or assigns, operate as covenants running with the land *for the benefit of such other lots or their owners.*" These restrictions were held enforceable by one grantee as against another.

In Bresee v. Dunn (1918) 178 Cal. 96, 172 Pac. 387, the court said:

> "Undoubtedly, covenants imposing building restrictions have been frequently upheld, but the courts are slow to declare such burdens upon real property to exist unless *it clearly appears from the deeds* of conveyance not only that a general scheme of improvement is contemplated, but also if a grantee of the original covenantee seeks to enforce a restriction, that it is not a mere personal covenant, but *passes with the land.* * * * There is nothing in either of the quotations from conveyances set forth in plaintiff's pleading and nothing in the averments of the complaint to take the pleaded restrictions out of the category of purely personal covenants made for the original grantor's benefit." (The italics are added in the foregoing quotations.)

It is true that language may be found in the opinion in each of those cases which, taken by itself, would seem to point to a different conclusion, but the excerpts above quoted are in harmony with the points there actually decided. It is also true that each of those cases is distinguishable from the Werner Case on the ground of a difference in the facts. But a careful consideration of the points decided and of the reasons stated therefor will reveal the fact that the decision of the Werner Case followed them as the natural sequence and logical development of a line of decision extending over a period of more than 17 years. In the Werner Case the court said:

> "There are decisions to the effect that when it appears that the owner of a subdivided tract has sold various lots in it from time to time and in each conveyance has exacted restrictive covenants which, it is evident, when all the deeds are considered together, were exacted in accord with a common plan, it is enough, and that mutual equitable servitudes have been created, although in any single deed taken by itself there is nothing to indicate any intent to create such reciprocal rights. [Citing cases.] There is likewise authority to the contrary. Mulligan v. Jordan, 50 N. J. Eq. 363, 24 Atl. 543; Roberts v. Scull, 53 N. J. Eq. 396, 43 Atl. 583; Sharp v. Ropes, 110 Mass. 381; Judd v. Robinson, 41 Colo. 222, 124 Am. St. Rep. 128, 14 Ann. Cas. 1018, 92 Pac. 724."

Appellants assert herein that the cases there cited were misconstrued by this court, and that they do not at all sustain the rule for which they were cited. This assertion is not warranted. Mulligan v. Jordan, 50 N. J.

Eq. 363, 24 Atl. 543, and Roberts v. Scull, 58 N. J. Eq. 396, 43 Atl. 583, both expressly hold that the mere fact that the common grantor had exacted the same restrictions in the deeds to all of the lots in the tract is not sufficient evidence that the covenant was entered into for the benefit of all those lots. Sharp v. Ropes, 110 Mass. 381, holds, in effect, that the exaction of such uniform restrictions, coupled with the further circumstance that the restrictions in terms prohibited the carrying on of any "trade or manufacture injurious or offensive to dwelling houses or their occupants in the neighborhood," would not be sufficient to justify the conclusion that the restrictions were for the benefit of all the lots. Judd v. Robinson, 41 Colo. 222, 92 Pac. 724, 124 Am. St. Rep. 128, 14 Ann. Cas. 1018, is so much in point that if it had been a decision of this court it would have compelled the ruling which was made by the trial court in the case at bar.

Appellants apparently lose sight of the fact that their right to relief herein must rest upon the foundation of a contract between the original grantor and defendants' predecessor in interest, whereby it was agreed that the restrictions should be for the benefit of all the lots in the tract, not merely for the benefit of the grantor, and upon the further foundation that defendants purchased their lot with knowledge or notice of such agreement. As Lord Cottenham said in Tulk v. Moxhay, 2 Phil. Ch. 774:

> "The question is not whether the covenants run with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the *contract entered into by his vendor and with notice of which he purchased.*" (Italics added.)

And, as was said in Nottingham Patent Brick, etc., Co. v. Butler, 15 Q. B. Div. 261:

> "Where the same vendor selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold, without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are *meant by him and understood by the buyers* to be for the common advantage of the several purchasers." (Italics added.)

It takes two to make a contract. There must be a meeting of the minds of both parties thereto. The mere fact that the vendor in the exaction of uniform building restrictions had in his own mind a general plan or scheme of improvement falls short of establishing even his own intention that such restrictions shall be for the benefit of any one other than himself, and much less does it establish such a meeting of minds between him and his grantee as is necessary to create a contract. Given such intention in the mind of the grantor, there must have co-existed a like intention in the mind of his grantee before the first element of plaintiff's cause of action can come into existence. A purchaser, realizing that changed conditions in the future might render a release of the restrictions most desirable, might be willing to purchase subject to restrictions for the benefit of a single vendor, while he would be wholly unwilling to purchase subject to the same restrictions in favor of 50 or 500 other lot owners, any one of whom could prevent the release thereof in the future. He might be willing to take the chance of being able to negotiate with his vendor for a release of the restrictions at a later date, but would realize that such a prospect would be hopeless if there should be a large number of separate lot owners each entitled to insist upon the maintenance of the restrictions.

[3] It is not necessary to invoke the rule of the Werner Case herein in order to sustain the judgment appealed from, because the complaint is wholly lacking in any averment that the restrictions were intended by both parties thereto to be for the benefit of all the lots in the tract, and is wholly lacking in any allegation that the defendants purchased their lot with knowledge or notice of any such intention or agreement.

The case of De Gray v. Monmouth Beach Club House Co., 50 N. J. Eq. 329, 24 Atl. 388, chiefly relied upon by appellants makes it clear that—

> "The right of the owner of a lot to enforce a covenant restrictive of the use of another tract, entered into between former owners, depends primarily on the covenant having been made for the benefit of the land embracing said lot."

That case is at variance with the Werner Case in that it holds impliedly that parol evidence may be resorted to for the purpose of ascertaining the intention above referred to. But the principal ground of decision in that case appears to have been that such intention clearly appeared from the language of the deed itself there under consideration, when read in the light of the circumstances surrounding its execution. The restrictions embodied in all the deeds therein forbade the use of the property conveyed for any "uses or purposes that shall depreciate the value of the neighboring property for dwelling houses." The court said:

> "The phraseology of the covenant indicates it is for the benefit of neighboring property. There can be no doubt that each purchaser from the trustees was aware of the plan, and bought with the understanding that all the deeds were to contain the covenant, and bought with that consideration in view."

It also appeared that the title to the entire tract was vested in trustees, who held the same for the purpose of selling and making conveyances of *all* the lots in the tract, and in this connection the court said:

> "The trustees had no other interest in the title than as holding it for sale. The case does not admit of the idea that the covenant was only for the advantage or benefit of the grantors, or that it was other than for the benefit of all the lands and each purchaser. These considerations make the right of the complainant to maintain this action clear."

[4, 5] Appellants' contention that they should have been permitted to introduce parol evidence to establish the intention of the parties may be sufficiently answered by pointing out that they were not entitled to introduce *any* evidence thereof because their complaint contained no allegation as to the intention of the grantees in said deeds, and therefore tendered no issue to which such evidence would be relevant. But, aside from this consideration, we are satisfied that it is our duty to adhere to the conclusion expressed in the Werner Case:

> "That if the parties desire to create mutual rights in real property of the character of those claimed here they must say so, and must say it in the only place where it can be given legal effect, namely, in the written instruments exchanged between them which constitute the final expression of their understanding."

Any other rule would make important questions of the title to real estate largely dependent upon the uncertain recollection and testimony of interested witnesses. The rule of the Werner Case is supported by every consideration of sound public policy which has led to the enactment and enforcement of statutes of frauds in every English-speaking commonwealth.

The judgment is affirmed.

We concur: WILBUR, C. J.; LAWLOR, J.; LENNON, J.; WASTE, J.; KERRIGAN, J.; SEAWELL, J.

(191 Cal. 139)

FLYNN et al. v. CHIAPPARI et al.

(S. F. 9762.)

(Supreme Court of California. May 12, 1923.)

1. Municipal corporations ⚷495—Discretion of authorities in method of assessments not reviewed in absence of fraud or mistake.

Where the matter of selecting the method of assessment of benefits from street improvements has been committed to municipal authorities, the exercise of their discretion therein will not be reviewed by the courts in absence of fraud or mistake.

2. Municipal corporations ⚷413(1) — Improvement of avenue held within ordinance providing for improvement of "main streets."

Where a street improvement ordinance defined a "main street" as being a street that bounds a block, and a "block" as "the blocks known or described as such upon maps and books of the assessors," and there was no requirement that a block should be rectangular in shape, and the only kinds of streets defined therein were main streets, an avenue for which benefits were assessed was a "main street," notwithstanding that the blocks on which it abutted were irregular in shape.

3. Municipal corporations ⚷456(1)—Location of defendant's property not fronting on street held to present situation requiring a method of assessment other than prescribed in ordinance.

Where an ordinance of San Francisco, adopted in 1913, authorizing street improvements, provided certain methods of making assessment to pay expenses thereof, but, if none of the methods provided were sufficient, the board might establish by resolution a method for such assessment, and where property practically fronted on a street, but in fact it neither fronted nor cornered on it, on account of a portion of another street intervening between the first street and the property line, and such property could not be assessed under any prescribed plan of the ordinance, it presented a situation under the ordinance for the board's establishing a method by means of which assessment could be made.

4. Constitutional law ⚷290(3)—Notice to property owners not required when Legislature determines benefits to property by improvements.

Where the Legislature determines the amount of benefits and property to be benefited, by describing the property to be charged or by establishing a rule which automatically determines the property to be charged when applied to the physical facts, notice to property owners is not required to satisfy due process.

5. Constitutional law ⚷290(3)—Due process requires notice to property owners where administrative board determines property to be charged and fixes benefits.

Where the determination of the property to be charged with assessments for street improvements and the benefits to accrue thereto is committed to an administrative board, due process requires that property owners affected thereby shall be given adequate notice and opportunity to be heard.

6. Constitutional law ⚷290(3) — Notice of assessment of benefit by board of public works held insufficient as due process.

Where a board of public works of a city adopted a resolution describing property to be charged for street improvement, but its ordinance of intention, which was published and posted, failed to describe any property to be charged and contained no hint that property would be charged other than that chargeable under the front foot rule, such notice was insufficient as due process as affecting property which did not front on the improvement.

7. Municipal corporations 🔑486(3)—Rule of notice to property holders of benefits assessed where none prescribed by Legislature stated.

In the absence of any rule established by legislative authority, whereby property to be charged can be ascertained, a notice to property holders must, if not directly, at least by adequate reference, describe the property to be charged, in order that owners affected thereby may have opportunity to be heard.

8. Constitutional law 🔑290(3)—Right of appeal from assessments held not to cure omission of notice necessary to satisfy due process.

Where the notice of assessment of benefits for street improvements was insufficient to satisfy due process, the fact that the ordinance provided for taking of appeals by the owners affected and for hearing thereon could not operate to cure such omission.

9. Appeal and error 🔑171(1)—Trial theory that method of assessment was not under front-foot rule conclusive on appeal.

In an action to foreclose liens for street work under a street improvement ordinance, where plaintiffs alleged that the front-foot method was insufficient to authorize the board of public works to make an assessment and that it proceeded to make assessment in another manner, plaintiffs are concluded thereby on appeal.

10. Municipal corporations 🔑469(3)—"Fronting on street," as used in assessment ordinance, held to refer to boundary line between street and a lot.

In suit to foreclose liens for street work under a street improvement ordinance, in view of the ordinance's reference to lots "fronting on a street," "fronting on the improvement," having reference to the boundary line between street and lot, and not to the boundary line of the lot which is in the center of the street, an assessment of benefits under the front-foot rule was not contemplated where there was part of another street between defendant's lot line and the street line of the street improved.

11. Municipal corporations 🔑469(1)—Lot not fronting on street not assessable under front-foot rule.

A lot which does not front on a street is not assessable for improvements of such street under the front-foot rule.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

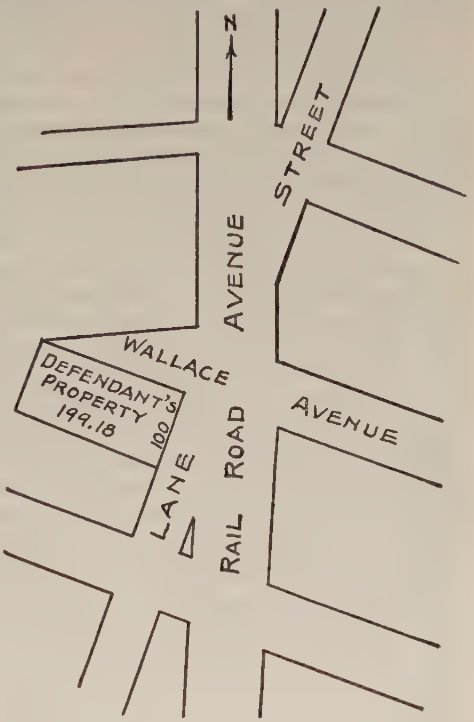
Action by James J. Flynn and another against Giovanni Chiappari and another. Judgment for plaintiffs, and defendants appeal. Reversed.

P. A. Bergerot and A. P. Dessouslavy, both of San Francisco, for appellants.

Fabius T. Finch and Paul F. Fratessa, both of San Francisco, for respondents.

John B. Gartland, of San Francisco, amicus curiæ.

MYERS, J. The defendants appeal from a judgment in favor of plaintiffs foreclosing certain liens for street work under the street improvement ordinance of San Francisco adopted in 1913. The following rough description of the physical situation, while not strictly accurate, will suffice to illustrate the questions raised herein: Lane street, running northeast and southwest, is intersected at right angles by Wallace avenue, running southeast and northwest. These two, in turn, are crossed by Railroad avenue, running north and south. The last-named street overlaps, in part, the intersection of the two first named, but does not precisely coincide therewith; its center line being perhaps 20 feet east of the center of said intersection. Appellants' property is within the quarter block bounded on its southeasterly side by Lane street and on its northeasterly side by Wallace avenue, and fronts upon those two streets. The work for which appellants' property is assessed is in the westerly half of Railroad avenue. Of this work about one-third is within the intersection of Lane street and Wallace avenue, as well as within the lines of Railroad avenue. One-third is within the intersection of Lane street and Railroad avenue, but without the lines of Wallace avenue, and one-third within the lines of Railroad avenue, but not within the lines of either of the other two streets.



The San Francisco street improvement ordinance has been under consideration of the courts in the cases of Bienfield v. Van Ness, 176 Cal. 585, 169 Pac. 225; McGinn v. Van Ness, 40 Cal. App. 600, 181 Pac. 70, 183 Pac. 950; Federal Const. Co. v. Wolfson, 186 Cal. 267, 199 Pac. 512; Federal Const. Co. v. Newhouse, 186 Cal. 284, 199 Pac. 519; City St. Imp. Co. v. Pearson, 181 Cal. 640, 185 Pac. 962, 20 A. L. R. 1317, and Flinn v. Shafter Realty Co. (Cal. Sup.) 212 Pac. 194, and a résumé of its provisions is to be found in the Pearson Case, supra. It is similar in most of its provisions to the Improvement Act of 1911 (Stats. 1911, p. 730). In proceeding under it the board of public works first declares the expediency of the proposed improvement, wherein it directs the preparation of plans and specifications, after which it passes a resolution of its intention to recommend to the supervisors that the improvements be made, in which resolution a day is fixed for the board's action thereon. A copy of said resolution is required to be published in the official newspaper, to be posted in the board's office, and notices of the proposed improvement, which refer to the resolution of intention for further particulars, are required to be posted along the line of the contemplated improvement, and, if the improvement is to be made upon a crossing or intersection or any part thereof, one at least in front of each quarter block or irregular block liable to be assessed for such improvement, and in the case of the proposed formation of a district, along all the streets within such district. If upon such notice and after a hearing the board so determines, it shall pass a resolution recommending to the supervisors that they order such improvement to be made. When the contemplated improvement in the opinion of the board of public works is of more than local or ordinary public benefit, the expense of the improvement may be made chargeable upon a district and the board shall set out such district in its resolution of intention. Provision is made for an appeal from such resolution, but where there is no appeal, or where the supervisors do not sustain it, the supervisors order the work to be done, whereupon the board of public works invites sealed proposals for the improvement, awards the contract therefor, and upon its completion makes the assessment. Section 17 of the ordinance provides that, except where the expense is to be assessed upon a district, it "shall be assessed upon the lots and lands fronting thereon, except as hereinafter specifically provided; each lot or portion of a lot being separately assessed in proportion to the frontage, at a rate per front foot sufficient to cover the total expense of the work." It provides that—

> "The expense of the work done on main street crossings shall be assessed at a uniform rate per front foot on the quarter blocks and irregular blocks adjoining and cornering upon the crossings."

This is followed by various provisions for allotting the expense in specific cases of intersections of subdivision streets, alleys, terminations, etc., provisions for the allowance of credits where work has already been done by the property owners, and provisions for the levying of the assessment "when the resolution of intention declares that the expense of the work and improvement is to be assessed upon a district" and these are followed by section 18, which provides as follows:

> "If at any time there shall be any street work or improvement done, and none of the methods herein provided are sufficient to authorize the board of public works to make an assessment to pay for the expenses thereof, then said board shall, before it passes a resolution of its intention to recommend the ordering of said work or improvement, establish by resolution a method by means of which such assessment shall be made; and on the completion of the work or improvement to the satisfaction of said board, or to the satisfaction of the supervisors on appeal, said board shall make an assessment, to pay the expense thereof according to the method established by said resolution."

It is alleged in the complaint and found by the court that none of the methods provided in said ordinance was or is sufficient to authorize the board of public works to make an assessment to pay for the expense of said work, and that it, therefore, before adoption of its resolution of intention, duly adopted a resolution by which it established a method by which such assessment should be made, and that upon the completion of the work it made an assessment in accordance with the method thus established by it.

[1] It appears from the evidence that Railroad avenue is an important thoroughfare, serving a considerable district of the city. Appellants contend that the improvement was therefore "of more than local or ordinary public benefit," and that the board should accordingly have proceeded under the district method of assessment. This is not a ground upon which courts are justified in holding an assessment void. The matter of selecting the method of assessment has been committed to the municipal authorities, and the exercise of their discretion therein should not and will not be reviewed by the courts, in the absence of fraud or mistake. Hadley v. Dague, 130 Cal. 207, 62 Pac. 500; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; French v. Barber Asphalt Pav. Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; Larsen v. San Francisco, 182 Cal. 1, 14, 186 Pac. 757.

[2] Appellants also assert that Railroad avenue is not a main street, as defined in the ordinance, because of the circumstance that it extends diagonally through rectangular blocks which had already been platted and laid out. The ordinance defines a "main street" as being a street that bounds a block, and a "block" as "the blocks known or designated as such, upon the maps and books of the assessor." There is no definition or re-

quirement in the ordinance, nor elsewhere so far as we are advised requiring that a block shall be rectangular in shape. The complaint alleged and the court found it to be a main street. The only kinds of streets mentioned in the ordinance are main streets, alleys, subdivision streets, avenues, lanes, places, and courts, and main streets are the only ones defined therein. We are of the opinion that Railroad avenue must be held to be a main street, notwithstanding the circumstance that the blocks which it assists in bounding are irregular in shape.

[3] In City Imp. Co. v. Pearson, supra, referring to section 18, it was said:

> "It is difficult to give this section any meaning unless it was intended to require the board of works to look into the matter at the beginning and provide for installments if it found that the assessment was likely to exceed one-half of the tax valuation on the properties."

In the light of the facts disclosed in the instant case and the practical application made of this section by the board of public works herein, it is now apparent that the section was probably designed to meet such a situation as here obtains. Appellants' property herein, to all practical intents and purposes, fronts and corners upon Railroad avenue, and therefore benefits especially from the improvement thereof. But in fact and in law it neither fronts nor corners upon Railroad avenue because of the fact that the easterly line of plaintiffs' property is distant from 18 to 40 feet westerly from the westerly line of Railroad avenue, and a portion of Lane street intervenes between the westerly line of Railroad avenue and the easterly line of appellants' property. Therefore, under the front-foot plan of assessment appellants could not be made to pay any portion of the cost because their property does not front upon the improvement, and the quarter block in which it is contained is neither adjoining nor cornering upon the crossing. Under these circumstances, if the board should determine, as it evidently did here, that the improvement was not of more than local benefit or importance, and therefore did not justify the creation of an assessment district, there was no method available by which appellants' property could be made to bear its proper portion of the cost except by proceeding under some method devised pursuant to the authorization contained in section 18.

[4] Appellants contend that if it be determined that the provisions of section 18 were properly applicable to the situation here obtaining, the proceedings herein were nevertheless void because of the absence of notice to the property owners sought to be charged sufficient to confer jurisdiction and to satisfy the requirements of due process. This contention must be sustained. Such notice is not required where the Legislature itself determines the amount of the benefits and the property to be benefited, either by describing the property to be charged (Miller & Lux v. Drainage Dist., 182 Cal. 252, 265, 187 Pac. 1041), or by establishing a rule or criterion which will automatically determine the property to be charged when applied to the physical facts, such as the "front-foot" rule (Hadley v. Dague, supra, 130 Cal. p. 217 et seq., 62 Pac. 500; French v. Barber Asphalt Pav. Co., supra; Louisville v. Barber Asphalt Pav. Co., 197 U. S. 430, 25 Sup. Ct. 466, 49 L. Ed. 819). The reason for this is that the property owners are conclusively presumed to have been heard through their representatives in the Legislature. Tarpey v. McClure (Cal. Sup.) 213 Pac. 983. It is also true that for the purposes of the instant case the board of supervisors is the Legislature. Larsen v. San Francisco, supra. But the supervisors in this case did not determine either the property to be charged or the benefits to be charged against it, nor did they fix any rules by which these were to be determined. These were determined by the board of public works, and never even reported to the supervisors.

[5, 6] Where, as here, the determination of the property to be charged and the benefits to accrue thereto is committed to an administrative board, due process requires that the property owners affected thereby shall be given adequate notice and an opportunity to be heard upon both these questions. Brookes v. City of Oakland, 160 Cal. 423, 117 Pac. 433; People v. Van Nuys Lighting Dist., 173 Cal. 792, 162 Pac. 97, Ann. Cas. 1918D, 255. No such notice was given in this case. The board of public works adopted a resolution describing the property to be charged which was spread upon its own records, and a map showing the location thereof which remained in its own files. Its resolution of intention, which was posted in its office and published, not only failed to describe any property to be charged, but it contained no hint or suggestion that any property would be charged other than that chargeable under the front-foot rule. Notices were posted along the line of the improvement and in front of the quarter blocks in which appellants' property is situate. But they merely contained a brief description of the proposed improvement and a reference to the resolution of intention for further particulars. If appellants, seeing those notices, had been led thereby to examine the resolution of intention, they would have found therein a description of the proposed improvement, but no reference to any property to be charged therefor. They would thus naturally conclude that the assessment was to be made by the front-foot method, and knowing that their property did not front upon the improvement, or upon a quarter block cornering thereon, they would rest assured that it was not to be charged.

[7] In the absence of any predetermined rule established by legislative authority (such as the front-foot rule), whereby the property

to be charged can be ascertained, the notice must, if not directly, at least by adequate reference, describe the property to be charged, in order that the property owners affected thereby may be accorded a real opportunity to be heard. Anaheim Sugar Co. v. County of Orange, 181 Cal. 212, 183 Pac. 809; People v. Lake Co. Water Dist., 183 Cal. 137, 190 Pac. 630. The mere fact that the records and files of the board of public works contained such description, and that they were open to inspection by the public, in no way cures this omission. Anaheim Sugar Co. v. County of Orange, supra, 181 Cal. 224, 183 Pac. 809.

[8] There are various provisions in the ordinance for the taking of appeals by property owners affected and for hearings thereon. But, manifestly, an opportunity to appeal is of no value to a property owner who, because of insufficient notice, has never had an adequate opportunity for a hearing in the first instance. The curative provisions in the ordinance do not and cannot operate to cure the omission of such notice as was necessary to satisfy the requirements of due process. Imperial Land Co. v. Imperial Irr. Dist., 173 Cal. 660, 161 Pac. 113.

[9-11] In the effort to meet this objection, respondents now contend, upon this appeal, that this was in reality a front-foot assessment; that appellants' property both fronts and corners upon the improvement, under the principle of law that the title of the lot owner extends to the center of the street. Respondents alleged in their complaint and the court found, in effect, that the front-foot method was insufficient to authorize the board of public works to make an assessment, and that it therefore proceeded under section 18, and they are concluded thereby upon this appeal. But aside from this, it is perfectly clear that the procedural ordinance in its numerous references to lots "fronting on a street," "fronting on the improvement," "blocks adjoining and cornering upon the crossings," etc., has reference to the boundary line between the street and the lot, and not to the boundary line of the lot which is in the center of the street. In the latter view, there is no such thing as a lot fronting upon a street. It would front upon an adjoining lot in the middle of the street. Moreover, the trial court found, in response to allegations of the answer, that appellants' lands do not "front, abut upon, adjoin or are contiguous to any portion of Railroad avenue," and that "the quarter block in which they are situate is distant 18.29 feet in a straight line from the nearest point on the westerly line of Railroad avenue." Even if we should assume that the portion of the improvement charged against appellants' property was all within an intersection of streets, still it is not chargeable against appellants' property under the front-foot rule because it does not "corner on the work," as was the case in Martin v. Wagner, 120 Cal. 623, 53 Pac. 167.

It is not necessary to consider what would have been the legal consequence if the board of public works had submitted its plan for spreading the assessment to the board of supervisors and the latter had approved and adopted the same before ordering the work, because nothing of the sort was done. The conclusion that the notice herein was insufficient to confer jurisdiction renders it unnecessary to discuss the other points raised by appellants.

The judgment is reversed.

We concur: WILBUR, C. J.; LAWLOR, J; LENNON, J.; SEAWELL, J.; KERRIGAN, J.; WASTE, J.

(61 Cal. App. 608)

VERMILYEA v. VERMILYEA. (Civ. 3788.)

(District Court of Appeal, Second District, Division 2, California. April 10, 1923. Hearing Denied by Supreme Court June 7, 1923.)

1. Limitation of actions ⟹48(2)—When right accrues where indefinite delay in payment contemplated stated.

Where an agreement for the payment of money contemplates an indefinite delay in payment, the statute of limitations does not begin to run until actual demand has been made, or the happening of some event designated as the extreme limit of time for payment.

2. Limitation of actions ⟹66(2)—Duebill and letter accompanying it held to evidence an indebtedness immediately due without demand.

A duebill, acknowledging an indebtedness to another, and a letter accompanying it, *held* to evidence an indebtedness which was due immediately and without demand as to which the four-year statute of limitations would run, though no demand was made.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by J. K. Vermilyea against Minerva D. Vermilyea, as executrix of the estate of Samuel E. Vermilyea, deceased. Judgment for plaintiff, and defendant appeals. Reversed.

S. L. Carpenter, of Los Angeles, for appellant.

Flint & MacKay, of Los Angeles, for respondent.

CRAIG, J. Defendant demurred to the plaintiff's amended complaint filed against the estate of Samuel E. Vermilyea, deceased, on the ground that the claim sued upon was barred by the four-year provision of the statute of limitations. The demurrer was overruled. The only question here presented is as to the correctness of this ruling.

The action is based upon two writings received by the plaintiff from the deceased inclosed in the same envelope, and which must be read together to determine the intent of their author and the legal obligation resulting from his act in executing them. The letter is as follows:

> "In relation to that $1,000 will say am glad you mentioned it for I should have given you some writing before now that would be a legal obligation in case of my death, but have been expecting to make a sale of some of my property all the time and then intended to pay it off and so have put it off. I inclose a little statement in relation to the deal which would be paid by my estate if anything should happen. I have made the interest 7%, as you will observe, so no question could arise in relation to illegal interest in case of my death. I have deemed wise to make the statement fully full, so you would not have to make any proof of the circumstances, but could simply file the paper with my administrator in case of my death, and the claim would be allowed. Of course I may die any moment, but hope to live some time yet, and, if I do, think will be able to pay you the money before the summer is over."

The statement to which reference is made reads:

> "Due John K. Vermilyea, for value received, one thousand dollars, with interest thereon from October 4th, 1906, at the rate of seven per cent. per annum.
> "S. E. Vermilyea."

[1] Appellant contends that immediately upon delivery of the duebill the statute of limitations pleaded began to run; that the letter was intended by the deceased to make provision against the running of the statute, which, not being permitted by law, must be held ineffective. He asserts the legal proposition that, as public policy is the foundation of the statute of limitations, it cannot be waived in advance. This respondent does not dispute, but asserts that the statute did not begin to run in this instance because the contract contemplated indefinite delay in the payment of the amount due on demand, in which case he contends the law does not require that the demand be made within the statutory period of limitations, and that the statute does not begin to run until actual demand or the happening of an event designated in the contract as the extreme limit of time for payment, in this instance the death of the deceased. The legal principles upheld by respondent are sound.

[2] However, from the construction we place upon the writings they are inapplicable to the facts of the instant case. It seems clear that the intent indicated by the writings before us was to recognize the existence of an obligation to John K. Vermilyea by the deceased in the sum of $1,000 with interest from October 4, 1906, until March 29, 1913, when the writings were executed, and until payment; that this obligation is expressly admitted as an existing one due immediately and without demand. Such, unquestionably, would be the legal effect of the duebill if considered alone. Lee v. Balcom, 9 Colo. 216, 11 Pac. 74. We think the letter was intended as one of transmission only, and was not meant by S. E. Vermilyea to qualify the unconditional nature of the duebill in any respect. It must be borne in mind, also, that as the language of the duebill is unequivocal it cannot be modified unless the letter contains some provision making a demand a condition precedent to a right of action upon the part of the payee. We find no statement to that effect, but on the contrary it says that in case of the writer's death his brother would not need to make any proof, but "could simply file the paper" with the administrator of the estate of the decedent. Therefore the statute began to run at once upon the execution of the writings. The cases cited by respondent are applicable only where a demand is necessary to the accrual of the plaintiff's right of action. This is true of both Jamieson v. Jamieson, 72 Mo. 640, and Vickrey v. Maier, 164 Cal. 384, 129 Pac. 273.

More than seven years had elapsed from the date of the letter, and writing accompanying it, before the death of the maker. Hence, the plaintiff's right of action was barred, and the demurrer should have been sustained.

The judgment appealed from is reversed.

We concur: FINLAYSON, P. J.; WORKS, J.

61 Cal. App. 347

E. B. & A. L. STONE CO. v. DE FREMERY WHARF & LAND CO. et al.
(Civ. 4462.)

(District Court of Appeal, First District, Division 1, California. March 13, 1923.)

1. Appeal and error ⟹1011(1)—Findings of trial court conclusive on appeal.

Findings of the trial court on conflicting evidence are conclusive on the appellate court.

2. Damages ⟹78(2)—Contract held not to provide a penalty contrary to statute.

A contract between plaintiff stone company and defendant wharf company provided that plaintiff might use defendant's wharf and as rental to pay to defendant five cents per cubic yard of stone landed at the wharf. The contract further provided that for the first two years the aggregate rentals should not be less than $3,000, and for the next three years not less than $3,600 per year. The contract also provided that in case of default by

---

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

plaintiff defendant might terminate the contract and retake possession of the wharf "and that such retaking of possession of said wharves and property shall be the extent of the penalty the wharf company may exact of the stone company." *Held*, in view of the circumstances and the situation of the parties, that the word "penalty" had no particular significance, and the contract was not open to the objection that it provided a penalty contrary to Civ. Code, §§ 1670, 1671.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by the E. B. & A. L. Stone Company against the De Fremery Wharf & Land Company and another. Judgment for plaintiff, and defendants appeal. Reversed, with directions.

Moran & Heer, Charles S. Wheeler, and John F. Bowie, all of San Francisco (Nathan Moran, of San Francisco, of counsel), for appellants.

W. F. Williamson, of San Francisco, for respondent.

ST. SURE, J. Defendant De Fremery Wharf & Land Company was the owner of certain waterfront property in Oakland upon which it conducted a wharfage business. In 1914 the wharf company entered into a contract with plaintiff, E. B. & A. L. Stone Company, for a period of years. Defendant Barron Estate Company, during the second year of the contract, acquired, by purchase, the De Fremery wharves; hence its presence as a party to the action. Its interest is identical with that of the wharf company. In the aforementioned contract the Stone Company agreed to "handle and route the transportation of a portion of its rock, sand and gravel business, incoming * * * upon and through the wharves and bunkers of the wharf company," at a price of five cents per cubic yard or long ton, with the stipulation that if plaintiff failed to move the given tonnage per year it should pay for the short tonnage at the rate of five cents per ton or cubic yard.

The contract further provided:

> "The Stone Company further guarantees to the wharf company that the aforesaid business handled by it upon or over the property of the wharf company will be sufficient to produce to the wharf company a sum of money, at the rate per ton aforesaid, of not less than three thousand dollars ($3,000.00) for each and every year during the first two of the said five (5) years, and not less than three thousand six hundred ($3,600.00) dollars for each and every year during the last three (3) years of the said five (5) years. The Stone Company further agrees that it will, on or before the 15th day of each calendar month during the said five (5) years make settlement with and payment to the wharf company for the business done by it as aforesaid during the preceding month, and if such business, at the end of each year during the time this contract shall remain in force, be found not to amount to the minimum sum applying as aforesaid to such preceding year, the Stone Company agrees to pay to the wharf company any deficiency existing to bring such payment up to said minimum."

And a further paragraph reads:

> "It is mutually understood and agreed that in the event of a violation of the Stone Company of any of the covenants or agreements herein contained on its part to be performed, the wharf company shall have the right, by notice in writing, to terminate this contract and immediately thereupon to take possession of any portion of the said wharves or property then occupied by the Stone Company, *and that such retaking of possession of said wharves and property shall be the extent of the penalty the wharf company may exact of the Stone Company.*" (The concluding clause is italicized by us for the reason that we intend to hereinafter make particular reference to it.)

At the end of the first year of the operation and performance of the contract there was a deficiency in the aggregate of the monthly tolls, and, after some controversy as to the interpretation of the contract, the Stone Company paid the deficiency.

At the end of the second year the tolls paid amounted to less than $1,000, leaving an unpaid deficiency of $2,331.50, which, after demand, remains unpaid.

The action was commenced by the Stone Company for reformation of the contract upon the ground of mutual mistake. The plaintiff alleged in its complaint, in connection with the payment provision of the contract, that it was mutually understood and agreed that—

> "Plaintiff might elect either to pay the difference between the amount of tolls actually earned and the said minimum sum, or to make default in such payment and suffer the cancellation of the said agreement by the wharf company, defendant herein, but that in the event the said wharf company did cancel and terminate the said agreement, such cancellation and termination should be the only remedy or right of the said wharf company, and the only liability or obligation of the plaintiff under such circumstances, and that if the said wharf company did not cancel or terminate said agreement, plaintiff would only be required to pay the said tolls upon the quantity of such materials actually delivered upon or transported across the property of the said wharf company."

And it was further alleged that instead of stating the understanding and agreement of the parties, as in the last paragraph set forth, the contract merely stated what appears in the paragraph hereinbefore quoted containing the italicized clause.

Defendants answered with specific denials and various defenses, and, by way of cross-complaint, sought to recover the unpaid deficiency, amounting to $2,331.50. The trial court denied reformation. It found that a deficiency existed to the amount claimed by defendants, but denied recovery.

Defendants appeal from the judgment denying them relief upon their cross-complaint. The error they complain of is that from the facts as found by the trial court it has drawn an incorrect conclusion of law and entered a judgment erroneous in law. A reversal is sought directing the entry of a judgment in favor of defendants in accordance with the findings.

Counsel for the respective parties earnestly argue the question as to whether or not the agreement made between the wharf company and the Stone Company is a lease. We think it immaterial what the instrument is labeled. Its form is of little account. Stockton Savings & Loan Society v. Purvis, 112 Cal. 239, 44 Pac. 561, 53 Am. St. Rep. 210. We have preferred to call it a contract. The question involved in the appeal is the interpretation of the instrument in accordance with familiar rules found in the Civil Code.

The negotiations for the contract covered a period of several weeks, and were conducted by Mr. A. L. Stone on behalf of the Stone Company, and Mr. Cadman on behalf of the wharf company. The proposed contract was prepared by the attorneys for the wharf company and delivered to Mr. Stone for his approval, and he added to it the following clause:

> "And that such retaking of possession of said wharves and property will be the extent of the penalty the wharf company may exact of the Stone Company." (This clause appears italicized in a portion of the contract hereinabove quoted.)

The contract, with the additional clause, was accepted by the wharf company and executed by the parties.

[1] Up to this point there is no conflict in the evidence. Now comes the rub. Mr. Stone says that it was understood between himself and Mr. Cadman that the contract should provide that the Stone Company might elect to pay the difference between the amount of tolls actually earned and the minimum sum, or to make default in such payment and suffer cancellation of the agreement by the wharf company, and that in the event of such cancellation the Stone Company would be relieved of further liability and would only be required to pay tolls upon the quantity of materials actually delivered or transported across the property. Mr. Cadman flatly contradicts Mr. Stone. This issue was tried by the lower court in the suit for reformation. It was finally disposed of when the court found that no grounds for reformation existed, and it can now concern us only in so far as its consideration may be helpful in construing the contract.

[2] Counsel for defendant contends that—

> "The provision for liquidated penalty or damage is void under Civil Code, §§ 1670 and 1671. Furthermore, there being no allegation of damage on the part of appellant wharf company, and no proof of actual damage so suffered, said appellant was not entitled to recover damages in any amount whatever."

We are mindful that the word "penalty," appearing in the clause added to the contract by Mr. Stone, has a well-defined legal meaning. But considering the whole contract, and viewing it in the light of the facts, circumstances, and situation of the parties, we believe that the use of the word had no particular significance and in no way altered the intention of the parties, so clearly expressed in the instrument. It seems to us that the case of McComber v. Kellerman, 162 Cal. 749, 752, 124 Pac. 431, contains a complete answer to plaintiff's contention. In the cited case an "oil lease" or mining license was under consideration. The lease provided for rentals reserved in default of licensee's drilling the well. Objections almost identical with those made in the case before us were there interposed. There, as here, the consideration for the contract was the specified price which the defendant was to pay for the privilege exercised or unexercised. "It was clearly in the nature of rental for the premises or compensation for the right and not an attempt to fix a penalty or liquidated damages." McComber v. Kellerman, supra.

It being admitted that there is an unpaid deficiency of $2,331.50, and the trial court having so found, it was error on its part to refuse defendants recovery. We are therefore of the opinion that the judgment should be reversed, with direction to the lower court to enter judgment for defendants in the sum of $2,331.50, and interest thereon from February 10, 1917.

It is so ordered.

We concur: TYLER, P. J.; RICHARDS, J.

---

61 Cal. App. 654

DROWN v. HADDOCK. (Civ. 3791.)

(District Court of Appeal, Second District, Division 2, California. April 14, 1923.)

1. Sales 🔑181(12)—Evidence held insufficient to establish a failure of consideration for note.

In an action on a note which was given in payment for "1 Admiral hay press with 8 H. P. International harvester engine attached, and one pair of small platform scales," evidence *held* insufficient to establish that such items were sold for use together as a hay baler, and that for such purpose they were worthless, thus establishing a failure of consideration.

2. Sales 🔑181(11)—Evidence held insufficient to establish a destruction of property for which note was given in payment, thus relieving maker.

In an action on a note given in payment for "1 Admiral hay press with 8 H. P. International-al harvester engine attached, and one pair of small platform scales," evidence that such items had been sold as a hay-baling outfit and that for such purpose they were unfitted *held* insufficient to establish that the "hay-baling outfit," the consideration for the note, was destroyed, thereby relieving the purchaser from liability on the note.

Appeal from Superior Court, Kings County; J. A. Allen, Judge.

Action by D. I. Drown against M. C. Haddock. Judgment for plaintiff, and defendant appeals. Affirmed.

Nowell & Moran and Russell & Heid, all of Tulare, for appellant.

K. Van Zante, of Hanford, for respondent.

WORKS, J. Defendant purchased from plaintiff, under a written conditional sale contract, "1 Admiral hay press with 8 H. P. International harvester engine attached, and one pair of small platform scales." These articles were to have been paid for, at a date fixed in the contract, by a certain lump sum, with interest and attorney's fees. Payment not having been made upon the day designated, plaintiff commenced this action to recover the amount due. He had judgment, and defendant appeals.

[1] The sole point argued by appellant is that there was a "lack or failure of consideration" for the contract between the parties. Although the agreement listed the articles described in it as we have listed them above, appellant refers to them in his brief, collectively, as a "hay-baling outfit." Treating the subject of the sale as a single thing, that is, as a hay-baling outfit, appellant contends that the transfer was without consideration for the reason that several witnesses testified that the three articles actually listed in the contract of sale would not work as a hay baler and that parts of the machinery broke down when the attempt was made to use them for that purpose. Appellant's view is that this testimony shows that the hay-baling outfit was worthless. We are pointed to nothing in the record to show that the articles were to be sold as, or that it was understood between the parties that they were together to be used as, a hay-baling outfit. Neither are we shown that each of the three articles had not an intrinsic value, either great or small, of its own. The articles may have been of considerable value, when taken all together, even though some parts of one or two of them may have broken down when they were subjected to the use to which appellant assumed to put them. These considerations render inapplicable the cases of Waltz v. Silveria, 25 Cal. App. 717, 145 Pac. 169, and Stanton v. Weldy, 19 Cal. App. 374, 126 Pac. 175. In truth, we cannot perceive that either of these cases has any bearing whatever upon the point now under discussion, although appellant seeks to apply them to it.

[2] It is contended by appellant that the "hay-baling outfit" was destroyed, as a whole, before title was to have vested in him under the contract, and that the loss resulting from such destruction must be borne by respondent. Waltz v. Silveria, supra, is relied upon to support this contention. The idea that the "outfit" was destroyed is predicated solely of the testimony to the effect that the articles mentioned in the contract would not work together as a hay-baling outfit—that they were together worthless when devoted to such a use. There is no contention that the articles described in the contract, or any of them, were actually destroyed, even in the sense in which that term is employed in Waltz v. Silveria. The case does not support appellant's contention upon this point.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

61 Cal. App. 675

BIURRUN v. ELIZALDE et al. (Civ. 2604.)

(District Court of Appeal, Third District, California. April 16, 1923.)

1. Trial ⟹384—Rules of nonsuit on trial to court same as on trial to jury.

The rules governing nonsuits are the same when the trial is to the court as on trial to the jury.

2. Trial ⟹384—Court should disregard conflicting evidence on motion for nonsuit.

In considering defendants' motion for nonsuit, the court trying the facts should disregard unfavorable conflicting evidence.

3. Money received ⟹19(1)—Evidence showed receipt of money from the sale of sheep to plaintiff's use.

In an action for money had and received, where plaintiff's evidence tended to show that defendant knew that 700 sheep and the proceeds of sale thereof, to the extent of $8 a head, belonged to plaintiff, and that he received the proceeds of the sale to the use and benefit of plaintiff, granting nonsuit was error.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Vicente Biurrun against Eulalio Elizalde and another. From judgment granting nonsuit, plaintiff appeals. Reversed.

W. E. Davies, of Marysville, for appellant.

W. P. Rich, of Marysville, for respondent.

FINCH, P. J. Plaintiff appeals from the judgment of the trial court granting the motion of defendant Ramirez for a nonsuit.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

The action is for money had and received. The plaintiff testified:

"On the 26th day of December, 1919, I had business dealings with the defendant Elizalde. * * * Defendant Ramirez was present at that time. I offered to let Mr. Elizalde run my sheep until he could sell them, and agreed with him that I would pay him $2,176 as expenses for running them, and when he sold the sheep he was to pay me $8 per head and keep for himself all that he received over that sum. * * * I had 728 head of sheep that I turned over to Mr. Elizalde. * * * We had a conversation outside on the same day, and Mr. Ramirez suggested that we make a note, and Mr. Ramirez wrote a note for us for the sum of $8,000. After I got the note I took it up to Mr. Carlin's office, and Mr. Carlin said it was no good, and he drew another note, which note Elizalde signed. * * * I took Elizalde's note in payment of the sheep. * * * Q. Did you sell your sheep at that time to Elizalde? A. I gave him to run the sheep. * * * Q. Did you sell them to him on that day? A. No sir. Q. Why did you take that note for $8,000? * * * A. For security. * * * Q. Did you take the note as the balance due on your sheep? A. As security to pay me later on."

Elizalde testified:

"I was present * * * on the 26th day of December, 1919, in company with Mr. Ramirez and Mr. Biurrun, and we had a talk on condition when I took the wethers that I had to pay Mr. Biurrun $8 when I sold them. * * * Mr. Ramirez and myself we asked Mr. Biurrun $2,176 to run the sheep, running expenses, and Mr. Biurrun put that money at the First National Bank for us. * * * Q. Did you receive 728 head of sheep from him at that time? * * * A. Yes, sir; I did. Q. You had a lot of sheep of your own at that time, did you not? A. I had 2,400 at the time. * * * I didn't buy the wethers from Mr. Biurrun, I took the sheep to run and to deliver after the sale $8 a head. * * * Later I sold the wethers at $9 per head * * * 8th of January, 1920. * * * I sold more sheep than the 700, and I took the whole check together and I gave it to Mr. Ramirez. * * * Q. How many sheep did you sell at that time? * * * A. Eight hundred and eight head. * * * Q. How many of those sheep were your own sheep? A. One hundred and eight head. Q. To whom did the other 700 belong? A. Vicente Biurrun. * * * I told Mr. Ramirez at the time I delivered the check to him that the price of 700 head of sheep at $8 a head was for Mr. Biurrun and the balance was to be put to my credit, and I indorsed the check and delivered it to him. At that time I owed Mr. Ramirez on a mortgage about $16,000. * * * I gave him (plaintiff) a note for $8,000, which represented the value of the sheep and the money borrowed from Mr. Biurrun. * * * The note which I gave him * * * was in payment of the sheep, together with the money that I borrowed from him. * * * That note was made just as security to be paid from the money Mr. Ramirez took. * * * At the time I sold the sheep 700 belonged to Mr. Biurrun."

No other witnesses were called. The testimony shows that plaintiff had not been paid any part of the money received by Elizalde for the 700 sheep sold, but that Ramirez retained the whole thereof.

"The rules as to nonsuit are the same, whether the trial is by the court or by a jury." Freese v. Hibernia Sav., etc., Soc., 139 Cal. 392, 395, 73 Pac. 172.

"It is beyond controversy that the right of a court to direct a verdict is, touching the condition of the evidence, absolutely the same as the right of the court to grant a nonsuit. It may grant a nonsuit only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given. * * * The rule as to directed verdicts is not that a verdict may be directed whenever the evidence is such that upon motion the court would grant a new trial. The court may grant a new trial even when there is substantial evidence to sustain the verdict, if it believes that the evidence preponderates against the verdict. It is under compulsion to order a new trial, and may do this of its own motion, when the evidence is wholly insufficient to sustain the verdict." Estate of Caspar, 172 Cal. 147, 149, 155 Pac. 631.

[1, 2] If it be conceded that there is evidence sufficient to justify the inference that the plaintiff sold the sheep to Elizalde and accepted the latter's note as payment therefor, such conflicting evidence must be disregarded on motion for a nonsuit.

[3] The evidence shows that Ramirez knew the 700 sheep and the proceeds of the sale thereof to the extent of $8 a head belonged to plaintiff and Ramirez received $5,600 of such proceeds "to the use and benefit of said plaintiff" as alleged in the complaint. If any authorities are necessary to show that plaintiff had a cause of action against Ramirez under such circumstances, the following are in point: Kreutz v. Livingston, 15 Cal. 345; Heydenfeldt v. Jacobs, 107 Cal. 373, 40 Pac. 492; Montgomery v. Rauer, 125 Cal. 227, 57 Pac. 894; First National Bank v. Wakefield, 148 Cal. 558, 83 Pac. 1076; Smith v. Farmers' & Merchants' Bank, 2 Cal. App. 377, 84 Pac. 348; Freitas v. Freitas, 31 Cal. App. 19, 159 Pac. 613; Bridgeford v. McAdoo, 48 Cal. App. 305, 191 Pac. 1113. Respondent does not suggest any theory upon which the judgment can be affirmed, and none suggests itself to the court.

The judgment is reversed.

We concur: PLUMMER, Justice pro tem.; BURNETT, J.

(61 Cal. App. 712)

LAMBERT et al. v. VALENTINE et al.
(Civ. 3808.)

(District Court of Appeal, Second District, Division 2, California. April 18, 1923.)

1. Bailment 🔑17—Bailee liable for conversion if he delivers property to other than bailor, except after a showing of a superior right.

A bailee of property is bound to return it to his bailor or be liable in an action of conversion at the hands of the latter if he delivers it to another person, unless he believes after the exercise of reasonable care and diligence that such other person has a claim to the property superior to that of the bailor.

2. Livery stable and garage keepers 🔑6—Garage in possession of truck held warranted in refusing to surrender it to legal owner under Motor Vehicle Act.

Where an automobile truck which was delivered to a garage for repairs had attached to it documents issued by the motor vehicle department of the state, indicating that the person delivering it to them was the registered owner, and that plaintiffs who later demanded its surrender were the legal owners, *held*, under Motor Vehicle Act, §§ 1, 3, as amended by St. 1919, pp. 193, 196, §§ 1, 2, that the garage keeper was warranted in refusing to surrender to plaintiffs, and owed no duty to search out the registered owner to ascertain his rights.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by Ira C. Lambert and another against F. E. Valentine and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Perry F. Backus, of Los Angeles, for appellants.

Leonard Evans, of Anaheim, for respondents.

WORKS, J. This is an action for claim and delivery, the property involved being an automobile truck. Defendants were in the automobile repair business. The truck was taken to their garage by one Lopez, who requested that certain repairs be made upon it. Defendants made the repairs and held the truck as security for their charges. Plaintiffs, claiming to be the owners of the vehicle, made tender to defendants of the amount of the charges, and demanded a delivery of the property to them. This defendants refused unless plaintiffs should first procure from Lopez a consent to the delivery. Plaintiffs did not procure such consent, but commenced the present action instead. Defendants had judgment, and plaintiffs appeal.

[1, 2] Appellants insist that several of the findings of the trial court were not sustained by the evidence, and these are the only points contended for by them. A solution of the questions thus presented may be made upon an examination of certain general features of the evidence and by the application of certain propositions of law to those features. The evidence is not without dispute as to some points, but in stating it we shall present those phases of it which are most favorable to appellants. Appellants, at the time when the demand for the possession of the truck was made, stated to respondents that they were the owners of it. The vehicle had attached to it, at the time it was left with respondents for repairs, certified copies of certain documents issued by the motor vehicle department of the state. These showed that Lopez was the registered owner of the truck and that appellants were its legal owners. Granting that respondents examined these copies—whether they did or not being one of the disputed questions in the evidence—it becomes material to determine what notice was thereby conveyed to them. Section 1 of the Motor Vehicle Act (as amended, Stats. 1919, p. 193; Deering's Consol. Suppl. to Gen. Laws, 1917–1921, p. 1646) defines the word "owner" as used in the act as "any person * * * having the lawful use or control, or the right to the use or control, of a vehicle, under a lease or otherwise, for a period of ten or more successive days." An examination of the section of the act providing for registration (section 3, as amended, Stats. 1919, p. 196; Deering's Consol. Suppl. 1917–1921, p. 1648) demonstrates that this definition includes those described in documents issued by the motor vehicle department, as in the present instance, as "registered owners." Coming now to the designation of appellants as "legal owners" in the copies of documents mentioned, it is to be noted that the Motor Vehicle Act (section 1 as amended, supra) defines the expression "legal owner" as "the owner of the legal title." By way of recapitulation, then, of the showing made by the evidence most favorable to appellants, it is to be noted that at the time demand was made for the possession of the truck respondents were notified of the fact that appellants were the owners of the legal title to it, but that Lopez was in lawful possession of it "under a lease or otherwise." It is plain under all the circumstances that at the time Lopez left the truck with respondents for repairs he was a bailor of the vehicle and they were his bailees (6 C. J. p. 1105, § 28). This condition of affairs remained after appellants had made their demand for the possession of the truck, for they made to respondents no communication which could have changed the situation. Undoubtedly it is the rule that a bailee of property is bound to return it to his bailor, under pain of an action of conversion at the hands of the latter if he delivers the property to any other person, unless he believes after the exercise of rea-

sonable care and vigilance that such other person has a claim to the possession of the property superior to that of the bailor (6 C. J., p. 1143, sec. 99). We conclude that respondents were justified in refusing to deliver the truck to appellants except upon the consent of Lopez, or, at least, until the latter could be heard as to the nature of his claim to the possession of the car as indicated by the terms of the documents issued by the motor vehicle department; and we are pointed to nothing in the law of bailments which made it the duty of respondents to search out Lopez and thus ascertain his rights in the premises. We think the disputed findings were supported by the evidence.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

61 Cal. App. 695

PEOPLE v. VITELLE. (Cr. 918.)

(District Court of Appeal, Second District, Division 1, California. April 17, 1923.)

1. Criminal law ⚷1166½(8)—One obliged to accept biased juror entitled to reversal of verdict of guilt, without inquiry as to sufficiency of evidence.

One who, because he has exhausted his peremptory challenges, is obliged to accept a juror, incompetent for actual bias, his challenge for cause being erroneously overruled, is entitled to a reversal, without inquiry as to the sufficiency of evidence of guilt, for infringement of his right to a fair and impartial trial.

2. Jury ⚷97(3)—Juror admitting prejudice from defendant's membership in Ku Klux Klan disqualified.

A juror cannot be said to be fair or impartial towards a defendant nor qualified to weigh evidence touching guilt or innocence on a criminal charge, when he admits that in weighing the evidence he will be prejudiced against defendant solely because defendant was a member of the Ku Klux Klan, an organization to which the juror was opposed.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

John H. Vitelle was convicted of assault to do great bodily harm, and he appeals. Reversed.

Emmons & Aldrich, of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CONREY, P. J. Defendant was convicted on the third count of the indictment. The offense charged was that of a felonious assault upon the person of one Mason, by means of force likely to produce, and which did produce, great bodily injury. The defendant appeals from the judgment and from an order denying his motion for a new trial. The sole ground of appeal is that the court erred in overruling defendant's challenges for cause to four jurors of the panel.

It seems to be conceded by counsel on both sides that at the time of the examination of these jurors it was well understood that the evidence would show that the defendant was a member of an organization known as the Ku Klux Klan, and that his alleged actions and conduct toward the complaining witness upon the occasion mentioned in the indictment were, according to the prosecution, a part of his activities as a member of that organization. Defendant's challenge to each of the four jurors was based upon the claim that the examination of the jurors showed that they were prejudiced against the defendant because he was a member of the Klan, and that they were disqualified on account of actual bias as defined in section 1073 of the Penal Code. It is there provided that a particular cause of challenge exists—

> "for the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party. * * *"

The right of challenge for actual bias is limited by section 1076 of the Penal Code as follows:

> "But no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety; provided it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him."

The four jurors to whom these challenges were made were Kanawyer, Ammon, Lauder, and McAdam. Kanawyer, Ammon, and Lauder were excused on peremptory challenge of the defendant after his challenges of those jurors for cause had been denied. After the defendant had used ten peremptory challenges (being the total number allowed to him by law) the defendant asked permission to use another peremptory challenge, which request was denied. At this time Mr. McAdam was in the jury box and had been examined as to his qualifications, and had been challenged for cause and the challenge denied. It resulted that McAdam was sworn as a juror and acted as a juror at the trial.

[1] On the record thus made, if McAdam was not qualified to act as a juror in the case, the denial of the challenge for cause constituted prejudicial error, for which neces-

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

sarily the judgment must be reversed. People v. Riggins, 159 Cal. 113, 120, 112 Pac. 862; People v. Helm, 152 Cal. 532, 93 Pac. 99. In that event it will not be necessary to consider the objections to the qualifications of the other jurors above mentioned.

Mr. McAdam testified that he knew the defendant; that he had read about the case; that he had heard it talked of since the indictment was found.

"Q. Did you ever hear any one expressing any opinion as to the guilt or innocence of Mr. Vitelle? A. I don't know. Q. Do you remember making any expression of opinion yourself? A. I haven't in regard to this case. Q. Are you conscious now, at the present time, of having any opinion one way or the other? A. Not in regard to this case; no. Q. Why do you qualify that? A. I am not in favor of the Klan. Q. That is what you have reference to? A. Yes. Q. You know now that Mr. Vitelle has been indicted as a member of the Klan, does that create in your mind a bias and prejudice against him? A. I don't think it would. Q. If it should transpire in this case that he was a leading member of the Klan, would that create in your mind any bias and prejudice against him? A. It would. Q. Do you think that with that bias and prejudice, you could act absolutely fairly and impartially toward him? A. I don't think I could. Q. You think if you were selected as a juror in this case, that the bias and prejudice you might have against him by reason of his connection with the Klan, would influence you in hearing testimony here? A. I could hear the testimony here, but his membership * * * Q. (Interrupting) Knowing your own mind as you do, if you were sitting as Mr. Vitelle is, would you be willing to be tried by 12 men who felt toward you and your case as you feel toward him and his case? A. I would not. Q. You think you are liable to be unfair in the matter? A. Well, I would weigh the testimony. Q. Well, why wouldn't you want to be tried by 12 men feeling as you do? A. Well, my membership would be against me, I think. Q. That is, you think the fact he is a member of it, would weigh with you to such an extent that you would be influenced in hearing the testimony? A. Yes. Q. Have you ever sat on a jury before? A. I have not. Q. If the court should instruct you in this case that it is the duty of the prosecution to prove every material fact necessary to constitute the offense charged against the defendant, beyond a reasonable doubt and to a moral certainty, would you be prejudiced against an instruction of that kind? A. I would not. Q. If given, you would follow it? A. Yes. Q. If the court should further instruct you that the law presumed the defendant to be innocent as he sits here now, and that that presumption of innocence goes with him all through the trial, up to and including the time of finding the verdict, and that you, as a juror, are not at liberty to disregard that presumption of innocence, but must weigh it with all the testimony in the case, and reconcile the evidence, if possible, with this presumption of innocence, would you follow that instruction? A. I would. Q. Would you have any prejudice against it? A. I would not. Q. If the court gives you that, and also gives you an instruction in regard to what reasonable doubt is, and you had in your mind a reasonable doubt as to the guilt of the defendant and were about to vote not guilty, would you stop and consider what your neighbors might think about your verdict and allow that to influence you? A. I would not. Q. If Mr. Vitelle should go on the stand and testify in his own behalf, would you be inclined to reject his testimony simply because he was the defendant? A. I would not. Q. If, from his testimony alone, there arose in your mind a reasonable doubt as to his guilt, would you give him the benefit of that doubt by an acquittal? A. I would. Q. Do you know of any reason, outside of this bias and prejudice you spoke of, that might influence or bias you in this case? A. Not except it would take evidence to remove my bias against the Klan. Q. Outside of that, is there anything else? A. No. Q. Then you are pretty well satisfied in your own mind that the fact that he is a member of the Klan would, of itself, bias you against him? A. It would. Q. And that is the attitude of mind you have when you go on the jury? A. Yes, sir.

"Mr. Emmons: Challenge the juror under subdivision 2, § 1073, for existence of a state of mind with reference to the case and the defendant, which would prevent him from acting with entire impartiality.

"Mr. Dorsey: We will deny the challenge for a moment. Mr. McAdam, do you have any opinion now as to whether or not the defendant does belong to the organization? A. Except what I have seen published. Q. Then your opinion on that is merely from what you have seen in the newspapers? A. That is in regard to membership. Q. Well, at this time have you any prejudice against him by reason of the fact that his name was published in the paper as a member? A. Well, I would have to have it proved that he was connected with it. Q. Well, if it was proved that he was a member, you would then have a prejudice against him? A. Yes, sir. Q. Is that prejudice to the extent that you would be willing to find him guilty of this charge? A. Not unless it was proven up on the charge. Q. Unless it was proved he was guilty of this charge. Well, in determining whether or not he was guilty of this charge, would you allow any prejudice to creep in against him in determining on the evidence produced here? A. Well, I couldn't, unless it was proven he was a member. Q. You would have some opinion about his being a member of the organization? A. Yes. Q. Would you convict him of this charge merely because he was a member? A. No; only on the evidence. Q. If the evidence came in and showed he took part in any activities as a member, you would have a prejudice against him? A. Yes. Q. Until that time, would you have? A. I couldn't have. Q. You couldn't have until that appeared in the evidence? A. No. Q. As you are sitting now, you haven't any prejudice against this defendant here from anything at all, have you? A. Not personally; I have against the Klan. Q. You don't know he is a member of any organization yet, do you? A. No. Q. You would have to wait and find out what the evidence was, wouldn't you? A. Yes."

Thereupon the challenge was submitted and was denied.

[2] From the foregoing examination of the juror, it appears that he was willing to accept the court's instructions and to attempt to decide the case in accordance with the law as he should be instructed by the court, which instructions presumably would require the prosecution to prove beyond a reasonable doubt the facts necessary to constitute the offense charged against the defendant, and to give the defendant the legal presumption of innocence to which a defendant is entitled at all times prior to the complete establishment of his guilt. But McAdam assured the court that, immediately upon the production of evidence that the defendant was a member of the Klan, that would create in his mind a bias and prejudice against the defendant which would prevent him from acting fairly and impartially toward the defendant; that this prejudice would weigh with him to such an extent that he would be influenced in hearing the testimony; that it would take evidence to remove his bias against the Klan. True, he said that this prejudice would not be such that he would be willing to find the defendant guilty of this charge unless the fact of his guilt was proven; but, in determining whether the evidence amounted to proof, his prejudice against the Klan would influence him in passing upon the sufficiency of the evidence.

We find no escape from the conclusion that there existed in the mind of McAdam a state of mind in reference to the case which necessarily prevented him from acting with entire impartiality and without prejudice to the substantial rights of the defendant.

To disqualify the juror, it was not necessary in this instance that he should have stated that he had an opinion as to the guilt or innocence of the defendant. The challenge was not based upon the fact of such an opinion, but upon the existence of the state of mind to which we have referred. This disqualification exists in both civil and criminal cases, but, if there could be any difference, it would be more important in criminal cases. Yet, even in a civil action by a landlord against his tenant, where the juror, upon being informed what kind of an action was pending, declared himself hostile to all landlords, it was held that on account of this state of mind, the juror was incompetent and that the court exercised a sound discretion in allowing the challenge. Lawlor v. Linforth, 72 Cal. 205, 13 Pac. 496.

Actual bias, as described in the Code—"may consist of an opinion as to the guilt or innocence of the accused, based upon some knowledge or information of the facts embraced in the charge or of the evidence to be produced, or it may exist without such knowledge or information, and may consist of a preconceived opinion concerning the defendant or the prosecuting witness which would prevent a fair consideration by the juror of the evidence given or facts proven in the case." People v. Riggins, 159 Cal. 113, 117, 112 Pac. 862, 864.

In the case at bar the prosecuting witness, in testifying to the assault, directly identified the defendant as one of the men who forced him to go with them to the place where they flogged him with ropes; and there was other testimony tending to prove further participation of the defendant in that assault. The evidence for the prosecution fixed the time of the assault at between 8 and 9 o'clock of the evening of October 27, 1921. On the other hand, according to the testimony of the defendant and several other witnesses, the defendant at that time was playing cards at the home of a friend at a considerable distance away from the baseball park where the assault occurred.

For the purposes of the question at issue on this appeal, we are not concerned with the sufficiency of the evidence to have justified the jury in finding the defendant guilty. Let it be assumed that it is sufficient. But when it is said that it is for a jury to weigh and determine the effect of the evidence upon a disputed question of fact, the law intends that the accused shall have the right to have that issue determined by a fair and impartial jury. A juror cannot be said to be fair or impartial towards a defendant, and he cannot be qualified to weigh the evidence touching the guilt or innocence of a defendant upon a criminal charge, when such juror admits that in weighing the evidence he will be prejudiced against the defendant solely by reason of the fact that the defendant is a member of an organization to which the juror feels that he is opposed. And it matters not whether that prejudice (prejudgment) against the organization is, or is not, well founded. To compel a person to submit his liberty to jeopardy depending on the decision of a tribunal thus prejudiced would be to deny the protection of a fundamental right.

The judgment and order are reversed.

We concur: HOUSER, J.; CURTIS, J.

(61 Cal. App. 693)

WAECHTER et ux. v. BULLARD.
(Civ. 2500.)

(District Court of Appeal, Third District, California. April 17, 1923.)

1. Ejectment 🔑12—Rule as to proof of plaintiff's title stated.

If plaintiff in ejectment relies on a record or paper title, he must show a regular chain from the government, or from some grantor in possession, or from a common source from which each of the litigants claim, and introduction of a deed conveying the property to plaintiffs without showing title in the grantor or that grantor was the common source of title was ineffective.

2. Ejectment 🔑9(1)—Mere occupancy by defendant defeated plaintiff's action where element thereof lacking.

Where one of the essential elements is lacking in the showing on which plaintiffs in ejectment rely to establish their title, mere occupancy by defendants is sufficient to defeat it.

3. Adverse possession 🔑87—Act requiring payment of taxes as condition to adverse possession not retroactive.

Where possession and use were for more than five years prior to June 1, 1878, the date of adoption of the amendment to Code Civ. Proc. § 325, requiring the payment of taxes as condition of adverse possession, the question as to payment of taxes becomes immaterial, since the amendment was not retroactive.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by John Waechter and another against Robert Bullard. Judgment for plaintiffs, and defendant appeals. Reversed.

Charles H. Crocker, of Sacramento, for appellant.

George E. Foote, of Sacramento, for respondents.

BURNETT, J. The action is in ejectment, and plaintiffs had judgment from which the appeal has been taken. The answer of defendant consists of a specific denial of plaintiffs' ownership and alleged right of possession and plea of the statute of limitations and of title by adverse possession, and is followed by a cross-complaint seeking to quiet title as against plaintiffs. The principal point made by appellant is that the evidence is insufficient to justify the conclusion of the court in favor of plaintiffs. The land in dispute is described in the complaint as follows:

> "That certain real property situated in the city of Sacramento, county of Sacramento, state of California, known and described as the east 33 inches of the south one-fourth of lot No. 1, bounded by and between F and G streets and Fourteenth and Fifteenth streets."

[1] The only evidence offered and received on behalf of plaintiffs is a deed to them from Viola Amsden, a widow, dated February 11, 1920. In that deed the lot is described "as south one-quarter (S.¼) of lot one (1) bounded by and between F and G and 14th and 15th streets" in the city of Sacramento. After this deed was received in evidence, counsel for plaintiffs said:

> "I think that will complete my proof, your honor, as to offering my record of the title."

Plaintiffs thereupon rested, and defendant introduced the testimony of many witnesses, including himself, showing that he and his predecessors in interest had been in possession of the disputed strip for nearly 60 years. It seems clear that under the authorities and the rule that prevails in actions of ejectment the evidence on behalf of plaintiffs is insufficient to constitute prima facie evidence of title. It is to be observed that no contention was made that said Viola Amsden constituted the common source of title, nor was any evidence offered whatever that at the time of the execution of the deed she had any interest in the property. There is nothing to show that she or any one from whom she may have derived title was ever in possession of the property or had any right to such possession. The plaintiffs, of course, must rely upon the strength of their own title, and must show that they have a right superior to that of defendant. This they failed to do. The plaintiff, in an action of ejectment, if he relies upon a record or paper title, must show a regular chain from the government, or from some grantor in possession, or from a common source from which each of the litigants claims. Anything short of this is not sufficient to constitute prima facie evidence of title. 9 R. C. L. p. 843.

In Warvelle on Ejectment, § 235, it is said:

> "At common law, to authorize a recovery in ejectment, where the defendant is in possession, a valid legal title must be shown. * * * Where the rule, as stated, prevails, the plaintiff must establish his legal title, at the time of the demise laid in the declaration, either upon a connected documentary chain of evidence, or upon proofs of possession under a claim of right of sufficient duration to warrant the conclusion of the existence of such written title."

In 9 Cal. Jur. p. 982, we find this statement:

> "To establish his right of present possession, the plaintiff in an action to recover real property must show either title or prior possession. And if neither the plaintiff nor his grantors have ever been in possession, it is obvious that he must rely upon a strict title. In that event it is incumbent upon the plaintiff to prove a proper conveyance from a party having title or from a party in peaceable possession claiming title at the time the conveyance was ex-

> ecuted, in which case possession is prima facie evidence of title. The title relied upon must, however, be a legal and not merely an equitable title; since it is a settled rule that the holder of a mere equitable title cannot bring an action of this kind as against one having the legal title."

All of the authorities seem to be of the same effect and it is unnecessary to cite or quote further.

Considered most favorably to plaintiffs the case presents a contest for the right of possession between one who has been in actual and undisputed possession for many years and another whose claim arises solely from the naked deed of a stranger. The record thus exhibits a superior right in defendant.

But respondents say:

> "This case and the facts contained therein are similar to the case and the facts in Janke v. McMahon, 21 Cal. App. 781, 133 Pac. 21, and it is upon this case, and this case alone, that plaintiffs and respondents submit their case."

The decisive question therein, however, related to the claim of adverse possession. It was admitted by the appellant that the record title was in the respondent, and this court said:

> "Of course, if plaintiff had shown no title there would be significance and potency in the suggestion of appellant that defendant being in possession is entitled to judgment 'regardless of whether he had acquired a prescriptive title by adverse possession or not.' But, during all the time in controversy, the record title was in plaintiff or her predecessors in interest and the 'occupancy' referred to in section 1007 of the Civil Code must be construed in connection with the corresponding provisions of the Code of Civil Procedure, and, thus, the conclusion is reached that to overcome the legal title the occupancy must be under a claim of right, or adverse, as that term is used in the law."

After a review of the evidence and the authorities this court held that the evidence in the trial court was sufficient to support the finding that the possession of the defendant was not under a claim of right, and that it could not prevail against the undisputed record title of the plaintiff.

[2] But herein, as we have seen, an essential element is lacking in the showing upon which plaintiffs rely to establish their title, and the mere occupancy by defendant is sufficient to defeat it. There is no doubt of the rule, as quoted by respondents:

> "That in every action for the recovery of real property or the possession thereof the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law and the occupancy of the property by any other person is deemed to have been under and in subordination to the legal title unless it appears that the property has been held and possessed adversely to such legal title for five years before the commencement of the action."

But, as we have seen, plaintiffs are not in position to invoke it. Moreover, if we assume that the evidence was sufficient as to record title, then it is at least doubtful whether the finding should not have been in favor of appellant upon the other issue.

[3] It was shown that defendant's father and predecessor in interest went into possession of the lot, including the strip in controversy, in 1862; that it was inclosed by a fence; that the possession was open, notorious, continuous and exclusive, and during all the years down to the present time the father and mother of defendant used the property for the purpose of growing vines and vegetables. The question of the payment of the taxes is not material, since such possession and use were for more than five years prior to June 1, 1878, at which date the amendment to section 325 of the Code of Civil Procedure, requiring the payment of taxes as a condition of adverse possession, was adopted. Said amendment was not retroactive and would not affect any title that may have been acquired prior to its enactment by defendant's predecessor in interest. Sharp v. Blankenship, 59 Cal. 288; Webber v. Clarke, 74 Cal. 11, 15 Pac. 431.

The only uncertainty relates to the question whether the use and possession were "under a claim of right." This element, like other facts, may be shown by circumstantial as well as direct evidence, and it must be admitted that the manner in which the lot was used by defendant and by his father and mother would indicate strongly that they intended thereby to assert their ownership of the whole tract. In this connection we quote from defendant's testimony as follows:

> "Q. When did you first acquire any title in this property? A. Oh, it was along in 1889, somewheres along there before 1900. * * * Q. Now, then, did anybody ever dispute any part or portion of the property, or your right to the property, especially the south 40 feet—33 inches wide, a strip of parallelogram, 33 inches wide and 40 feet long, on the south of that fence, until these people came into the matter? A. Not till he came there. Q. That is the only dispute you have ever had over it? A. Yes. * * * Q. And have you ever—you or your father ever had any agreement with any one with reference to that line of fence? A. No, sir. Q. And you have always claimed the right to that property? A. Yes, sir. Q. You and your father have at all times paid all taxes that was ever levied against the properties there, have you? A. Yes, sir. Q. Did you ever obtain any permission, you or your father to erect that particular fence? A. No. sir. * * * Q. Now, then, why did you put that fence—why did your father put it there, or maintain that fence on that property? A. He went according to the surveyor's stakes and papers."

The case must, of course, be distinguished from one wherein the claimant admits that there was a question as to the boundary line. Such admission might be regarded as inconsistent with a claim of right to the whole of the land inclosed. But the fact that there may have been a mistake in locating the boundary line does not of itself preclude the claimant from establishing a title by prescription to the whole of the land inclosed if he shows that he actually claimed the whole of it and the other elements of adverse possession exist. The proper view of a situation like that is clearly stated in Woodward v. Faris, 109 Cal. 12, 41 Pac. 781, as follows:

> "Title to land may be acquired by adverse possession for five years within the limits of an inclosure, although the inclosure was made under a mistaken belief as to the boundary of the land, where it is claimed as matter of fact that the fences were upon the line; but, if the inclosure was made without claiming that the fences were upon the line, but with the expectation of moving them to the true line when it should be determined, the possession would not be adverse, and the statute would not run."

But while we think the showing made by the defendant as to this question is quite persuasive, and would justify a finding that he has acquired title by prescription, yet, in view of certain statements made by him on the witness stand that might be regarded as discrediting somewhat the testimony that we have quoted and of the conclusion we have reached as to plaintiffs' failure of proof, we leave open for further consideration, if the occasion should arise, the question whether there is or may be any substantial support for the contention that defendant has no such title.

The judgment is reversed.

We concur: FINCH, P. J.; HART, J.

---

61 Cal. App. 666

Ex parte CLEMENTE. (Cr. 987.)

(District Court of Appeal, Second District, Division 1, California. April 16, 1923.)

Health ⚷24—Information held to authorize quarantine of woman for infectious disease.

Information that a woman is not only conducting a house of ill fame, but personally participated in the unlawful acts carried on therein, furnishes reasonable ground to believe that she is affected with an infectious disease, authorizing the health department to enforce quarantine measures against her.

Petition by Marie Clemente for writ of habeas corpus to be directed to the Chief of Police of Los Angeles. Petitioner remanded to custody.

Warren L. Williams, S. S. Silverton, and L. D. Barnett, all of Los Angeles, for petitioner.

W. D. McConnell, City Prosecutor, J. Friedlander, Asst. City Prosecutor, and J. D. Taggart, all of Los Angeles, for respondent.

CURTIS, J. Petitioner is before this court upon a writ of habeas corpus. The petition therefor sets forth that she is illegally detained and restrained of her liberty by the chief of police of the city of Los Angeles, acting under instructions from the health department of the city of Los Angeles not to release her until she had submitted to an examination ordered to be made by said health department for the purpose of determining whether she was affected with a contagious or infectious disease.

Upon the hearing the testimony showed that the petitioner had been arrested and charged with conducting a house of ill fame. Two police officers of the city of Los Angeles testified that they visited the house of the petitioner on the day of her arrest, and of the acts and conduct of petitioner on this occasion. There was also testimony to the effect that the reputation of petitioner's house was that of a house of ill fame. This information had all been furnished to the health department, and upon it the department made its order for the examination of petitioner and for her detention until she should submit to such an examination. Repeated demands had been made of petitioner by the health department that she submit to the required examination, all of which had been refused by her.

We are satisfied that the testimony produced at the hearing warranted the conclusion that the house conducted by petitioner was a house of ill fame, that she was an inmate thereof, and personally participated in the unlawful acts carried on therein. The health department having this information was, in our opinion justified in its detention of the petitioner. This information furnished reasonable ground to believe that the petitioner was affected with the kind of disease referred to, and this, in view of two recent decisions of this court, was all that was necessary to have authorized the health department to enforce quarantine measures against the petitioner. In re Dayton, 52 Cal App. 635, 199 Pac. 548, and In re Arata, 52 Cal. App. 380, 198 Pac. 814.

Petitioner is remanded to the custody of respondent.

We concur: CONREY, P. J.; HOUSER, J.

(61 Cal. App. 775)

PEOPLE v. FLAHERTY. (Cr. 956.)

(District Court of Appeal, Second District, Division 1, California. April 25, 1923.)

Criminal law ⚷1071—Appeal held dismissable for failure to file statement of ground of appeal as required by statute.

Where, after conviction for a felony, defendant requested an order directing the reporter to make a transcript of the testimony taken at the trial to be used on appeal, but failed to state the grounds of appeal or points relied upon, as required by Pen. Code, § 1247, *held* that the appeal was wholly ineffectual and should be dismissed, nor could it be sustained on the ground that appellant desired only to urge certain grounds of appeal based on the record shown by the clerk's transcript or judgment roll.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Annette Flaherty was convicted of receiving stolen goods, and she appeals. Dismissed.

James Donovan, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CONREY, P. J. In the court below the defendant was convicted of the crime of receiving stolen property—a felony. She gave notice of appeal from the judgment and from an order denying her motion for a new trial. A clerk's transcript and a reporter's transcript are on file in this court. The Attorney General moves for dismissal of the appeal upon the ground that the record does not show that an application stating the grounds of appeal was filed by the defendant as required by section 1247 of the Penal Code. It does appear in the clerk's transcript that on the same day when she gave her notice of appeal the defendant filed with the clerk a request that the court make an order directing the reporter "to make a transcript of the testimony taken at the trial of said cause, to be used on appeal," but did not state the grounds of appeal or the points on which appellant relies.

Several times it has been held that the provisions of said section 1247 are mandatory. The section itself declares that —

> "If such application is not filed within said time, the appeal is wholly ineffectual and shall be deemed dismissed and the judgment or order may be enforced as if no appeal had been taken." People v. Ali, 38 Cal. App. 544, 176 Pac. 883.

Counsel for appellant argues that, even though she is thus precluded from asking consideration of any points arising out of the proceedings at the trial, and which would only appear in a record of the reporter's notes, nevertheless her appeal should stand, for the reason that she desires to urge certain grounds of appeal based upon the record shown by the clerk's transcript or "judgment roll." We appreciate the fact that, in a case where the defendant desires to appeal solely upon grounds which may be presented upon the record shown in the clerk's transcript, it would be a useless procedure to ask for a transcript of the reporter's notes. Nevertheless, the Legislature has seen fit to declare that the appellant must place in the record a statement showing the grounds of his appeal and the points upon which he relies. He is not required to do that in the notice of appeal, but within five days after giving his notice of appeal he must make this statement. We must presume that there was deemed to be good reason for requiring such a statement to be made. It furnishes in the record a certain evidence of good faith and is to that extent a protection against frivolous appeals. In the absence of such statement of the grounds of appeal, not only would it become unnecessary to prepare a reporter's transcript, but the clerk would be excused from preparing and filing the clerk's transcript provided for by section 1246 of the Penal Code. We are compelled to conclude and decide that this appeal "is wholly ineffectual."

The appeal is dismissed.

We concur: HOUSER, J.; CURTIS, J.

(61 Cal. App. 559)

KELLEY-CLARKE CO. v. LESLIE et al. (Civ. 4471.)

(District Court of Appeal, First District, Division 1, California. April 5, 1923. Hearing Denied by Supreme Court June 4, 1923.)

1. Parties ⚷7(2)—Agent acting for undisclosed principal held "trustee of express trust" entitled to sue, though not real party in interest.

Though plaintiff suing for damages for breach of a contract be conceded to have been acting as agent for an undisclosed principal in entering into the contract, he is in any event a "trustee of an express trust," and, as such, under Code Civ. Proc. § 369, an exception to the rule requiring suits to be prosecuted in the name of the real party in interest.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trustee of Express Trust.]

2. Set-off and counterclaim ⚷47—Defendants sued by agent of undisclosed principal may set up counterclaim against principal.

In an action by agent of an undisclosed principal to collect damages for a breach of a contract, defendants may set up against plaintiff any counterclaim or set-off they may have against the principal.

3. Frauds, statute of 🔑118(4)—Complete contract binding under statute may be gathered from letters, writings, and telegrams between parties.

A complete contract binding under the statute may be gathered from letters, writings, and telegrams between the parties relating to its subject-matter, and so connected with each other that they may be fairly said to constitute one paper relating to the contract.

4. Frauds, statute of 🔑118(4)—Contract made by telegrams held not invalid for lack of signature where telegrams referred to in subsequent signed letters and telegrams.

A contract for the purchase of pineapple entered into by defendants' agents through the exchange of telegrams *held* not invalid under Civ. Code, § 2309, requiring the signature of the parties to be charged, where defendants had by a subsequent signed telegram and letters which incorporated by reference the previous telegrams constituting the contract recognized the transaction as one under a contract.

5. Sales 🔑81(3)—Contract for the purchase of pineapple held to require "prompt shipment"; "immediate shipment."

A contract for the purchase of pineapple entered into through the exchange of telegrams *held* to provide for "prompt shipment," rather than immediate shipment, notwithstanding the vendor stated that it was "shipping immediately"; the term "prompt shipment" meaning within a reasonable time, and the term "immediate shipment" having a special significance in the shipping business, and meaning within five days, and not being synonymous with shipping immediately.

6. Appeal and error 🔑1064(1)—Conflict of instructions not prejudicial to appellant not reversible error.

A conflict in instructions which could not operate injuriously to appellant is not ground for reversal.

7. Sales 🔑384(7)—Measure of damages for breach of contract to purchase pineapple stated.

In an action for damages for the breach of a contract to purchase pineapple, *held,* that the proper measure of damages was the difference between the contract price and the price at which the goods were resold, plus expenses incident to the resale, under Civ. Code, § 3311, subd. 2.

8. Sales 🔑382—Testimony as to damages not objectionable because lump sum named.

In an action for damages for the breach of a contract to purchase pineapple, testimony on the measure of damages as to the amount of expenses incurred in a resale is not objectionable because given in a lump sum, particularly where defendants upon cross-examination could have obtained an itemization.

9. Trial 🔑320—Incorporation of amount of damages in form of verdict submitted to jury held not error.

Where the only evidence adduced at trial as to the amount of damages sustained by the breach of a contract shows the amount of damages to be the sum mentioned in the complaint, it is not error for the trial court to incorporate the amount in one of the forms of verdict submitted to the jury.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by the Kelley-Clarke Company against John H. Leslie and George H. Leslie, as individuals and copartners doing business as the J. H. Leslie Company, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Chickering & Gregory, of San Francisco, for appellants.

Raymond Perry, of San Francisco, for respondent.

ST. SURE, J. Action for damages for breach of contract for the purchase of pineapple. Appeal by defendants from a judgment, after verdict, in favor of plaintiff in the sum of $2,650.80. Plaintiff is a firm of brokers and manufacturers' agents with offices in San Francisco, and defendants have their place of business in Chicago.

The contract is evidenced by telegrams exchanged between F. A. Davis, a San Francisco broker, agent for plaintiff, and the Continental Brokerage Company in Chicago, acting for defendants. These telegrams show: (1) An offer on July 15, 1920, by Davis, to Continental Brokerage Company, of a lot of sliced pineapple, subject to confirmation, for prompt shipment; (2) request, on same day, from Continental Brokerage Company, for confirmation to defendants of all pineapple offered; (3) advice, on same day, from Davis to Continental Brokerage Company, confirming for prompt shipment part of the goods by plaintiff to defendants, with an offer of additional goods to complete carload; (4) request, on July 16, 1920, for confirmation of additional goods; (5) advice, on July 16, 1920, of Davis to Continental Brokerage Company, of confirmation by plaintiff of additional goods, "same terms my wire July 15 to complete carload. Shipping immediately."

We have made but brief reference to these telegrams, because it is undisputed that they contain all the terms of a complete contract, viz. the seller, the buyer, the quality and quantity of the commodity purchased, the price, the manner of shipment, the manner of payment, and the brokerage.

The goods were shipped July 24th, eight days later. On August 3d the Continental Brokerage Company advised Davis by wire that defendants refused to honor draft attached to bill of lading for the pineapple, claiming that the goods were bought for "immediate shipment," and shipped five days late. The market on pineapple had declined sharply—about 25 per cent.—in the meantime. Davis replied by wire to the telegram of August 3d on the following day, explaining that the goods were shipped as soon as car could be obtained, and offering a discount if the draft were paid within a certain time. On August 5th defendants themselves sent to Davis the following telegram:

> "Referring to telegram Continental Brokerage Kelley Clarke's car pineapple was confirmed immediate shipment other car was for prompt shipment. No stipulation as to car shortgage which they were fully aware of and should not have confirmed if they could not comply with contract so we cannot accept as they were not shipped according to contracts.
> "John H. Leslie & Co."

Plaintiff then sent to defendants a telegram, in reply, in part as follows:

> "Very much surprised your attitude regarding pineapple which we confirmed July sixteenth for immediate shipment and shipped July twenty-fourth. Surely three days delay made no difference to you."

The use of the term "immediate shipment" in the foregoing telegram is explained in the following letter written by Mr. Adams, vice president of plaintiff corporation to the defendants:

> "San Francisco, California, August 14th, 1920.
> "John H. Leslie & Company, Chicago, Ill.—Gentlemen: The writer conducted a little investigation yesterday and discovered that the car of pineapple, which was shipped you by us on July 24th, was never confirmed for immediate shipment. The writer's statement in our telegram of August 5th, was incorrect, this being only on his understanding of the matter, and not on the actual facts. In explanation, will state that the writer was out of town at the time these goods were confirmed, and it was only yesterday that we discovered that the goods had been confirmed you for prompt shipment, and also that they were originally offered on this basis. This being the case, we intend to protect our interest and suggest that you look into the matter and if you find we are correct take up our draft upon arrival of the goods.
> "Yours very truly,
> Kelley Clarke Company,
> "Per AWA."

Numerous telegrams and letters were exchanged between plaintiff and defendants as to whether the contract was one for "immediate shipment" or "prompt shipment." Plaintiff took the position that the goods were offered, accepted, and confirmed for prompt and not immediate shipment. Defendants were put upon notice that refusal to honor plaintiff's draft would result in suit by plaintiff for the full amount of the invoice or for any loss occasioned by resale. The car of pineapple arrived in Chicago August 17th, and was later sold to a New York buyer and shipped to New York. Damages claimed are made up of the difference between the invoice price under the contract and that on resale, demurrage on the car while held in Chicago, and expenses in carrying the goods to the new market. On the trial defendants offered no evidence, but relied on objections to the introduction of the documents offered by plaintiff and cross-examination of its witnesses.

[1, 2] Defendants urge five points for a reversal of the judgment. The first is that plaintiff is not the real party in interest, citing section 367 of the Code of Civil Procedure, and arguing that the case does not come within the exceptions set forth in section 369, Code of Civil Procedure. There is some evidence in the record to the effect that the pineapple in question was owned by Kockos Bros. Conceding plaintiff to have been, as defendants now contend, agent for an undisclosed principal, plaintiff was the trustee of an express trust, and as such an exception to the general rule requiring suits to be prosecuted in the name of the real party in interest. Allen v. Chatfield, 34 Cal. App. 785, 786, 168 Pac. 1149, and cases cited therein. It makes no difference whether the principal knew of the suit or not. In such an action defendants may set up against the agent any counterclaim or set-off they might have against the principal. The record shows that defendants dealt with the plaintiff as the real party throughout the entire proceedings, and set up no objection to it on this ground in their answer.

[3] The second point is that there is no memorandum signed by defendants or their authorized agents, and that the contract is therefore void by reason of the statute of frauds. The record clearly shows a contract entered into between plaintiff and defendants through Davis in San Francisco and the Continental Brokerage Company in Chicago. It is the law that a complete contract, binding under the statute of frauds, may be gathered from letters, writings, and telegrams between the parties relating to its subject-matter, and so connected with each other that they may fairly be said to constitute one paper relating to the contract. Elbert v. Los Angeles Gas Co., 97 Cal. 244, 32 Pac. 9.

[4] Conceding that the telegrams contain all of the elements of a contract, nevertheless defendants contend that the contract yet lacks the greatest essential, to wit, the signature of the parties to be charged, either by the parties themselves or some one shown to be authorized by them. Section 2309, Civ. Code. By their signed telegram of August 5th, quoted above, defendants treated the contract as one made for them with plaintiff. Signed telegrams and letters between the parties incorporated by reference the previous telegrams constituting the contract. Defendants neither denied the contract nor repudiated the acts in their behalf of the Continental Brokerage Company. In a letter written by defendants to plaintiff on August 14th, before the goods arrived in Chi-

cago, wherein defendants seek to justify their position in interpreting the contract as one for immediate shipment, they say:

> "We are sorry that a misunderstanding has arisen but a contract is a contract."

It will thus be seen that, while there was not an express ratification of the effect of the contract expressed in words, there was an express recognition that there was a contract. The uncontradicted evidence is that the respective parties recognized the transaction as one under a contract, the difference between them being as to whether the contract called for "prompt shipment" or "immediate shipment." As was said by our Supreme Court in Ballard v. Nye, 138 Cal. 588, 597, 72 Pac. 156, 159:

> "Of course authority must be shown, but it need not be express authority; it may be implied and one of the recognized legal methods of proving authority is by ratification. From such proofs the law implies previous authority to the same extent as if in the first instance it had been expressly conferred. The doctrine of ratification proceeds upon the theory that there was no previous authority, and that the relation of principal and agent did not in fact exist, but implies it from the acts and conduct of the parties, and when so implied, is equivalent to previous authority, and results as effectively to establish the relations of principal and agent as if the agency had been authorized in the beginning."

See section 2307, Civ. Code; Quinn v. Dresbach, 75 Cal. 162, 16 Pac. 762, 7 Am. St. Rep. 138; Ralphs v. Hensler, 97 Cal. 301, 32 Pac. 243; Pope v. Armsby Co., 111 Cal. 159, 43 Pac. 589; Ford v. Lou Kum Shu, 26 Cal. App. 203, 146 Pac. 199; Anglo-California Bank v. Cerf, 147 Cal. 393, 399, 81 Pac. 1081; Union Trust & Realty Co. v. Best, 160 Cal. 263, 267, 116 Pac. 737; Phillips v. Phillips, 163 Cal. 530, 535, 127 Pac. 346.

The third point is that—

> "The jury arbitrarily and without warrant disregarded the peremptory instructions of the court with regard to the effect of the immediate shipment clause."

[5] The trial court erroneously interpreted the contract to be one for immediate shipment." The contract is contained in the first five telegrams exchanged between Davis on behalf of plaintiff and the Continental Brokerage Company on behalf of defendants. The offer was made and accepted for prompt shipment. An additional offer was made upon the same terms as the first, and was thereafter accepted. In the telegram confirming the sale of additional goods the agent for plaintiff uses these words:

> "Same terms my wire July 15th to complete car. Shipping immediately."

The words "shipping immediately" were not a necessary part of the contract between the parties. The contract used the term "prompt shipment"—the goods were offered and accepted on that basis. In the interchange of telegrams the term "immediate shipment" was not used or suggested by either party to the contract, although, in the shipping business, the term "immediate shipment" has a special significance. There is evidence in the record to show that it means within five days. "Shipping immediately" has no particular significance other than is conveyed by the ordinary meaning of the words. "Prompt shipment" means within a reasonable time. It may therefore be said that in the shipping business "immediate shipment" and "shipping immediately" are not regarded as synonymous terms. We think that the use of the words "shipping immediately" were merely incidental to the telegram of confirmation in which they appeared, and were added by plaintiff's agent for the purpose of indicating to the buyer that the shipment would be made without unreasonable delay. The goods were shipped within eight days.

The trial court instructed the jury in part as follows:

> "I charge you that the word 'immediately' undoubtedly has a relative meaning, and must be read in the light of surrounding circumstances."
>
> "I hereby instruct you that the words 'immediate shipment,' as used in the contract involved in this action, if any, meant not in excess of five business days."
>
> "I furthermore instruct you that, if you believe from the evidence in this case that the term 'immediate shipment' meant shipment within five days from the making of the contract, if any, and that the shipment in question was not made until eight days thereafter, your verdict shall be in favor of the defendants and against the plaintiff, even though the failure to ship within five days was due to inability upon the part of plaintiff to secure transportation."
>
> "I instruct you that there is no note or memorandum signed by any of the defendants herein, stating that the terms of shipment, if any, were otherwise than immediate shipment; you are therefore to take it as the fact that, if there existed any contract in the present matter, such contract provided for immediate shipment."

[6] A reading of these instructions renders analysis of them unnecessary. They are obviously conflicting, and the last is so strongly favorable to the defendants that we are willing to adopt defendants' characterization of it as "peremptory." The trial court accepted the erroneous construction given to the contract by defendants, as the last of the above-quoted instructions virtually directed the jury to find for the defendants. But the trial court must have been confused about the matter, because there is a conflict in the instructions, and, further, while in effect doing so, it refused to give an instruction for a directed verdict, in

terms, in favor of defendants, and submitted the case to the jury with two forms of verdict, one for damages for plaintiff in the full amount prayed for, and the other a general verdict in favor of defendants. The jury either disregarded or misunderstood the instructions of the court. The verdict was in favor of plaintiff and against defendants for the amount sued for. This presents an interesting, but by no means novel, question. It has been repeatedly held that—

> "A conflict in instructions which could not operate injuriously to appellant is not ground for reversal." Dennison v. Chapman, 105 Cal. 447, 458, 39 Pac. 61, 64, and cases therein cited.

It is only when an erroneous instruction has resulted in prejudicing the rights of the complaining party that the judgment will be reversed, and it is the general rule that such action will not be taken by the appellate court for error in giving or refusing to give instructions if the verdict is manifestly right. 14 R. C. L. § 74, pp. 815, 816. Mr. Thompson, in his work on Trials (section 2431), says that instructions faulty or technically erroneous will not work a reversal of the judgment if the jury are not misled, or if as a whole the case was fairly presented to them, and especially if their verdict is obviously correct. And, further, as having some bearing on this case, we find in Yolo Water & Power Co. v. Hudson, 182 Cal. 48, 51, 186 Pac. 772, 774:

> "A party cannot complain of an instruction given at his own request or of an error in an instruction given at the instance of his adversary when he requests a substantially similar one."

Interpreting the contract as being one for "prompt shipment," and not for "immediate shipment," we are of the opinion that the verdict of the jury was manifestly right, and therefore should not be disturbed.

[7] The next point is that "the amount of the damages cannot be sustained, and the manner in which the assessment of said damages was submitted to the jury constituted prejudicial error." Plaintiff sued for $2,650.80, and the jury's verdict was for that amount. The complaint, following the language contained in subdivision 2 of section 3311 of the Civil Code, alleged:

> "That by reason of said breach of contract said plaintiff has been damaged in the sum of $2,650.80, which is the difference between the actual amount due from the defendants under the terms of the contract, hereinbefore referred to over the value to plaintiff, together with the expenses properly incurred in carrying said merchandise to market, which would not have been incurred if defendants had accepted said merchandise."

The evidence showed that the difference between the contract price and the price at which plaintiff resold the goods was the sum of $1,911.10, and that the sum of $739.70 was for the additional expenses incident to the resale of the pineapple in New York. Defendants say in their brief:

> "The theory upon which plaintiff proceeded in attempting to prove its damage was apparently that it was entitled to the difference between the contract price and the resale price, plus the additional expense in getting the goods to market where they were resold."

[8] We think the theory was correct, and that the modifications suggested by defendants do not apply. The undisputed evidence of the resale and the price obtained thereupon is sufficient. The testimony as to the amount of the expenses was not objectionable because given in a lump sum. Defendants could have obtained itemization of the charges when opportunity was given to do so upon cross-examination. It is too late to complain of that now.

The objection that the sale was not conducted in accordance with the provisions of the Civil Code is without merit. The uncontradicted evidence shows that an effort was made to resell the goods in Chicago, and that there was no market in that city. Defendants admitted that they knew that the goods were offered for resale in Chicago, and, as plaintiff suggests, they were thus given an opportunity of saving the item of expense of which they complain.

[9] The only evidence adduced at the trial as to the amount of the damages was that introduced by plaintiff. It showed that the amount of damages was the sum mentioned in the complaint for which judgment was asked, to wit, $2,650.80. That being the only evidence before the court upon the subject, it was not error for the trial court to incorporate the amount in one of the forms of verdict submitted to the jury.

In urging their last point for reversal defendants say that the trial court committed an "unusual number" of errors in its rulings on evidence and in its giving or withholding of instructions. The record shows that the court had a somewhat difficult task to perform during the trial of the case, as almost every question asked by plaintiff of its witnesses was objected to by defendants. We have read the record, and find it free from error prejudicial to defendants. In view of what we have heretofore said about the court's instructions we think further discussion thereof unnecessary. The instructions given were most favorable to the defendants, and complaint that others more favorable were not given is supererogatory.

The judgment is affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

61 Cal. App. 585

SOUTHWICK v. MOORE. (Civ. 4027.)

(District Court of Appeal, Second District, Division 2, California. April 9, 1923. Hearing Denied by Supreme Court June 7, 1923.)

1. Fraudulent conveyances 🔑57(1) — When debtor insolvent stated.

A debtor is insolvent when he is unable to pay his debts, when they fall due, from his own means.

2. Fraudulent conveyances 🔑297—Evidence justified finding of grantor's insolvency at time of deed.

In action by a creditor of decedent to set aside a deed from decedent to his wife as in fraud of creditors, evidence *held* to justify a finding of decedent's insolvency at time of its execution.

3. Fraudulent conveyances 🔑300(5) — Evidence justified finding of lack of consideration in deed from debtor to his wife.

In action by a creditor of decedent to set aside a deed from decedent to his wife as in fraud of creditors, evidence *held* to justify a finding that deed was without consideration; any previous claim the wife might have had against grantor having been discharged by his proceedings in insolvency.

4. Fraudulent conveyances 🔑299(12)—Deed from debtor husband to wife held made in contemplation of insolvency.

In action by a creditor of decedent to set aside a deed from decedent to his wife as in fraud of creditors, evidence *held* to show that by making deed of the only property he owned decedent became insolvent, and the transfer made in contemplation of insolvency, and therefore void as to existing creditors.

5. Fraudulent conveyances 🔑69(1) — Deed without consideration may be void, as made with intent to defraud future creditors.

A deed without consideration may be void, as made with the specific intent to enable grantor to defraud future creditors.

6. Fraudulent conveyances 🔑298(4) — Deed fraudulent as to existing creditors prima facie fraudulent as to future creditors.

Proof of fraudulency of a deed as to existing creditors supplies a prima facie case against creditors whose claims arise subsequently.

7. Fraudulent conveyances 🔑146(2) — Continued acts of ownership by grantor after conveyance, with grantee's knowledge, held suggestive of fraud.

Where a husband executed a deed to his wife, which she withheld from record, acts of the husband thereafter in exercising acts of and claiming ownership in the premises, with the knowledge of the wife, *held* strongly suggestive of fraud.

8. Fraudulent conveyances 🔑163—By redemption of property from foreclosure sale, wife held not to be innocent purchaser.

Where a husband in fraud of creditors conveyed property to his wife, who secretly withheld deed from the record, the wife being a party to the fraud, by redemption of the property from foreclosure sale she could not become an innocent purchaser as to the creditors.

9. Fraudulent conveyances 🔑286(8) — Evidence of grantor's statements, subsequent to fraudulent deed to wife, held admissible.

In action to set aside a deed as fraudulent as to creditors, evidence of grantor's statements, subsequent to delivery of the deed, to the effect that he still owned the property, was admissible.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by G. W. Southwick against Mary Theresa Moore, as administratrix with the will annexed of the estate of Thomas W. Moore, deceased, and individually. Judgment for plaintiff, and defendant appeals. Affirmed.

R. B. Canfield, Frank L. Rabe, and William G. Griffith, all of Santa Barbara, for appellant.

Richards, Heaney & Price, of Santa Barbara, for respondent.

CRAIG, J. This is an action by the plaintiff as a creditor of Thomas W. Moore, deceased, to set aside a deed from said decedent to his wife, Mary Theresa Moore, on the ground that the deed was given to defraud creditors. By this proceeding it was sought to claim the property conveyed and have it declared that of the estate of Thomas W. Moore, and as such applied to the statisfaction of the plaintiff's claim, which had been allowed and approved before the filing of the action, in the sum of $3,457.09. The deed in question was executed on the 24th day of March, 1898, and purported to convey a part of the Las Positas or Hope ranch, in the county of Santa Barbara. The case was tried before the superior court of Santa Barbara county, and judgment rendered in favor of the plaintiff, by which it was held that the deed was null and void as against the plaintiff, and it was adjudged that the property described therein is a part of the estate of Thomas W. Moore, deceased, to be applied to the payment of the plaintiff's claim.

The principal contention of the appellant is based upon the assertion that certain findings are not supported by the evidence. There is also a question raised that the court committed error in connection with the admission of evidence. The following further statement of the facts is necessary to a clear understanding of the issues:

Mary Theresa Moore was a daughter of Thomas Hope, who at one time owned the Rancho Las Positas, containing in all 3,281 acres. After the death of Thomas Hope, his ranch was distributed to his widow and six children, one of whom was Theresa Hope. Later this property was partitioned among the owners in common, and by the partition Mary Theresa Moore (née Hope) and her brother, James C. Hope, received lots 5 and 5½, which included the property described in the deed in question in this case. On May 19, 1890, James C. Hope conveyed his share of the property allowed to him by the partition to Thomas W. Moore, husband of the defendant herein. The consideration for the deed from James C. Hope to Moore was paid by the defendant from her separate funds and amounted to about $20,000. Thereafter Moore brought suit to quiet title to the property, making his wife defendant. Through that proceeding and other necessary steps, he removed what were apparently certain clouds upon the title. In 1893 defendant executed a quitclaim deed of this property to her husband; in 1894 he conveyed it to Mrs. Moore, the deed expressly stating that the estate alienated should be her separate property Thereafter he instituted proceedings and secured discharge from his debts by voluntary insolvency, receiving the final discharge on June 16, 1897. One of the debts listed and discharged was the obligation for the money advanced by defendant to purchase the property from her brother. On the following day the defendant conveyed the property involved in this suit to her husband as his separate property and for a recited consideration of $16,000. As heretofore stated, in 1898 he executed a deed of the same property to the defendant; this he delivered to her in the office of H. C. Booth, an attorney at law. In making the delivery, Moore said to Mrs. Moore, "This is the deed to your property." The defendant kept the deed in a private box in her home until a few hours before the death of her husband on the 19th day of March, 1916. She then gave it to her attorney and instructed him to record it, which he did. All of the previous deeds between the parties were recorded immediately after being executed. During the entire period from March, 1898, until March, 1916, Moore dealt with this property as his own, at all times holding himself out as its owner, to the full knowledge of the defendant; he executed many leases and other instruments of a proprietary character, of which 75 were recorded. In some of these instruments, in which the representation appeared that Thomas W. Moore was the legal owner, the defendant joined, signing as his wife. The property was at all times after Mrs. Moore's last deed to her husband assessed to him, and after the year 1900 he paid the taxes. At the time of Moore's death there was a mortgage upon the premises for about $24,000, owned by the Central Bank. This was subsequently foreclosed, and then Mrs. Moore redeemed the property from its incumbrance.

The claim of the plaintiff consisted of a promissory note, dated September 16, 1914, in the sum of $3,480 for services rendered in a certain sale of real estate. This note was unsecured. The plaintiff testified, however, that he extended the credit in reliance upon the ownership by Moore of the ranch in question; that he heard a rumor to the effect that the property had been transferred to Mrs. Moore, and examined the records of Santa Barbara county, and thereby ascertained that the title appeared there to be vested in Moore. The court found that on March 24, 1898, "Thomas W. Moore was and for a long time prior thereto had been insolvent"; also, referring to the deed in question, "that there was and is no consideration for said attempted conveyance or said purported deed;" further, that the deed was made with the intention to hinder, delay and defraud the creditors of Thomas W. Moore, present and future; and that Mary Theresa Moore actively participated in such fraud. These are the findings which appellant contends are not supported by the evidence.

The evidence relied upon by the respondent to establish the insolvency of Moore is the following: The county auditor testified from the records in his office that the only property assessed to Moore for the year 1898 was the land involved in this action, with furniture, wagons, and horses. Mrs. Moore testified that she did not know of any other property belonging to him. In 1898 Moore's personal property was sold by the state for unpaid taxes for that year. The taxes on the land in question were not paid, and had not been paid since 1896. During the year 1898, upon two occasions, Moore transferred a lease to secure a debt. A mortgage for $4,960 and a trust deed for $12,000 existed as security for obligations, these liens both being upon the ranch here in dispute. Since his discharge in insolvency, and in fact until 1910, Moore had no business or occupation of profit, except to lease out a part of the ranch, where the Moores lived, but which they did not farm. No witness testified to his earning any money during this period, except in overseeing a few transactions for Mrs. Moore.

[1-3] A debtor is insolvent when he is unable to pay his debts from his own means as they become due. In re Ramazzina, 110 Cal. 488, 42 Pac. 970; Washburn v. Huntington, 78 Cal. 573, 21 Pac. 305. Measured by this standard these facts are sufficient to sustain the finding of insolvency. They show that when the deed was executed Moore was a debtor; they constitute evidence from which the trial court might fairly infer—in fact, could hardly have avoided the conclusion—that he did not possess money or property with which to pay such debts. The evidence to sustain the finding that the deed in question was without consideration is also ample. If Mrs. Moore had formerly held any claim against Moore, it was dis-

charged by the proceeding in insolvency. The only debt which is shown to have existed was for the advancement made by Mrs. Moore in the way of payment to her brother for the deed to Moore.

Appellant insists that this was not the claim presented by Mrs. Moore in the insolvency proceeding. However, we think the evidence is such as to permit the deduction that this was the same claim, and all inferences are to be so drawn, if possible, as to sustain the findings. One note of Moore's discharged in insolvency was dated May 10, 1890. The transaction by which James C. Hope transferred the ranch to Moore accrued at almost the same time, Hope's deed to Moore being dated May 19, 1890. In listing the claim for the note above mentioned, which when presented in the insolvency proceeding totaled $14,395, principal and interest, Moore's petition showed Mrs. Moore as a creditor for the principal sum of $10,000 as "indebtedness accrued from 1890 to 1896" upon notes for money borrowed and advanced during that period. This surely included the consideration for the purchase of the ranch from James C. Hope. Besides, if any other indebtedness existed against Moore in her favor, the burden rested upon her, the defendant, to prove it if she would avoid the disadvantage of the finding that the deed in question was without consideration. On the contrary, at one point, while testifying, she said that she did not remember that at the time this deed was made Mr. Moore owed her any money.

Having concluded that the evidence sustains the finding that the deed of March, 1890, was without consideration, and that when it was executed Moore was insolvent, it becomes unnecessary to consider the intent of Mrs. Moore, or determine whether or not she designedly participated in fraud which her husband may have perpetrated in making the deed. Knox v. Blanckenburg, 28 Cal. App. 298, 152 Pac. 59; Judson v. Lyford, 84 Cal. 508, 24 Pac. 286; Ross v. Wellman, 102 Cal. 1, 36 Pac. 402. We pass to a consideration of the evidence as supporting the finding that the deed was made to hinder, delay, and defraud creditors.

[4, 5] If there could be any dispute as to Moore's insolvency before the deed was executed there certainly can be no shadow of doubt that by making the conveyance of the only property he owned he became insolvent and that the transfer was made "in contemplation of insolvency." Emmons v. Barton, 109 Cal. 662, 42 Pac. 303; Borgfeldt v. Curry, 25 Cal. App. 624, 144 Pac. 976; Knox v. Blanckenburg, supra. Such a transfer is void as to existing creditors. Section 3442, Civ. Code. Respondent was not an "existing creditor" when the deed was executed. A deed without consideration may be void, as made with the specific intent to enable the grantor to defraud future creditors. Schell v. Gamble, 153 Cal. 448, 95 Pac. 870; Bush & Mallett Co. v. Helbing, 134 Cal. 676, 66 Pac. 967. Whether such intent is shown is a question of fact, and not one of law. Section 3442, Civ. Code.

[6, 7] However, as bearing upon the point now under consideration, to wit, the bona fides of Moore when he made the transfer, the proof sufficient to establish fraud as to existing creditors supplies a prima facie case of fraud against those whose claims arose subsequently. Hemenway v. Thaxter, 150 Cal. 737, 90 Pac. 116. The continued control of the property after the conveyance is further evidence of fraudulent intent. Purkitt v. Polack, 17 Cal. 327; Bush & Mallett Co. v. Helbing, supra; Murphy v. Mulgrew, 102 Cal. 547, 36 Pac. 857, 41 Am. St. Rep. 200. The exercise of acts of ownership and claims of ownership by Moore subsequent to the execution of the deed with the knowledge of Mrs. Moore is strongly suggestive of fraud. The deed was ready to be placed on record at any moment, although Moore was enabled to trade on the credit of the ownership of the ranch. It is apparent that he knew that it was unrecorded; otherwise, he would not have assumed the control of the estate as owner. He thus participated in the secrecy, and may properly be held to have intended deception through the concealment of the fact that a transfer of title had occurred.

As said in Schell v. Gamble, the burden of proof is upon the creditor to establish the fact of the fraudulent intention of the grantor; that burden is, however, sustained where a prima facie case is made out. As we have shown in the instant case, the creditor added other evidence to a prima facie showing. Of course, the evidence was circumstantial; but that is usual in such cases. It is also true that the record contains other testimony, especially that of the appellant, tending to contradict the respondent's proof. It has not been necessary to give this extended consideration, since it is not the province of an appellate court to weigh and contrast the evidence.

[8] The redemption of the property from the foreclosure sale did not give appellant a clear title as against the claim of a creditor of the deceased under the circumstances of this case. By the redemption she merely removed the lien of the mortgage. Being the grantee under the deed of March, 1898, and a party to the fraud against the creditors of Moore, she could not become an innocent purchaser by the redemption as to them. Phillips v. Hagart, 113 Cal. 552, 45 Pac. 843, 54 Am. St. Rep. 369.

[9] Appellant contends that it was error to permit witnesses to testify as to statements made by Moore, subsequent to the delivery of the deed, to the effect that be still owned the property. It is well established that such evidence is admissible where the issue is one of fraud. Bush & Mallett Co. v. Helbing, supra. Emmons v. Barton is not in point, because it does not contain such an issue nor was concealment and deception charged therein. We have examined other alleged errors on the part of the court in admitting evidence, and find nothing therein of such importance as to warrant a reversal, even if slight technical errors occurred.

Judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

---

61 Cal. App. 678

LAUGHTON v. McDONALD et al.

(Civ. 2601.)

(District Court of Appeal, Third District, California. April 16, 1923.)

1. Frauds, statute of 🔑129(11)—One holding land under verbal agreement and making valuable improvements and paying purchase price entitled to have contract enforced.

One who enters into possession of land under a verbal agreement of sale, and who makes valuable improvements thereon, and particularly if he pays the purchase price, is entitled to have the contract enforced; the statute not applying to such case.

2. Specific performance 🔑121(5)—Evidence held to show defendants purchased land under verbal agreement, entered into possession, and improved it so as to be entitled to deed.

Evidence *held* to show defendants purchased land under a verbal agreement, entered into possession, and made valuable improvements thereon, so as to entitle them to a deed from plaintiff, claiming to be a bona fide purchaser.

3. Vendor and purchaser 🔑232(1)—Knowledge of possession of land by one other than vendor held sufficient to put purchaser on inquiry.

Where plaintiff, before purchasing land, saw the property and that defendants were in possession, such facts were sufficient to put him on inquiry.

4. Vendor and purchaser 🔑228(2)—One held not bona fide purchaser of land.

Where plaintiff, before purchasing land was told by defendants that they had purchased the property and were the owners thereof, plaintiff could not successfully maintain he was an innocent purchaser for value without notice.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Ejectment by Joseph Frederick Thompson Laughton against William McDonald and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Ray Manwell, of Marysville, for appellant.

W. H. Carlin, of Marysville, for respondents.

BURNETT, J. The complaint is in the usual form of an action in ejectment, and the prayer is:

"(1) For the recovery of the possession of the demanded premises and for the sum of $100 damages for withholding the possession thereof.

"(2) For the sum of $50, value of said rents, issues, and profits, and costs of suit."

The defendants denied the material allegations of the complaint, except admitting that they were in possession of the land in controversy, and, as a separate defense and by way of cross-complaint, they alleged:

"On or about the 1st day of January, 1900, one Katherine McIntyre was the owner in the possession, and entitled to the possession, of the lands in plaintiff's complaint herein described; and on or about the said date she did, for the price or consideration of $10 per acre, by a verbal agreement then and there made between her and cross-complainants grant, sell, and transfer the west 25 acres of the southwest quarter of the northwest quarter of section 27, township 17 north, range 5 east M. D. M., situate and being in the county of Yuba, state of California, to wit, the west 25 acres of the lands in said complaint described.

"The said consideration of $10 per acre was and is an adequate consideration for the contract and as to said Katherine McIntyre, and to all persons interested the said contract is just and reasonable; and whatever rights plaintiff claims to have acquired were so acquired with full knowledge of the rights of these cross-complainants as in this cross-complaint set forth.

"At the said time of the said verbal agreement in paragraph 2 of this cross-complaint mentioned said 25 acres aforesaid were entirely unimproved, with no buildings or improvements thereon, and were grown up to chaparral, brush, and in a generally wild and uncultivated condition.

"'That thereupon upon the making of said verbal agreement of purchase and sale aforesaid and in good faith and relying thereon, these cross-complainants moved upon and took possession of said 25 acres, and have since cleared the brush therefrom, constructed, and now have thereon a dwelling house, barn, chicken house and other outbuildings and improvements; have reduced said lands to a high state of cultivation; and during a period of approximately 20 years they have occupied and used said 25 acres as their home; brought thereon water from Browns Valley irrigation district; have irrigation thereon; have paid for all said water; paid all taxes and assessments of every kind levied or assessed thereon and have paid the full purchase price of said lands in said sum of $10 per acre; all in full reliance upon the said verbal agreement and with full knowledge not only of said Katherine McIntyre, but of all her successors in interest, including the plaintiff in this action and his predecessors in interest and their grantors."

No question was or is raised as to the sufficiency of the pleadings. The trial was had before the judge of the court without a jury, and the findings and judgment were in favor of the defendants. In the judgment the court decreed "that defendants and cross-complainants now are and at the date of the commencement of this action were the owners, in the possession, and entitled to the possession" of the land in controversy (describing it) "and during none of said times did plaintiff have, nor has he now any right, title, or interest in or to the same or any part or portion thereof." The court further directed the plaintiff, within five days from notice, to execute a good and sufficient deed granting and transferring to defendants the said land, and an elisor was appointed to execute such deed should plaintiff fail to do so.

[1] That one who enters into possession of real property under a verbal agreement of sale and who makes valuable improvements thereon, and particularly if he pays the purchase price, is entitled to have the contract enforced, and that the statute of frauds does not apply to such case is settled beyond controversy, and it is hardly necessary to cite authorities in support of this legal proposition. However, among the long list of cases in which the question is discussed, we may refer to Arguello v. Edinger, 10 Cal. 150; Churchill v. Russell, 148 Cal. 1, 82 Pac. 440; Kinsell v. Thomas, 18 Cal. App. 683, 124 Pac. 220; and Howard v. Stephens, 38 Cal. App. 296, 176 Pac. 65. All the decisions are in accord with the following statement made in the Kinsell Case, supra:

> "The doctrine that verbal contracts for the sale of land, if part performed by the party seeking the remedy, may be specifically enforced, is an elementary principle in equity jurisprudence and of universal application throughout the American states."

[2] It is equally as clear from the record that the evidence brings the case within the application of the foregoing principle. Indeed, the case is stronger for the reason that the entire consideration was paid by defendants. Mrs. Mary McDonald testified, in response to questions by her counsel, as follows:

> "Q. Did you have an agreement with Mrs. McIntyre about buying that land? A. Yes, sir. Q. Tell the judge what that was. A. Well, the agreement was I bought that 25 acres from Mrs. McIntyre, the agreement was I was to pay so much every year. Mr. Carlin: How much? A. I paid $20 every year and sometimes $25 and sometimes $40 when I could get it. I kept up the taxes right along; that was to go in as payment on the place—the taxes—whatever was left over went on the installment plan, paid in installments? Q. Was your agreement with her that you were to pay $20 a year each year? A. Yes, sir. Q. Some years you paid— A. Paid more, $25; yes, sir. Q. In your agreement with her when you settled up the whole thing were you to get your deed? A. No, sir; she died before she made the deed. Q. Was she to give you a deed? A. She was to give me a deed; yes. Q. Tell the court about that. A. She was to give me a deed. Q. When? When you got it all paid up? A. When I got it all paid up she was to make out the deed; I was to get the deed. Q. Was she a widow woman? A. Yes, sir; she was a widow woman. Q. How far did Mrs. McIntyre live or was her house from this land? A. About a mile, I should say about a mile. Q. What was the condition of the land when you bought it this way; was it cleared or uncleared? A. No, sir; it was all brush. Mr. Carlin: Was there any house or any building on it? A. No, sir; I put up the buildings. Q. How soon after making this agreement did you and your husband go to live on the place? A. Well, as soon as we got the house up. Q. How soon did you commence to put up the house? A. In a short time, it didn't take long. Q. As soon as you made the bargain did you go at once to build? A. Yes, sir. Q. You built your house, did you? A. Yes, sir. Q. Is that the same house that is there now? A. Yes, sir. Q. A frame house, I suppose? A. Yes, sir. Q. Did you build any outbuildings? A. Yes; a little chicken house and shed. Q. How about the chaparral and the brush, did you clear it? A. Cleared off some of it, some of it. Q. How many acres about did you clear? A. I couldn't exactly say, just cleared off as we went, maybe 10 or 15."

It was also shown that the price paid was an adequate consideration for the land, and it is not disputed that Mrs. McIntyre referred to in said testimony was the original owner of the property.

We may add that much corroborative evidence is disclosed by the record including the testimony of several witnesses that Mrs. McIntyre admitted that she had sold the land to defendants. It is true that some receipts were introduced in evidence of money paid by defendants, reciting that it was for rent of the premises, but neither of defendants was able to read or write, and they both testified that they had no knowledge or information that it was recited in said receipts that the money was for rent. There is some evidence also that the defendant William McDonald admitted that he was not the owner of the land, but he explained by saying that he meant he had not received a deed for it. It appears also that at the time when it is claimed he made such admission he was a man of feeble intellect and scarcely capable of performing or understanding a business transaction. At any rate, the most that appellant can claim is that there is a conflict in the evidence as to this vital point, but it is apparent from the record that the finding is abundantly supported by the evidence, which was offered and received on behalf of defendants.

[3, 4] As to the only other point discussed by appellant, that he is an innocent purchaser without notice, it is also clear that the court

was justified in finding against his contention. The evidence shows that before purchasing he went out and saw the property; saw respondents in possession. This, of course, would put him upon inquiry, but the evidence goes further, as shown by the testimony of Mrs. McDonald that she told appellant that defendants had purchased the property from Mrs. McIntyre and were the owners thereof. Under such circumstances he would, of course, purchase the property at his peril, and he could not successfully maintain that he was an innocent purchaser for value without notice. It is unnecessary to cite authorities in support of the proposition so well established. If it may be said that the record shows some evidence in support of appellant's claim, it cannot be doubted that the evidence to the contrary is sufficient to support the judgment.

We find no merit whatever in the appeal, and the judgment is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, Justice pro tem.

(61 Cal. App. 785)

HELLNER v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 4271.)

(District Court of Appeal, Second District, Division 1, California. April 26, 1923.)

1. Appeal and error ⚷381—Sureties on bond must be excepted to within time.

Where, after an appeal has been perfected and notice of an undertaking on appeal given, an appellee has failed to take exception to the sureties on the undertaking within five days as required by Code Civ. Proc. § 978a, *held*, that no ground for dismissing the appeal existed because the sureties on the undertaking were not acceptable.

2. Mandamus ⚷57(1)—After an improper dismissal by the superior court of an appeal from the justice court, writ of mandate furnishes appropriate remedy to appellant.

Where the superior court has improperly dismissed an appeal from the justice court, a writ of mandate by the Court of Appeal directed to the superior court is an appropriate remedy.

Application by Chas. J. Hellner for a writ of mandate directed to the Superior Court of the state of California in and for the County of Los Angeles and others. Writ allowed.

Ingle Carpenter and Chas. W. Fourl, both of Los Angeles, for petitioner.

H. G. Bittleston, of San Francisco, and Edward Judson Brown, of Oakland, for respondents.

CONREY, P. J. On petition for writ of mandate. The return to the alternative writ does not raise any issues of fact of any importance.

In an action in the justice's court wherein the petitioner Hellner was defendant, judgment was rendered against the defendant on the 19th day of January, 1923. On January 30th the defendant filed a notice of appeal, and also filed an undertaking on appeal. On Monday, the 5th day of February, before noon, he served on the attorneys for the plaintiff notice of the appeal and notice of the filing of the undertaking on appeal; said notice setting forth the date of the filing of said undertaking on appeal. On February 9th the plaintiff filed in the justice's court and served on the defendant a notice of exception to the sufficiency of the sureties on said undertaking and requiring that they justify as required by law. On February 6th the certified copy of the justice's docket and the other documents required to be filed in the superior court on appeal from a judgment of a justice's court were filed in the superior court of Los Angeles county. Thereafter the plaintiff moved the court to dismiss said appeal on the ground that the defendant's sureties, or other sureties in their place, had failed to justify, notwithstanding that they had been duly served with notice of exception to the sureties on said undertaking. The court granted said motion and dismissed the appeal. By reason of the facts stated, petitioner asks for a writ of mandate commanding the respondent court to vacate said order of dismissal and to reinstate the appeal and proceed with the trial of the cause.

The law which governs this case is found in section 978a of the Code of Civil Procedure. The time allowed to the respondent on an appeal from a justice's court within which he may except to the sufficiency of the sureties on an undertaking on appeal is defined by the phrase "within five days after the filing of the undertaking." In this case that time (allowing an extra day because the fifth day was Sunday) expired on the 5th day of February. Notwithstanding that said section of the Code provides that "notice of the filing of the undertaking must be given to respondent," no action by respondent is made to depend upon or follow the giving of this notice. "The exception to the sureties seems to have no direct relation to or connection with this notice. It may be taken before or after any formal notice of the filing of the undertaking, provided it is taken within five days after such filing." Rigby v. Superior Court, 162 Cal. 334, 339, 122 Pac. 958, 960; Blake v. Superior Court, 17 Cal. App. 51, 118 Pac. 448.

[1, 2] Since the appeal was perfected and the notice of undertaking given, in full compliance with the method prescribed by law, and since the respondent on appeal did not except to the sureties within the time requir-

ed by law, there exists no legal ground for dismissal of the appeal on the record here presented. And as petitioner has no remedy by appeal, the writ of mandate furnishes an appropriate remedy. Golden Gate Tile Co. v. Superior Court, 159 Cal. 474, 114 Pac. 978; Widrin v. Superior Court, 17 Cal. App. 93, 118 Pac. 550.

Let the peremptory writ issue.

We concur: HOUSER, J.; CURTIS, J.

61 Cal. App. 592

In re PRICE et al.

PRICE v. MURRAY.

(Civ. 2560.)

(District Court of Appeal, Third District, California. April 9, 1923.)

1. Infants ⚷84—Evidence held insufficient to warrant finding that guardian ad litem authorized employment of attorney.

In proceedings on an application for an award to attorneys for legal services performed for the estate of minors prior to the appointment of a general guardian, where such attorneys were employed by the mother of said minors, evidence *held* insufficient to warrant a finding that the guardian ad litem, himself a capable attorney, authorized the employment of other attorneys.

2. Infants ⚷84—No implied promise by guardian ad litem to pay for services of attorneys not employed by him.

The rule that services rendered to another with his consent and acquiescence without an understanding that they are gratuitous imply a promise to pay does not apply to the employment of attorneys by the mother of minors to represent them in a suit in which a guardian ad litem has been appointed, and the evidence without conflict shows that, so far as the estate of the minors was concerned, the understanding was that the services were to be rendered gratuitously.

3. Guardian and ward ⚷49—Guardian ad litem in sole charge of litigation and contracts by mother for legal services not binding on estate.

Under Code Civ. Proc. § 372, providing that an infant must appear either by his general guardian or by a guardian ad litem appointed by the court in which the action is pending, the mother of the minors is without authority to make their estate liable for the payment of the fees of attorneys employed by her; the sole power to represent the minors being committed into the hands of the guardian ad litem.

4. Guardian and ward ⚷49—Estate not chargeable for additional counsel employed by mother not shown to be necessary.

Where the guardian ad litem appointed for minors was an eminent attorney, he could not render the estate liable for the fees of other attorneys, and hence the estate was not liable for the services of such attorneys employed by the mother of the minors in the absence of a showing that such expenditure was reasonable and necessary; the equitable rule as to the allowance of all reasonable and proper expenditures where the minors' father is dead and the mother has their custody having no application in view of the appointment of a guardian ad litem, and there having been no order of court permitting such expense.

Appeal from Superior Court, Madera County; C. E. Beaumont, Judge.

Application by Stanley Murray against John L. Price, as guardian of the person and estate of Louis E. Price and another, minors, for an allowance of attorney fees. From an order granting such allowance, the guardian appeals. Reversed.

Henry C. McPike, of Oakland, for appellant.

Mason A. Bailey, of Madera, and W. C. Ring, of Madera, for respondent.

BURNETT, J. John L. Price having been appointed general guardian of the person and estate of said minors, respondent made an application to the court in said guardianship matter for an allowance of three thousand dollars for services performed for said minors before the appointment of said general guardian in an action brought in the superior court to quiet title to certain real estate in the county of Madera. The application was opposed by said general guardian, and, after a full hearing, the court made an order that "Stanley Murray, Esq., and W. C. Ring, Esq., do have and recover of and from J. L. Price, general guardian of Louis E. Price and Harold C. Price, minors, the sum of seven hundred and fifty (750) dollars," from which order the appeal has been taken by the general guardian. From the findings of the court we glean the following:

"III. That on or about the 7th day of September, 1919, Bessie Price, the mother of said defendants, and the person having the sole custody of them, employed said firm of Murray & Ring to appear in behalf of said defendants in said action as their attorneys; that the amount of compensation for their services was not agreed upon or determined at that time, but it was then and there understood and agreed between said attorneys and said Bessie Price that said attorneys would be compensated for their services from the estate of said minors.

"IV. That thereafter, and on or about the 13th day of September, 1919, said M. B. Harris, guardian ad litem of said defendants, authorized said Murray & Ring to appear in his behalf as such guardian ad litem in said action and in behalf of said defendants, and it was then and there understood and agreed by and between said guardian ad litem and said attorneys that they would be compensated for their service from the estate of said minors."

Said attorneys performed practically all the work in behalf of said minors that said action entailed and were successful in their efforts.

"Said minor defendants were financially unable to and did not meet any of the necessary expenditures and disbursements in said action, and said attorneys made all of such expenditures and disbursements necessary therefor. * * * That at the time said Bessie Price requested said Stanley Murray and W. C. Ring, Jr., to represent said defendants in said action, Stanley Murray knew that a guardian ad litem, to wit, M. B. Harris, had been appointed by order of the said superior court to represent said minors, and that said M. B. Harris was an attorney of the court appointing him, and was well qualified in point of learning to fully represent said minors in the said action."

We have sought in vain in the record to find any substantial evidence to support the finding that said attorneys were employed by the guardian ad litem to represent the minors in the litigation. M. B. Harris testified directly to the contrary, and his testimony was not contradicted in any respect.

As to what occurred when Mr. Ring consulted with him, in answer to questions by Mr. Ring he testified as follows:

"Mr. Harris, do you recall when I came down to Fresno with the answer and cross-complaint that were first filed in the case and showed them to you, and I don't know whether you remember that particularly or not, but I will refresh your memory with it. A. Well, I wouldn't want to be positive, Mr. Ring. I remember your coming there with an answer, pleading in the matter. Q. Do you recall that I came down there one afternoon about the 15th or 16th day of September, 1919, and told you that I was W. C. Ring, Jr.? I don't think we had ever met before, and Mr. Murray and I had been retained by Mrs. Bessie Price to represent the children in the case, and we had prepared an answer and cross-complaint to be filed and asked you if you would verify it as guardian ad litem? A. I remember something of that kind, yes. Q. Do you remember saying at that time, 'Well, I am very busy and it is growing late in the afternoon'—I think it was perhaps 4 or 4:30 then—'and I won't have time to look it over to-day, but, if you will leave it I will look it over, and if it is all right I will verify it and send it to the court or send it back to you.' Do you remember some such conversation as that? A. I think that probably happened, if you remember it. I don't recollect it exactly that way, but I know you brought papers for me to verify. Q. Well, I said, 'Mr. Harris, the time will be up to-morrow, or very shortly, and it will be necessary for this to be filed, if it is going to be filed in time, right away, and if you haven't time to give it attention now, we can verify it, either Mr. Murray or I, since you are out of the county where the action is pending anyhow'? A. I recall the fact that you were willing to have the verification made here. I recall that. Q. And do you remember of making any objection to that at that time? A. No, I didn't object to it. Q. In fact, Mr. Harris, the only point that you wanted clear between Mr. Murray and myself during the whole course of the proceedings was that you, personally, were not going to be liable for any attorney's fees for the work? A. Mr. Ring, I wouldn't put it that way, and in fact, I didn't put it that way in my correspondence. I felt I had no right to incumber the estate with an obligation that I had been appointed to perform and I undertook to make that clear. Mr. Ring: Q. In any way that it would be an assistance to us as attorneys in the case, you were willing for us to sign our names as guardian ad litem too? A. I think I stated it to you and in a letter, so as to be absolutely certain that while I was glad that you should act, yet it must be with your knowledge it wasn't by my employment, and further, where assistance was offered to the minors, I had no right to refuse it, but it wasn't by my employment as guardian of the estate or otherwise."

There was also some correspondence between Mr. Ring and Senator Harris, of which we may refer to the concluding part of a letter written by the former to the latter on October 21st, as follows:

"However, we do not care to stand on the fence between your failure to actually and irrevocably either consent or refuse to consent to our further participation in the case.

"We would therefore thank you to come out and say one way or the other your desires in the matter, although, of course, we understand that you consented to our going ahead. We do not expect to look to you for any compensation for our services, but do feel that we should know exactly where we are in the matter in your regard."

Two days later Mr. Harris replied as follows:

"The letter to which you refer as not having been answered by me was received. There did not seem to be any occasion for a reply. I had already stated to you fully my position in the matter. I had not employed you and feel fully competent personally to take care of the interests of my wards. You had been employed by the mother of my wards and under that employment had obtained my consent to appear for me. A controversy having arisen between you and your employer, you desired me to give you authority to continue in this case. I did not feel that I could be a party to the controversy and told you that you had my permission to continue to act as attorneys of record for me, but that I had not employed you, and would not be responsible to you in any way for your fees. That if you chose to continue in the case with that understanding, it was satisfactory to me that you should do so.

"I do not know how I could have made my position any plainer, and I do not know how I could consistently take any other position. It is my duty to protect my wards, and I have no right to refuse any assistance that may be offered."

Mr. Harris testified further:

"The letters state pretty thoroughly the transactions between Murray & Ring and myself as guardian ad litem. In addition to the letters there were one or two conversations with Mr. Ring. I don't recollect ever having any conversation with Judge Murray, but with Mr. Ring I made it quite clear as far as I was personally concerned I was ready to take care of the case for the minors as their guardian, but in view of the fact that the firm had been employed by the mother who wished a defense made by them also for the minors, that I would only consent and willingly consent that they should take part in the proceedings as they saw fit for the protection of the minors, but they must understand it was not at my employment or the employment of the estate, but at the employment of the mother. That conversation, I am quite clear, took place once and possibly oftener, and I made the same statement in open court at one time before the court."

It is not claimed that the witness was not entitled to full credit. Assuredly, there is nothing inherently improbable in his testimony, nor is there a single circumstance revealed that would discredit it in the least. Moreover, the witness is a man of superior attainments, and he expressed himself so clearly that there can hardly be any room for misunderstanding as to his meaning. We may remark that a significant and corroborative circumstance is found in the fact that Mr. Ring did not take the stand to contradict the statements of the witness. If his recollection of the interview had been different, he would, of course, have felt constrained to so inform the court.

[1] As we read and construe the record, we can reach only the conclusion that said finding is entirely unsupported. If we concede, therefore, that the guardian ad litem had authority to employ other attorneys to represent the minors in the litigation and thereby to bind their estate for the value of such services, we can find in the evidence no sufficient basis for this theory.

[2] We do not overlook the contention of respondent:

> "That the mother of the minors employed him to defend her children's interests, and the guardian ad litem authorized the appearance and the performance of the services under circumstances from which law and equity imply a promise and obligation to pay. Because, when services are rendered to another with his consent and acquiescence without an understanding that they were to be rendered gratuitously, a promise to pay therefor is implied. Lacy Mfg. Co. v. L. A. Gas Co., 12 Cal. App. 37, 106 Pac. 413; Batcheller v. Whittier, 12 Cal. App. 262, 107 Pac. 141; 40 Cyc. pp. 2808, 2809."

But the doctrine has no application for the reason, already stated, that the evidence shows without conflict that there was an *understanding* that, as far as the estate of the minors is concerned, the services were to be rendered *gratuitously*.

The question remains whether the other finding as to the employment by the mother is a sufficient support for the judgment.

As to the fact of employment Judge Murray testified:

> "Bessie Price came to me and said, 'Suit has been brought by the Prices against—filed in this court,' and she was rather indignant on the ground that she had not been, they had not asked her to become the guardian, and seemed to be a family feeling there, and she said 'that inasmuch as we had been school mates and she had known me all my life that she wanted to intrust her case to my care,' and I thereupon took the papers up to my office, and she at that time cautioned me. She said she was in fear of Mr. Price and didn't want him to know what she was doing, so I took the papers up to the office and consulted my associate at that time, Mr. Will C. Ring, and after going into the matter we proceeded to defend the action."

The witness further testified that thereafter she told him that—

> "Mr. Price had been after her so strenuously to drop the suit and making threats she decided it might be better to drop it and send the bill, and I sent her a bill, and upon receipt of it she came back to the office, and she said in view of his actions she wanted us to continue with the case and under no circumstances to drop it; that she wished me to continue with the case and protect the interests of her two children."

[3] From the foregoing it may be doubted whether the court could rationally conclude that the parties agreed or understood that the estate of the minors was to be charged with the value of said services, but be that as it may, the mother had no authority by such contract to make said estate liable. She was not the agent of the minors in reference to said litigation. The sole power to represent the minors was committed into the hands of the guardian ad litem. Section 372 of the Code of Civil Procedure provides that the infant "must appear either by his general guardian or by a guardian ad litem appointed by the court in which the action is pending."

Even if there be a general guardian, the court may, if deemed advisable, appoint a guardian ad litem "to represent the infant in the action or proceeding." Herein there was no general guardian, and there is no possible basis for the claim that the one appointed by the court for that very purpose under the sections of the Code was not clothed with exclusive power to direct, manage, and control the suit in behalf of said minors. He would be subject to the supervisory authority of the court, but subject to that limitation he is the sole representative of the minors, and no one can divide or diminish his prerogative. In 22 Cyc. 661, it is said:

> "His powers are strictly limited to matters connected with the suit in which he is appointed, and his acts with respect to the infant's rights concerning any other matters are unauthorized; but he is a full representative of the rights and interests of the infant for the particular case in which he is appointed, and is clothed with as full and perfect author-

ity for that suit as the general guardian is for all the duties incident to his office."

On the following page the statement is:

> "The duty of a guardian ad litem or next friend is to look after the infant's interest and to act for him in all matters relating to the suit as he might act for himself if he were of capacity to do so."

In other words, the authority of the guardian ad litem in relation to the suit is equal to what would be the authority of the ward if he were an adult. Manifestly this would be inconsistant with the authority of any other person to employ counsel for the minor in such litigation.

In Cole v. Superior Court, 63 Cal. 86, 49 Am. Rep. 78, it is declared:

> "The court is, in effect, the guardian—the person named as guardian ad litem being but the agent to whom the court, in appointing him (thus exercising the power of the sovereign state as parens patriæ) has delegated the execution of the trust, and through such agent the court performs its duty of protecting the rights of the infant or incompetent person."

In Emeric v. Alvarado, 64 Cal. on page 593, 2 Pac. on page 459, we find this:

> "There is no change of parties by the appointment of the guardian ad litem. The guardian does not become a party. The infant is the party, and he only appears by the guardian. The latter is appointed to appear for the infant, and to manage and take care of the suit for such infant when he is plaintiff and to appear, manage and take care of the defense for the infant when he is defendant. In case of an infant defendant, the answer is put in by the guardian for the infant. The guardian has authority to appoint an attorney to put in such answer, but the attorney so appointed is the attorney of the guardian and not of the infant."

[4] But herein the guardian ad litem was and is an eminent attorney, capable of attending to the litigation, and the evidence shows that there was no need for assistance. Under such circumstances, even if the employment had been made by the guardian, the court would not have been justified in charging the estate of the minors with the additional cost. The guardian could not thus shift to other persons the responsibility imposed upon him personally by his appointment. At any rate, if he employed an attorney he would be primarily liable, and if he paid for the services, it could be allowed against the estate of his ward only in case the evidence showed the expenditure to be reasonable and necessary. Hunt v. Maldonado, 89 Cal. 636, 27 Pac. 56; McKee v. Hunt, 142 Cal. 526, 77 Pac. 1103. Indeed, the rule in this state seems to be that before employing an attorney, if he expects to charge the estate with the cost, he must obtain an order of the court permitting such expense. In Morse v. Hinckley, 124 Cal. 154, 56 Pac. 896, it is said:

> "If a guardian cannot enter into a valid contract, without first obtaining an order of the probate court, for repairs and improvements of buildings on property belonging to the ward, surely a guardian without such authority cannot enter into a contract for the employment of legal services so as to bind the ward, or in any way affect his property."

In support of the allowance of the claim by reason of the employment by the mother, respondent asserts:

> "Courts of chancery from the beginning have been clothed with jurisdiction over infants and their estates to enforce and secure their protection, maintenance and education. For this purpose and to this end all reasonable and proper expenditures may be made from the minor's estate. This is always true when the minor's father is dead and it is in the custody of its mother 'without reference to her own ability to support and educate them, and such allowance may be made not only to provide for the future, but also to reimburse her for past expenditures.'"

Many authorities are cited to vindicate the foregoing statement, among them In re Beisel, 110 Cal. 267, 40 Pac. 961, 42 Pac. 819, and no fault can be found with this general view of the relation of the parents to their children; but it has no application to this particular case, which is controlled by the express provisions of the statute.

The equitable principle thus invoked by respondent is indeed aptly illustrated in the Beisel Case wherein, according to the syllabus, it was held:

> "Where the mother of minor children has acted in good faith for their benefit without letters of guardianship, she is chargeable in equity as a quasi guardian, or trustee of their estates, and an accounting and settlement of such trust after the issuance of letters of guardianship, is in the nature of an accounting in equity to be determined upon equitable principles; and the court has jurisdiction in such accounting to allow reasonable and proper credits to her for maintenance of the minor children, and for expenditures incurred on their account prior to the letters of guardianship."

But, as stated before, herein the situation called for a special service for the minors, and the law required the court to impose that duty upon a special agent, and the court acted in accordance wtih such mandate of the law, leaving no room for the exercise of such equitable principle. If the guardian ad litem had declined or omitted to represent the minors and the mother in order to protect their interests had employed an attorney a different situation might be presented. In such case it would be at least just to allow the attorney employed by the mother the compensation that would otherwise go to the guardian.

We are reluctant to reverse the order since the estate had the benefit of the services, but we see no other alternative. Indeed, nearly all the work required to suitably represent the minors was performed by respondent and his associate. They relieved the guardian ad litem to a great extent, but it would be subversive, we think, of the principles that prevail in guardianship matters, to allow this charge against the estate of the minors.

Some other questions are discussed, but we deem it unnecessary to consider them.

The order is reversed.

We concur: FINCH, P. J.; HART, J.

(61 Cal. App. 787)

KANSABURO OHSAKI et al. v. AHERN. (Civ. 4516.)

(District Court of Appeal, First District, Division 1, California. April 26, 1923.)

1. Landlord and tenant ⟹180(1)—Complaint in action for lessor's breach of lease held to state cause of action.

In an action by tenants against lessor for damages, a complaint, which alleged that after advance payment of rent and expenditures they were notified by both the landlord and another that such other had acquired title and that the tenancy could only continue with his consent, which consent he withheld, and that plaintiffs had performed of all covenants, stated a cause of action.

2. Landlord and tenant ⟹174—One holding property under contract from one who has no title may yield it to true owner without legal proceedings and without losing his right to damages.

One who has gone into possession of property under a lease contract from person who has no title thereto, or who has subsequently lost the same, may yield it to the true owner without waiting for the latter to take it forcibly or by legal proceedings, and by such yielding he is not precluded from recovering damages of his original lessor.

3. Landlord and tenant ⟹63(2)—Tenant's complaint alleging breach of leased contract and seeking damages held not to deny landlord's title.

The complaints in an action by tenants for the breach of a lease contract, which alleged that after they went into possession they were dispossessed by a failure or alienation of their landlord's title, *held* not to amount to a denial of such landlord's title; the action being not a possessory action, but one for damages.

4. Pleading ⟹67, 192(2)—Complaint need not anticipate defense; ambiguity or uncertainty in allegations anticipating defense not ground of demurrer.

Plaintiffs were not required to make allegations to meet or cut off a defense, and if, in so doing, they were ambiguous and uncertain in their recitals, objection thereto could not be raised by general demurrer.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Kansaburo Ohsaki and others against W. J. Ahern. Judgment for defendant, and plaintiffs appeal. Reversed.

Algernon Crofton, of San Francisco, and Chas. A. Wetmore, Jr., of Marysville, for appellants.

Hoefler, Cook & Snyder and E. E. Hull, all of San Francisco, for respondent.

TYLER, P. J. Action for damages for breach of contract in relation to real property.

A demurrer to the amended complaint was sustained, and upon refusal of plaintiffs to further amend the action was dismissed. This is an appeal from such judgment.

[1] It appears from the amended complaint that on November 16, 1920, the defendant leased to plaintiffs a certain tract of land in Sutter county containing some 136 acres, more or less, for the cropping seasons of 1921, 1922, and 1923. Plaintiffs, in accordance with the terms of the lease and at the time of the execution thereof, paid to the defendant the sum of $6,000 in advance as rental. Previous to this transaction the lessor, Ahern, had borrowed from one Huston the sum of $2,800, and as security for the payment thereof had conveyed to Huston by deed of trust the tract of land in question. This loan matured on January 1, 1921, and not having been paid the land was sold to Huston on May 1, 1921, under the trust deed, and title vested in him. Shortly thereafter on May 7, 1921, the defendant Ahern notified plaintiffs that Huston was the lawful owner of the land and that the continuance of the lease depended upon his consent. On May 14, 1921, plaintiffs were notified by Huston that he was such owner, and that he would not recognize or continue the lease given to them by defendant, and demanded of them that they surrender to him possession of the land forthwith. Plaintiffs complied with this demand. The complaint contains further allegations to the effect that by reason of these facts plaintiffs were denied possession and quiet enjoyment under the lease, notwithstanding that they had performed all the terms and covenants thereof required by them to be performed; and in support of their claim for damages it is alleged that between the time the lease was entered into and the 1st day of May, 1921, plaintiffs, in accordance with and relying upon the terms of the lease, expended in the tilling and cultivation of the land the sum of $2,850. Judgment was accordingly prayed for the sum of $8,850, which sum consists of the advance rental of $6,000, together with the amount expended in the cultivation of the land.

The demurrer to this complaint was sustained upon the ground that it failed to state a cause of action.

Respondent assigns several reasons in support of the order sustaining the demurrer.

It is first claimed that it was the duty of plaintiffs to require proof of the claimant of his paramount title before voluntarily surrendering possession to him; and that as the complaint fails to show such facts or that Huston held or possessed such title it is defective for this reason. It is further claimed that the pleading is likewise defective in failing to allege consent on the part of the defendant to plaintiffs' surrender, and in the omission of any allegation to the effect that plaintiffs had notified defendant of Huston's claim of paramount title, which, it is claimed, was necessary in order that defendant might have had an opportunity to defend his own title.

[2] These contentions are wholly without merit. The complaint as above indicated recites in what manner Huston acquired title, and it further recites that plaintiffs were notified both by Huston and defendant himself that Huston was the lawful owner. Other allegations upon the subject charge that defendant informed plaintiffs that the continuance of the lease depended upon Huston's consent, and that further recognition of plaintiffs' tenancy was refused by Huston. No question of lack of notice to defendant in order to enable him to resist Huston's claim of paramount title can therefore in any manner be involved, as notice would have been a useless and idle act. Under such circumstances, one who has received possession of property under a contract from a person who has no title, or who has subsequently lost the same, may yield it to the true owner without waiting for the latter to take it forcibly or by legal proceedings. Jeffers v. Easton, Eldridge & Co., 113 Cal. 345, 354, 45 Pac. 680.

[3] Respondent's further contention that the facts pleaded amount to a denial by plaintiffs of their landlord's title is equally without merit. This is not a possessory action, but one for damages for breach of the terms of a lease. Defendant, according to the recitals in the complaint, denied further title in himself and admitted it to be in Huston. Yielding title to a claimant under such circumstances does not amount to a denial of title. Jeffers v. Easton, Eldridge & Co., supra.

[4] Something is said of the complaint being ambiguous. Plaintiffs were not required in stating their cause of action to incorporate allegations in their complaint for the purpose of meeting or cutting off a defense. If in so doing they were ambiguous or uncertain in the recital of their allegations, this objection could not be raised by a general demurrer. Munson v. Bowen, 80 Cal. 572, 22 Pac. 253.

We do not deem further discussion of the case necessary. To recapitulate, the complaint alleges a right of possession in plaintiffs which carries with it a covenant of quiet enjoyment. Civ. Code, § 1927. It further alleges full performance on the part of plaintiffs of all the covenants required of them to be performed under the lease, the breach of defendant, and the damage caused thereby. These allegations we deem sufficient.

For the reasons given, the judgment is reversed.

We concur: RICHARDS, J.; St. SURE, J.

---

61 Cal. App. 720

CARROLL v. LATHAM et al. (Civ. 4030.)

(District Court of Appeal, Second District, Division 2, California. April 20, 1923.)

1. Landlord and tenant ⚷86(1) — Evidence held to support finding lessees had not exercised option to extend term of lease.

A finding that lessees had not exercised their option to extend the term of their lease before they were evicted *held* supported by evidence notwithstanding its complication with evidence relating to request by lessees for leave to assign lease.

2. Appeal and error ⚷1071(5)—That finding was not supported by evidence held immaterial where finding was not responsive to issues.

Whether a finding is supported by evidence is immaterial where the finding is not responsive to any issue framed by the pleadings.

Appeal from Superior Court, Imperial County; R. D. McPherrin, Judge pro tem.

Action by C. N. Carroll against Arch Latham and others, in which action one of the defendants interposed a cross-complaint against plaintiff. Judgment for plaintiff, and defendants and cross-complainant appeal. Affirmed.

E. R. Simon, of El Centro (H. A. Wolford, of Hillsboro, N. M., of counsel), for appellants.

Kimpton Ellis, of Los Angeles, Dorsey Whitelaw, of El Centro, and Walter J. Desmond, and Charles La V. Larzelere, both of Long Beach, for respondent.

WORKS, J. Plaintiff, as lessor, entered into an agreement of lease with certain of defendants, whereby the latter acquired a leasehold term in certain lands. The lease granted to the lessees an option to extend the term for an added period of two years. The original term having expired plaintiff evicted the lessees from the demised premises, and commenced this action for damages because

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

of the alleged breach of certain covenants of the lease. One of the defendants interposed a cross-complaint against plaintiff upon a certain alleged claim. Plaintiff had judgment upon the issues framed under both the complaint and the cross-complaint, and the defendants and the cross-complainant appeal.

[1] It is contended by appellants that the lessees had exercised their option to extend the term of the lease, before they were evicted from the demised property, and they insist that the findings to a contrary effect which were made by the trial court were not supported by the evidence. There is no question under the evidence that the lessees, some months before the expiration of the original term, requested leave to assign the lease for both the remainder of the term and for a period beyond that term, as to which period they indicated a desire for an extension on behalf of their proposed assignees. Further, there is no doubt that the request for leave to assign was refused by respondent. The evidence on the question whether the lessees exercised their option to extend the term on their own behalf, as contemplated by the covenants of the lease, is complicated by its intermixture with the evidence relating to the request for leave to assign. The confusion resulting from this complication is plainly evident in the testimony of respondent, but we think that his testimony, as set forth in the brief of appellants, alone was sufficient to support a finding that the option was not exercised, and this notwithstanding the confusion mentioned. Before we quote from respondent's testimony it is to be noted that the Johnson and Coberly mentioned by him were the agents of the lessees, who acted for them in conveying the alleged notice that they were exercising the option to extend. Parts of the testimony of respondent, with our italics, follow:

> "Q. Did Mr. Johnson ask you to extend the lease? A. Yes, sir. Q. *To extend it?* A. *No, sir; not to extend it. He didn't.* He asked me to transfer the lease. Q. Did any one at any time ask you *to extend* this lease for a period of two years after its expiration? A. *I don't think they did.* Q. After September, 1919 [when the original term ended]? A. *No, sir; I don't think so.* * * * In that conversation something came up about an extension, but I always told them I wouldn't extend the lease, that *I wouldn't transfer it.* * * * Q. You say Mr. Johnson asked you to consent to the assignment of this lease to N. R. Vail? A. He asked me to do it; well, yes; he did. Q. Didn't he at that time tell you that [the lessees] had elected *to extend* the lease for the two years' period? A. *No, sir.* * * * He might have asked me about it, but I refused anything in regard to transferring the lease or in regard to the two years' extension. * * * Q. If you refused to extend the lease, isn't it a fact that Johnson and Coberly did talk to you about extending the lease? A. Of course, they talked to me about it. Yes, sir; but I didn't consent to it. Q. Didn't Mr. Johnson tell you [the lessees] had elected to extend the lease for two years and were claiming that they had a lease for two years additional? A. Oh, yes; they claimed that they had got the lease and they would hold it for two years longer. Q. What they asked you to do was *to assign* not only the lease for the balance of the first year, but for the balance of the first year and *two more years?* A. Yes, sir; *and I refused.* Q. And Mr. Coberly also told you, did he not, he talked to you about [the lessees] wanting to extend this lease for two years, didn't he? A. Yes, sir; but my contract said that they *could not sublease it and I refused.* Q. Mr. Coberly requested you to consent to the assignment for the balance of the first two years and *to assign* this lease for *two years additional?* A. Yes, sir; he asked me to, but I refused to do it."

The disputed findings were supported by the evidence.

[2] Appellants make several other points, but, with the exception of one, they are all met by the conclusion which we have reached upon the question of which we have just made disposition. That excepted one requires a special treatment. The complaint was principally based upon a provision of the lease to the effect that the lessees agree "to return the farm at the expiration of this lease * * * in first-class condition, particularly as to a full stand of alfalfa being seeded and growing in order that no lapsed time will ensue at the expiration of this lease." We say that the complaint was principally so based because there are in it allegations upon a claim for damages for lost farm machinery. The allegations of the complaint upon what may be termed its main feature, then, were as follows, making due ellipsis:

> "That under and by the terms of the said lease [the lessees] agreed to return the said farm premises at the expiration of said lease * * * in first-class condition, particularly as to a full stand of alfalfa being seeded and growing in order that no lapse of time would ensue at the expiration of said lease; that said [lessees] failed and neglected, on or at the expiration of said lease, or at all, to return the said farm * * * in first-class condition, and failed to have a full, or any stand of alfalfa seeded or growing thereon, but on the contrary left the said property in a badly damaged condition, to wit."

The complaint then sets forth specifically the particulars in which the "badly damaged condition" consisted. All these allegations are put in issue directly by specific denials contained in each of the two answers by which the various defendants responded to the allegations of the complaint. No exception is taken by appellants to any finding which the trial court may have made upon the issues thus presented, but they do complain that the evidence does not support a finding to the effect that it is not true that at the time of the expiration of the original term under the lease "the said defendants, or any of them had kept the letter and spirit of said lease." This finding, so far as we can discover, is not responsive to any issue framed by the pleadings. It certainly does not meet the issue which we have just outlined, that being the only issue as to which the finding could apply even remotely. It is therefore immaterial whether the finding is supported by any evidence.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

61 Cal. App. 667

HAY v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

(Civ. 4272.)

(District Court of Appeal, Second District, Division 1, California. April 16, 1923. Hearing Denied by Supreme Court June 16, 1923.)

Constitutional law 🔑205(3)—Jury 🔑39—Statute exempting honorary members of company, troop, or division of designated state militia organization held invalid.

Pol. Code, § 2102, seeking to extend to "not to exceed twenty honorary members" of a company, troop, or battery, the privilege of exemption from jury duty as provided in section 2098, and even exemption from service on any posse comitatus, on the mere payment of $50 into the civil fund of such company, troop, or battery of certain designated state military organization, is invalid as violating Const. art. 1, §§ 11, 21, by granting an immunity which is denied to other citizens who, upon the same terms, might be willing to purchase exemption from the same inconveniences.

Original petition for writ of mandate by W. H. Hay against the Superior Court in and for the County of Los Angeles, and Hon. Russ Avery, as Judge. Writ denied.

Farrand & Slosson and Henry C. Huntington, all of Los Angeles, for petitioner.

Thomas Lee Woolwine, Dist. Atty., Wm. J. Clark, Deputy Dist. Atty., and James P. Costello, Deputy Dist. Atty., all of Los Angeles, for respondents.

CONREY, P. J. Application for writ of mandate to require respondents to excuse petitioner from service as a grand juror.

Petitioner claims exemption as an honorary member of an infantry company of the state militia, in accordance with the provisions of sections 2102 and 2098 of the Political Code.

In the state of Michigan it has been held that an exemption of this character is not unconstitutional and is not class legislation. Hall v. Burlingame, 88 Mich. 438, 50 N. W. 289. For note referring to other cases on the subject see 5 A. & E. Ann. Cas. 783. The case which seems nearest to denial of the right to create this privilege is Neely v. State, 4 Lea (Tenn.) 316.

A clear statement of the distinction between an exemption based upon some kind of service and an exemption purchased with money is found in the brief for appellant in Albert v. White, 33 Md. 300.

In Stewart v. State, 23 Ga. 181, it is said that "the actual service rendered, and skill acquired by the regular members, is the foundation of the exemption from road, patrol, and jury duties." This referred to members of a voluntary military company.

In McGunnegle v. State, 6 Mo. 367, the exemption was based upon actual membership in a fire company, and was sustained as based upon a reasonable distribution of the duties of citizenship.

In Hamann v. Heekin, 88 Ohio St. 207, 102 N. E. 730, reported in Ann. Cas. 1915A, 1058, the Supreme Court of Ohio declared void a statute exempting contributing members of National Guard companies from jury duty. But the decision was based upon the terms of the statute, which did not provide for such immunity upon equal conditions, either as to military service or as to amount of money to be contributed. It is not made entirely certain whether the court would have followed Hall v. Burlingame, the Michigan Case, supra, if the conditions had been the same; although that case is referred to in the opinion.

Sections 11 and 21 of article 1 of the Constitution of California provide as follows:

> "Sec. 11. All laws of a general nature shall have a uniform operation."
>
> "Sec. 21. No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature, nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

In Ex parte Jackson, 143 Cal. 564, 573, 77 Pac. 457, 461, the Supreme Court was considering the validity of a license ordinance which, among other things, forbade the carrying on of a livery or feed stable in the city of Whittier without first having procured a license so to do. Having first stated that the ordinance failed to suggest any exercise of police power, and that its sole object in that regard was to impose a license tax for revenue only, the court stated that the section of the Constitution which provides that no citizen, or class of citizens, shall be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens, was not applicable to the case. The court said:

> "It is enough to satisfy the provisions of section 21 of article 1 of the Constitution that any citizen of the state or the United States

may engage in the specified business in the city of Whittier upon the same terms as any other citizen may engage in such business therein."

It is left open to inference that if the ordinance had attempted to require the payment of a license fee by some citizens engaged in that business in the city, and had exempted others, the ordinance would have been obnoxious to the provisions of said section.

In the case of In re Sumida, 177 Cal. 388, 170 Pac. 823, the court had under consideration an ordinance to which objection was made that it was in conflict with certain provisions of the Constitution, including section 21 of article 1. The court said:

> "From necessity it has been held that the Legislature may classify in order that it may adapt its legislation to the needs of the people. If this cannot be done, laws will not always bear equally upon the people. This classification, however, must be founded upon differences which are either defined by the Constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity in the legislation. It must not be arbitrary, for the mere purpose of classification that legislation really local or special may seem to be general, but for the purpose of meeting different conditions naturally requiring different legislation."
>
> "A law is general and uniform in its operation when it applies equally to all persons embraced within the class to which it is addressed, provided such class is made upon some natural, intrinsic or constitutional distinction between the persons composing it and others not embraced in it. * * * The difference on which the classification is based must be such as, in some reasonable degree, will account for or justify the peculiar legislation."

In the case of In re Blois, 179 Cal. 291, 295, 176 Pac. 449, 450, referring to said section 21 of article 1, the court said:

> "This latter section of the Constitution has been given direct application to statutes and ordinances which have been enacted and sought to be enforced either by the state or by political subdivisions thereof, and in which attempts have been made to discriminate in favor of or against particular persons or classes of persons as to whom no reasonable basis of discrimination can be seen to exist; and in all such cases the courts of this state have uniformly held such attempted legislation to be void"—citing cases.

Applying the principle thus stated, the court in that case held void an ordinance of the city of Palo Alto providing for the inspection of laundries which solicited laundry work in the city, and requiring a larger inspection fee for laundries located outside the city limits than for laundries located within the city limits. It was held that the ordinance was discriminatory and therefore invalid under the Constitution.

In Mordecai v. Board of Supervisors, 183 Cal. 434, 192 Pac. 40, was pointed out that the provision of the Constitution for uniformity of operation of legislation (section 11, art. 1) is closely connected with the further provision expressly prohibiting the granting of special privileges or immunities, and the court again reiterated the statement of the decisions that—

> "While the requirement that a general law must have a uniform application does not mean that it must have a universal operation, and it is valid if it applies alike to all persons or objects within a class—or, what is the same thing, there is excepted from its operation a class—founded upon some 'natural, intrinsic, or constitutional distinction,' yet if the statute operates only upon a class, or there is excepted from its operation a class, not founded upon a 'natural, intrinsic, or constitutional distinction,' its operation is not uniform, and it is discriminatory legislation of the sort which the Constitution purposed to prohibit and is invalid."

It is plain that the provisions of section 2102 of the Political Code endeavor to extend to "not to exceed twenty honorary members" the privilege of exemption from jury duty, and even exemption from service on any posse comitatus (a service peculiarly appropriate to citizens on occasions of public disorder and danger), on the mere payment of $50 into the civil fund of a company, troop, or division of certain designated military organizations of the state. We are of the opinion that such a statute, if held valid, will create a privileged class whose exemption is purchased solely with money and is not earned by any other kind of service to the state or to the public. For be it noted that said section 2102 specifically provides that such "honorary" members "shall not be required to drill or perform any military duty by reason of such membership." They would thus be given, contrary to the provisions of said section 21 of article 1 of the Constitution, an immunity which is denied to other citizens who upon the same terms might be willing to purchase exemption from the same inconveniences.

The alternative writ of mandate heretofore issued is discharged, and the application for a peremptory writ is denied.

We concur: HOUSER, J.; CURTIS, J.

(61 Cal. App. 689)

PEOPLE v. MOROTTI. (Cr. 1097.)

(District Court of Appeal, First District, Division 1, California. April 17, 1923.)

1. **Infants 🔑20—Evidence of contributing to delinquency held sufficient.**

Evidence on prosecution for contributing to the delinquency of a female child by acts tending to cause her to lead an idle, dissolute, and immoral life, *held* sufficient to support a conviction notwithstanding inherent improbabilities in testimony which might affect its weight.

2. **Criminal law 🔑415(1)—Complaint of victim of lust to be admissible to be made voluntarily and soon.**

That a complaint by the victim of the lust of another may be admissible on prosecution of the other, it should have been made voluntarily and soon after commission of the outrage.

3. **Witnesses 🔑390—Writing signed by others held inadmissible to impeach witness.**

A writing signed by O. and B., stating what F., a female child, told them that M. did to her, *held* inadmissible on prosecution of M. for contributing to the delinquency of F., to impeach F., who had surprised the prosecution by denials of the commission by M. of the acts charged; the testimony of O. showing that F. made no such statement to him or in his presence, and the writing being doubly hearsay, so far as O. undertook to state therein what F. said to B. out of O.'s presence.

4. **Criminal law 🔑1186(4)—Erroneous admission of testimony held prejudicial.**

Erroneous admission, on prosecution for contributing to delinquency of a female child, of what she had told others, contradictory of her testimony denying the commission by defendant of the charged acts, *held* clearly prejudicial, and so ground for reversal, notwithstanding Const. art. 6, § 4½.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Giuseppe Morotti was convicted of contributing to the delinquency of a minor, and appeals. Reversed.

E. B. Martinelli and Jordan L. Martinelli, both of San Rafael, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

RICHARDS, J. The defendant was charged with and convicted of the offense of contributing to the delinquency of a minor, the charging part of the information consisting in the averment that the said defendant did, on or about the 20th day of January, 1922, at and in the county of Marin, state of California, willfully, unlawfully, and lewdly commit certain specified lascivious acts of fondling and personal contact upon the person of one Florinda Berri, a female child of the age of nine years, which would tend to cause said child to lead an idle, dissolute, and immoral life. This appeal is from the judgment of conviction of this offense.

[1] The first contention of the appellant is that the evidence was insufficient to justify the verdict or support the judgment. We find no merit in this contention. The prosecution produced the witness Agostini, who testified directly to the commission of the acts complained of by the defendant within the presence and observation of the said witness. It is true that the testimony of this witness is attended with certain inherent improbabilities which might be held to affect its weight, but which are not, in our opinion, sufficient to so far destroy its value as to render it insufficient to sustain the verdict of the jurymen if believed by them. The argument of the appellant as to the insufficiency or doubtful character of this testimony is more particularly directed to the appellant's second contention, which is that the trial court committed prejudicial error in the admission of certain other evidence offered by the prosecution in support of its case. The occasion for the offer of this evidence arose in this wise: The prosecution placed upon the witness stand the minor child, a girl of the age of nine years, upon whose person the lascivious acts charged against the defendant were alleged to have been committed. The child, when examined in chief as such witness, denied that the defendant had committed any of said acts upon her person and denied that she had ever been at the place with the defendant where the acts were alleged and testified to by the witness Agostini to have been committed. The prosecution, being surprised by her denials, undertook to cross-examine the witness and also undertook to lay the foundation for impeaching her testimony by questions having for their purpose the showing that she had made statements to certain other persons which were in contradiction of her testimony as given upon her examination in chief. The child was asked whether she had not had conversations with her aunt, Mrs. Bolla, and with a Mr. O'Connor, at the home of her said aunt in Gonzales, with relation to the conduct of the defendant toward her in her father's barn in Marin county a few weeks before. She admitted that she had had conversations with these two persons at the place indicated, and also admitted that in response to certain very general questions asked by them she had responded at first with denials, but had finally answered affirmatively to some of these questions; but she insisted that in so doing she was excited and hysterical and so pressed that she did not understand what she was saying, and that her affirmative responses given under these circumstances were untrue. After this vain attempt to procure from the child testimony which would sustain the charge against the defendant, the prosecution

placed upon the witness stand Mr. O'Connor, who testified that he was the probation officer of the county of Marin, wherein the offense was charged to have been committed; that having learned of the statements which the witness Agostini had made, he sought to interview the child at the home of her parents in that county, but found that she had been sent to the home of her aunt, Mrs. Bolla, at Gonzales, in Monterey county. He accordingly went to Gonzales, and learning from the child's aunt that she was in school, drove over to the school and got the child. On the way back to the house of the aunt he undertook to interview the child as to the conduct of the defendant toward her, asking her some very general questions touching the acts of the latter, to which the child replied with denials or made no reply, but became nervous and hysterical. Upon reaching the house of the aunt he undertook to further question the child in her presence, but with no result except to render the child hysterical. He then suggested that the aunt should take the child into a room apart and question her at length and in detail as to the acts and conduct of the defendant toward her. The aunt and the child went into another room, away from the presence of the witness. In a few moments the aunt returned, saying, "The girl admits everything." The witness O'Connor then went into the room, where the child was lying on the bed, and testified that he said to the child, "Is this true that you told your aunt?" and the child said, "Yes." He then said:

> " 'Is it a fact that Morotti did those things to you in the barn?' she said, 'Yes.' 'Did he do it very often?' She said, 'He was after me all the time.' "

He then testified he went out of the presence of the child and into the adjoining room, where the aunt was, and there put in writing the following statement, which when written, was signed by the child's aunt and by himself. It reads as follows:

> "On April 5th at the home of Mrs. Elvezia Bolla, Gonzales, Florinda Berri stated that Joe Morotti, an employee on her father's ranch at Point Reyes, took her into the barn on many occasions and fooled with her private parts, and at one time in January, 1922, took off her pants, exposed his private parts, and placed his private parts between her legs; that she wants to stay with her aunt at Gonzales, being afraid to return to her father's home at Point Reyes because Morotti bothered her every time she went in the barn. Agostini saw them twice in the barn in January.
>
> "This statement was made to the probation officer of Marin county in the presence of her aunt Mrs. Bolla.
>
> "[Signed] Mrs. Elvezia Bolla.
> "Thos. O'Connor."

Prior to offering the foregoing evidence of O'Connor and before offering in evidence the above-quoted document, the prosecution had placed upon the witness stand Mrs. Elvezia Bolla, the child's aunt, and who had proved almost as reluctant and recalcitrant a witness as had the child herself. Mrs Bolla admitted that she had signed the writing above quoted, but she denied that the statements attributed therein to the child had been made to her by the child in anything like the detail in which they appeared in said writing or that the child had made or understood that she was making any such specific admissions as the writing contained. She asserted that she did not read over the writing before signing it and did not understand its contents and that in the main its specific statements as to what the child had said then were untrue. The prosecution, having examined these two witnesses in the manner and with the result above indicated, offered in evidence the foregoing written statement. It was objected to upon the ground that it was incompetent, irrelevant, immaterial, and hearsay, and that no proper foundation for its introduction had been laid. These objections were overruled by the trial court and the writing was admitted in evidence and read to the jury. The conviction of the defendant followed, and that his conviction was in a large measure due to the testimony of the witness O'Connor and to the specific statements contained in this writing we entertain little, if any, doubt. If the ruling of the trial court in admitting in evidence this writing was erroneous, the error was prejudicial in a high degree.

[2, 3] That this ruling of the trial court was erroneous seems to us to be manifest. Its admission was first sought to be justified upon the ground that it embodied a complaint which the alleged victim of the defendant's lascivious acts and conduct had made soon after the commission of said acts, but the difficulty with the respondent's contention in the case is that the undisputed evidence shows that the child made no such complaint; that whatever statement she made was not voluntary; and that whatever admission she may have made was forced by persistent questioning from her reluctant lips and was attended with almost immediate denials. As to the rule that a complaint on the part of the victim of the lust of another, when made voluntarily and soon after the commission of the outrage upon her feelings or person, is admissible in evidence in cases of this character, there can be no doubt. The admission of this writing cannot, however, be justified upon that ground, nor does the prosecution as the respondent herein seriously attempt so to do. The real and only defensible ground upon which the respondent stands in seeking to justify the admission in evidence of this document is that it was offered in contradiction and impeachment of the testimony of the child, who had surprised the prosecution by its denials of the commission by the defendant of the acts complained

of. As to this ground it is to be noted that the record discloses that the writing was offered and admitted solely upon the ground that it impeached the testimony of the child. As such impeaching evidence there are two insuperable objections to its admission. The first is that in so far as it purported to be the statement of the witness O'Connor as to what the child had said to him, his own evidence shows conclusively that the child made no such statement to him or in his hearing; and the second is that in so far as the witness O'Connor undertook to state in said writing what the child had said to her aunt out of his presence it was doubly hearsay and hence inadmissible upon that ground. People v. Lambert, 120 Cal. 170, 52 Pac. 307. But it would also be inadmissible upon the further ground that there is not the slightest scintilla of evidence that the child ever made to her said aunt the statements which said writing details. The utmost that the record discloses is that in response to some very general questions which the aunt put to the child when alone with her the child responded chiefly with denials, with here and there a reluctant affirmation or admission which was almost immediately withdrawn. This writing, therefore, in so far as it purported to embody what the witness O'Connor himself heard the child say or admit, was itself contradictory of his own sworn testimony upon the subject and hence inadmissible either as embracing contradictory admissions of the child or as a memorandum made by him at the time and used to refresh his memory while a witness upon the stand.

[4] The claim of the respondent that this writing was admissible as evidence in contradiction of the testimony of Mrs. Bolla has a threefold answer, the first of which is that the writing was not offered or admitted for that purpose; the second is that Mrs. Bolla, when on the witness stand, admitted that she had signed the writing but denied that she knew its contents when she did so, and as to this there is no evidence in the record that the writing was ever read over to or by her; and the third reason is that the writing does not purport to contain any statement which the child ever made to her aunt while out of the presence of O'Connor, but only purports to embody statements made by the child to the probation officer O'Connor in the presence of the aunt; while the undisputed evidence shows that no such statement was ever made. This removes every ground upon which the admission in evidence of this writing is attempted to be justified. It was clearly inadmissible, and it is clearly prejudicial in the highest degree under the peculiar circumstances of this particular case. To a case of this character and to an erroneous ruling of this prejudicial nature the provisions of section 4½ of article 6 of the state Constitution can have no possible application.

The judgment is reversed.

We concur: TYLER, P. J.; ST. SURE, J.

61 Cal. App. 702

In re MORGANSTERN. (Cr. 967.)

(District Court of Appeal, Second District, Division 1, California. April 17, 1923.)

1. Attorney and client 🔑51—That bar association is incorporated does not preclude its filing of accusation for disbarment proceedings.

The fact that a bar association is incorporated does not place it outside the terms of Code Civ. Proc. § 291, as amended by St. 1921, p. 100, § 3, providing that the accusation in disbarment proceeding may be presented by a legally organized bar association.

2. Attorney and client 🔑31—Filing accusation in disbarment proceeding held within the implied power of incorporated bar associations.

Filing an accusation in disbarment proceedings *held* within the implied powers of an incorporated bar association, the purposes of which were to co-operate and supplement a bar association, and to maintain a standard which would enable the public to employ its members professionally, with full faith in their diligence and integrity.

3. Attorney and client 🔑52 — Accusation in disbarment proceeding held sufficiently signed and verified by president of incorporated accuser.

Under Code Civ. Proc. § 290, and section 291, as amended by St. 1921, p. 100, § 3, requiring the accusation in disbarment proceedings to be in writing, and relating to the verification thereof, *held*, that such an accusation filed by an incorporated bar association was sufficiently signed and verified when signed by the president and assistant secretary of the association, and verified by the president in his individual capacity.

4. Attorney and client 🔑52—Verification of accusation in disbarment proceedings held sufficient.

A verification of an accusation in disbarment proceeding by the president of an incorporated bar association which instituted the proceeding, stating that affiant "has been informed of all matters therein alleged, and that he believes them to be true, and upon such information and belief states that each and all of the charges therein contained are true," *held* sufficient.

5. Attorney and client 🔑52 — Sufficiency of oath to accusation in disbarment proceeding held solely from inspection of verification.

The sufficiency of the oath to the accusation in disbarment proceedings must be determined solely from an inspection of the verification.

---

6. Attorney and client ⇨49—Disbarment held not precluded because procedure to be followed not prescribed at time of declaring offenses constituting grounds for disbarment.

Though the court is not authorized to disbar or suspend an attorney, for the commission of acts not included in the statutes governing such proceedings, a disbarment for the violation of Code Civ. Proc. § 287, subd. 5, is not precluded, because at the time of such misconduct the procedure in cases of violation of that act had not been provided for, since under section 187 suitable process or mode of proceeding might be adopted, and particularly where the acts committed were also a violation of section 287, subd. 2, which imposes no limitation on the power of the court to entertain a motion for removal or suspension.

7. Attorney and client ⇨52 — Constitutional law ⇨205(1)—Statutes ⇨79(2)—Statute authorizing verification of accusation by bar association on information and belief in disbarment proceeding held not invalid.

Code Civ. Proc. § 291, as amended by St. 1921, p. 100, § 3, authorizing the accusation in disbarment proceedings to be verified on information and belief when made by an organized bar association, is not special legislation in violation of Const. art. 1, § 21, or article 4, § 25, subd. 19.

8. Constitutional law ⇨70(3) — Legislature judge of necessity of creating particular classes and legislation with reference thereto.

The creation of a particular class and legislation with reference thereto is peculiarly within the province of the Legislature and it is only where there is not sufficient reason for making distinction in class that the court is warranted in adjudging such an act void as special legislation.

9. Attorney and client ⇨52 — Permitting of amendment of accusation in disbarment proceedings coincident with entry of judgment held not error.

Permitting an amendment to the accusation in disbarment proceedings after the case had been tried and coincident with entry of judgment *held* not error.

10. Depositions ⇨5—Disbarment proceeding held special in nature, and not criminal as relating to taking of depositions.

Disbarment proceedings *held* not criminal, but special in nature, and within Code Civ. Proc. § 2021, relating to taking of depositions.

11. Attorney and client ⇨57—Where judgment of disbarment sustained by evidence, appellate court will not interfere.

Where the evidence in disbarment proceedings, though conflicting, is sufficient to sustain the judgment, the appellate court will not interfere.

Appeal from Superior Court, San Diego County; J. P. Wood, Judge.

Disbarment proceedings by the Lawyers' Institute of San Diego against A. J. Morganstern. From an order directing disbarment, respondent appeals. Affirmed.

Albert Schoonover and Sweet, Stearns & Forward, all of San Diego, for appellant.

Harrison G. Sloane, Fred E. Lindley, and Albert J. Lee, all of San Diego, for Bar Ass'n of San Diego.

HOUSER, J. On the first count, the third count, and the fourth count of an accusation against him, A. J. Morganstern was found guilty of violation of his duty as an attorney and counselor at law and of moral turpitude, dishonesty, and corruption, following which, by a judgment of the court, his permanent disbarment was ordered.

In the first count of the accusation it appears that appellant, acting as an attorney, was representing one Lewis H. Gilman, who was charged with murder; that under an agreement with Agnes Gilman, the wife of said defendant, appellant received from her seven railroad bonds, which were to be hypothecated as security for a loan of $5,000 to be used by appellant for the purpose of paying all legal and other expenses in connection with the case against Lewis H. Gilman; that appellant procured the loan, but later sold the said railroad bonds for $5,690, with the understanding, as between him and Mrs. Gilman, that the difference between the loan and the amount received on the sale of the bonds, to wit, the sum of $690, was to be deposited in a bank to the credit of Agnes Gilman; that appellant neither deposited the $690 to Mrs. Gilman's credit, nor paid to her any part thereof; that thereafter, and at a time when Mrs. Gilman was under stress of great sorrow, weak in health and mind, and in a constant state of agitation and worry over the situation of her husband, appellant, taking advantage of her necessities, represented to her "that Lewis H. Gilman's neck was in danger," and that in order to secure his acquittal it would be necessary that $2,000 additional be furnished for the purpose of getting control of the jury which would try Lewis H. Gilman, and thereby appellant induced Mrs. Gilman to mortgage her home, which she did, and thereafter delivered $1,800 to appellant; that the $1,800 was not received by appellant for any proper expenditure in connection with the defense of Lewis H. Gilman, but that at all times appellant intended to and he did use the said sum of $1,800 for his own benefit; that the aggregate of said sums so received by appellant from Mrs. Gilman was grossly excessive, and was wholly disproportionate to any service to be rendered or any needs or exigencies of the case, and to the ability of either the defendant or Mrs. Gilman to pay, all of which was well known by said appellant at the time.

The third count of the accusation, in substance, charges appellant with having collected $100 from a client for the purpose of making a deposit on an order for a court reporter's transcript of testimony to be used on an appeal for said client; that appellant converted the $100 to his own use, and for a period of over two months appellant fraudulently failed to deliver the $100 to the court reporter, and by reason thereof the client lost his right of appeal.

By the fourth accusation appellant is charged with having filed with the court his own false affidavit, which was intended to be and was used by him for the purpose of deceiving and misleading the judge of the court in connection with his motion that his client be relieved from "excusable neglect" in permitting his right of appeal to lapse in the same action in which, under count 3 of the accusation, appellant was charged with having misappropriated the sum of $100.

[1, 2] Mr. Morganstern appeals from the judgment, and attacks the sufficiency of the accusation, first, because, instead of the accusation being presented by "a regularly organized bar association," as provided by section 291, Code of Civil Procedure, as amended by St. 1921, p. 100, § 3, the Lawyers' Institute of San Diego, a corporation, appears as the accusing party. The statute referred to merely provides that the accusation may be presented by an organized bar association, without specifying whether it shall be incorporated or unincorporated; and the fact that the accuser was a corporation instead of an unincorporated association did not place it outside the terms of the statute. Counsel for appellant also contend that the corporation was acting in excess of its powers in the premises. Its articles of incorporation disclose that the purposes for which it was formed include the following:

> "To co-operate with and supplement the present Bar Association, and to supply an agency whereby their ideals may be made effective in daily practice.
>
> "To maintain a standard, through the careful selection and supervision of its members, which will enable the public to employ such members professionally with full faith in their diligence and integrity."

While the statement of such purposes contains no express provision with reference to instigating or instituting actions in the nature of disbarment proceedings, the expressions "whereby their ideals may be made effective in daily practice," and the declared object of maintaining a certain standard among the members of the bar, are certainly broad enough to include within the implied powers of the corporation the course adopted by the corporation in this proceeding.

[3] Further complaint is made that the accusation is neither signed nor verified by the corporation itself, but is signed by E. E. Hubbell as president, and by Harrison G. Sloane as assistant secretary, in behalf of the accuser, and that it is verified by E. E. Hubbell, not in his individual capacity, but also in behalf of said accuser. There is nothing in the statute which requires that the accusation be signed by either the corporation, or by any association, or, indeed, by any person. Section 290, Code of Civil Procedure, requires only that the accusation be in writing, and section 291, Code of Civil Procedure, provides that the verification, when presented by an organized bar association, may be made on information and belief.

[4, 5] The form of the verification annexed to the accusation, so far as is here material, is that affiant "has been informed of all the matters therein alleged, and he believes them to be true, and, upon such information and belief, states that each and all of the charges therein contained are true." The verification in itself is a sufficient compliance with the requirements of the statute, and the further objection by appellant that nothing in the accusation is stated on information and belief is beside the point that the verification is prejudically defective. The sufficiency of the oath to the accusation must be determined solely from an inspection of the verification. In re Collins, 147 Cal. 11, 81 Pac. 220.

[6] Appellant claims immunity because of the asserted fact that he was accused under subdivision 5 of section 287, Code of Civil Procedure—his reason being that, although said subdivision was enacted in 1911, it was not until after June 29, 1921, that any direct method of procedure was provided by statute for enforcing that particular subdivision, and that the acts of which he is accused were committed before the enforcing statute took effect. In a matter of this nature the court is not authorized to disbar or suspend an attorney for the commission of acts not included within the terms of the statutes governing such proceedings. In re Collins, 147 Cal. 13, 81 Pac. 220. The statute (section 287, Code of Civ. Proc.), containing both subdivisions 2 and 5 thereof, under which the accusation here is based, was passed long before the time when it is alleged appellant committed the various acts set forth in the accusation herein. While the question of the force of statutes subsequently passed for the purpose of providing the necessary procedure when acting under the provisions of subdivision 5 of section 287, Code of Civil Procedure, is presented by counsel for appellant under the contention that such a law would be ex post facto, and consequently of no validity as to appellant's case here, it has been held in a disbarment proceeding that, where, under the provisions of section 187, Code of Civil Pro-

cedure, no procedure is expressly prescribed in the statute for the removal of an attorney, any suitable process or mode of proceeding may be adopted which may appear most conformable with the spirit of the Code. Barnes v. District Court of Appeal, 178 Cal. 504, 173 Pac. 1100. In the instant case the procedure adopted was that indicated by the provisions of section 289, Code of Civil Procedure, as applicable to all the different subdivisions of section 287, Code of Civil Procedure (with the exception of subdivision 1 thereof), as section 289, Code of Civil Procedure, read prior to the amendment thereof in 1921 (St. 1921, p. 99, § 2). Certainly the adoption of such procedure was "most conformable with the spirit of the Code." Moreover, it appears that it is alleged in each of the five counts of the accusation against appellant that the acts with which he was charged were in violation of subdivision 2 of section 287, Code of Civil Procedure—such allegation in each count being "that A. J. Morganstern has been, and now is, guilty of violation of his duty as such attorney and counselor at law in the following particulars, to wit." As heretofore set out, the court found in identical language with the charging clause of the accusation, and, in addition thereto, that he was "guilty of moral turpitude, dishonesty, and corruption." Also, that all of the allegations of the first, third, and fourth counts of the accusation were true. That the alleged acts also constituted moral turpitude, dishonesty, or corruption, in the language of subdivision 5 of section 287, Code of Civil Procedure, does not necessarily place the accusation as falling solely under that particular subdivision. Where, as here, the alleged acts are such that they show moral turpitude, dishonesty, or corruption in violation of his duties as an attorney and counselor, and committed in the course of the practice of his profession, he may be proceeded against under either subdivision 2 or under subdivision 5 of section 287, Code of Civil Procedure. Under subdivision 2 of section 287, Code of Civil Procedure, there is no limitation upon the power of the court to entertain a motion for the removal or suspension of an attorney. Ex parte Tyler, 107 Cal. 83, 40 Pac. 33. And see Disbarment of Danford, 157 Cal. 425, 108 Pac. 322; In re Treadwell, 67 Cal. 353, 7 Pac. 724; Disbarment of Wharton, 114 Cal. 367, 46 Pac. 172, 55 Am. St. Rep. 72.

[7] It is contended that the amendment to section 291, Code of Civil Procedure, which permits the verification to the accusation to be made on information and belief when the accusation is presented by an organized bar association, is special legislation, and consequently void under the provisions of subdivision 19 of section 25 of article 4, as well as by the provisions of section 21 of article 1 of the California Constitution. The statute very clearly provides that, when an accusation is presented by a particular class, to wit, an organized bar association, the procedure for the verification of the accusation shall be different from that required when an accusation is presented by any other class or by an individual. There is no attempt in the statute to divide the bar associations into incorporated or unincorporated associations, or to make any other distinction among them. They are all grouped together into one great class, and the rule is that a law will be held to be general and not special which applies uniformly to all persons included within a class which is founded upon some reasonable and natural or intrinsic distinction. City of Pasadena v. Stimson, 91 Cal. 251, 27 Pac. 604; Darcy v. Mayor of San Jose, 104 Cal. 642, 38 Pac. 500; Rode v. Siebe, 119 Cal. 521, 51 Pac. 869, 39 L. R. A. 342; Deyoe v. Superior Court, 140 Cal. 481, 74 Pac. 28, 98 Am. St. Rep. 73; Ex parte King, 157 Cal. 164, 106 Pac. 578. There is good reason for the distinction made in the statute, and a most natural one. Bar associations exist wherever groups of lawyers are to be found. It is the case with most bar associations, as with the one involved in this proceeding, that one of the purposes of their organization is "to supply an agency whereby their ideals may be made effective in daily practice." One of the ideals of lawyers is to maintain a standard which will insure to the public honesty and fair dealing in its transactions with members of the bar, and in order to do so it is necessary that a wholesome supervision should be exercised. Complaints of professional misconduct of any lawyer in a given community are usually referred to the bar association of that particular place, and, if, upon investigation, the facts appear to warrant action in the courts, proceedings for disbarment are instituted. Far from having a personal knowledge of all the facts in a given case, no member of the bar association may have personal knowledge of any relevant fact going to make up the charge against the accused. The bar association as an entire body, as well as each individual member thereof, ordinarily has no direct knowledge other than such as it or he may have acquired through hearsay communication.

[8] It is therefore eminently proper that, depending upon what appears to be reliable information, any member of the association, or, indeed, any other person should be permitted to verify the accusation on "information and belief." Such may have been some of the reasons existing in minds of the legislators of this state when the statute in question was passed. As is stated in Ex parte King, supra, the question is one primarily for the Legislature to determine, and

it is reasonable to assume that the Legislature, in creating the class, had reasons therefor which were good and sufficient in themselves. It is only when it clearly appears that there was no sufficient reason for making a distinction that a court will be warranted in adjudging the act void. Grumbach v. Lelande, 154 Cal. 684, 98 Pac. 1059. It follows that, no substantial reason being shown why the Legislature should not have created bar associations as a class, nor why an accusation presented by a bar association should not be verified on information and belief, the statute of which complaint is made is not special legislation within the meaning of the sections of the state Constitution to which reference has been made.

[9] The next reason assigned by appellant for a reversal of the judgment relates to an amendment to the first accusation in the pleadings. It appears that after the case had been tried and coincident with the entry of judgment it was ordered by the court that the amendment to which objection is now taken be filed. Counsel complain that the amendment presented an entirely different cause of action from that originally filed against appellant, and that before the filing of the amendment appellant had no notice that he was charged with the commission of any of the acts or offenses set forth in the amendment. The record is silent as to any objection ever having been taken to the filing of the amendment; but the record does disclose the fact that the issues presented by the amendment were fully met by appellant by evidence adduced at the trial. The case, so far as that feature was concerned, was fairly tried, and consequently appellant was in no wise injured by reason of an amendment which conformed to the proof.

[10] An objection by counsel for appellant to the "general manner of proceedings" herein, and especially directing attention to the fact that a motion was granted by the court permitting the taking of the deposition of appellant and other witnesses preceding the trial, on the ground that a disbarment proceeding is quasi criminal in its nature, and consequently that appellant was entitled to be confronted by the witnesses and to cross-examine them, is next to be considered. The record shows that there was no restriction placed upon counsel with reference to the cross-examination of the witnesses whose depositions were taken, and that appellant was accorded and that he availed himself of every right in that regard which he would have possessed had the examination been in open court. There is nothing in the statutes to which attention has been directed which would indicate that a matter in disbarment is other than a special proceeding, and, assuming it to be such, the rule for taking depositions therein is directly covered by section 2021, Code of Civil Procedure. In cases in which the nature of a disbarment proceeding is involved, or where the right to take depositions on the part of the relator in such a proceeding have been brought in question, the opinion of the court has been against appellant's contention. In a matter entitled In re Wellcome, 23 Mont. 259, 58 Pac. 711, it is held that a proceeding in disbarment is not a criminal action; that under the statute (nearly identical with ours) which provides that the testimony of a witness out of the state may be taken by deposition in an action at any time after service of summons or the appearance of the defendant, and in a special proceeding at any time after a question of fact has arisen therein, the deposition of a witness may be taken in a disbarment proceeding, and that a disbarment proceeding must be classified as a special proceeding. And, see, also, the following cases: Matter of Mathot, 222 N. Y. 948, 117 N. E. 948; In re Spencer, 137 App. Div. 330, 122 N. Y. Supp. 190; State v. Mosher, 128 Iowa, 82, 103 N. W. 106, 5 Ann. Cas. 984; In re Burnette, 73 Kan. 609, 85 Pac. 575; In re Morrison, 43 S. D. 185, 178 N. W. 732. Relying upon the foregoing authorities, this court is of the opinion that a disbarment proceeding is a special proceeding within the provisions of our statute, and that the depositions of witnesses may be taken therein on the part of the prosecution.

[11] It is insisted that the judgment is not in accordance with the evidence; but it is the rule that, where the evidence is sufficient, even though there be a conflict therein, the appellate court will not interfere with the judgment. That is a matter which is exclusively within the province of the trial court. Disbarment of Cruickshank, 47 Cal. App. 496, 190 Pac. 1038; Matter of Danford, 157 Cal. 429, 108 Pac. 322; In re Morton, 179 Cal. 513, 177 Pac. 453. From an examination of the record herein, this court is convinced that the evidence adduced, though conflicting, was sufficient to support the judgment.

No prejudicial error appearing, the judgment is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

61 Cal. App. 660

PLEASANT GROVE UNION SCHOOL DIST. v. ALGEO et al. (Civ. 2608.)

(District Court of Appeal, Third District, California. April 14, 1923.)

1. Statutes 🔑227—When "shall" and "must" are mandatory or otherwise stated.

The words "shall" and "must" are generally mandatory when used in statutes, although such construction is not imperative and may be construed to mean "may" when no right or benefit depends upon the imperative use, or when no public or private right is lost, or when such construction is necessary to prevent the infliction of wrong or the interference with a vested right, etc.; but if it appears that public policy is in favor of the imperative meaning the words will be held mandatory.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Must; Shall (in Statutes as Permissive or Mandatory).]

2. Elections 🔑186(4)—Statute making void ballots not marked by elector as provided by law held mandatory.

Pol. Code, § 1211, subd. 1, providing that in canvassing the votes any ballot which is not marked by the elector as provided by law shall be void, is mandatory.

3. Schools and school districts 🔑97(4)—Ballot in bond election not marked with cross held invalid.

Pol. Code, § 1883, providing that persons voting at a school bond election shall put a cross on their ballots after the words "Bonds—Yes" or "Bonds—No" to indicate whether they had voted for or against the issuance of bonds, and section 1599, requiring electors to stamp or write a cross in voting, are mandatory in view of section 1205, relating to the manner of voting generally, and wherein the same words are used and have been held to be mandatory, so that ballots in a school bond election, wherein the voters instead of making a cross wrote the word "Yes" after the words "Bonds—Yes", were invalid and should not be counted.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Petition by Pleasant Grove Union School District for a writ of mandate against George Algeo and others. Writ denied, and petitioner appeals. Affirmed.

W. H. Carlin, of Marysville, and Arthur Coats, of Yuba City, for appellant.

W. P. Rich, of Marysville, and Lawrence Schillig, of Yuba City, for respondents.

PLUMMER, Judge pro tem. In this action the petitioner applied to the superior court, in and for the county of Sutter, for a writ of mandate to compel the election officers of Cottonwood Election precinct to count two certain ballots cast at an election held in said school district in favor of the issuance of bonds by said district. The Superior court denied the writ on the ground that the two ballots were marked contrary to the manner provided for the expression of the choice of voters in school bond elections, as contained in section 1883 of the Political Code, wherein it is provided that persons voting at such elections shall put a cross upon their ballot, with pencil or ink, after the words "Bonds—Yes" or "Bonds—No" (as the case may be) to indicate whether they have voted for or against the issuance of bonds. The two ballots in question, not counted, did not contain any cross, but instead contained the word "Yes" after the words "Bonds—Yes."

Section 1883 of the Political Code, after providing that elections such as the one under consideration in this action shall be conducted in accordance with different sections of the Political Code, uses the following language:

> "And except further that persons voting at such bond elections *shall* put a cross (X) upon their ballots, with pencil or ink, after the words 'Bonds—Yes' or 'Bonds—No' (as the case may be) to *indicate* whether they have voted for or against the issuance of bonds." (The italics are ours.)

Section 1599 of the same code (as amended by St. 1917, p. 15), to which reference is made in section 1883, just quoted, contains the following provision relative to the manner of voting:

> "In casting his vote the elector must stamp or write a cross in the square space immediately following the name of the candidate for whom he desires to vote," etc.

Section 1205 of the Political Code, relating to general elections, contains the following:

> "In voting he *shall* stamp a cross (X) in the voting square after the name of every candidate for whom he intends to vote. * * * Where two or more candidates for the same office are to be elected and the voter desires to vote for candidates for that office, he *must* stamp a cross (X) after the names of all candidates * * * for whom the voter desires to vote." (The italics are ours.)

[1] It will thus be seen that the provisions of sections 1883 and 1599 of the Political Code are identical in the use of the words "shall" and "must" found in section 1205 of the Political Code, fixing the manner in which a voter is permitted to express his choice when voting at a general election. In ordinary parlance the words "shall" and "must" are compulsory in meaning, and as used in statutes are generally mandatory, although such construction is not imperative, and may be construed to mean "may" when no right or benefit depends upon the imperative use, or when no public or private right is lost, or when such construction is necessary to prevent the infliction of wrong or the

interference with a vested right, etc. On the other hand, it appears that if public policy is in favor of the imperative meaning, the words referred to will be held mandatory.

The general trend of authorities since the adoption of the Australian ballot system of voting has been toward holding the various specifications in the code as to the manner in which a voter shall express his choice as mandatory, save and except as liberalized by subdivision 4 of section 1211 of the Political Code, relating to marks upon the ballot other than those indicating the manner in which the voter has voted, and which might possibly have been placed there for the purpose of identifying the ballot. The reason for this is apparent, as, whether the cross is made by a stamp or with a pen, the likelihood of blots and other marks being made by the folding of the ballot is so great that unless this liberal provision and interpretation were given, the likelihood of well-intentioned voters to have their ballots invalidated would be exceedingly great. No such tendency of interpretation, however, appears when it comes to the cases having to do with the manner in which the voter must indicate his choice.

The case of Sweetser v. Pacheco, 172 Cal. 137, 155 Pac. 639, thus states the law:

> "Under the law as it now is and has been ever since the year 1903, the only way in which a voter can indicate his intent to vote for a particular candidate is by stamping a cross in, or at least partly in, * * * the voting square, the provisions of section 1205 of the Political Code being mandatory in this regard. Any other method is legally ineffectual to express an intent to vote for a particular candidate, by reason of the express language of this section providing how, and how only, the intent shall be indicated. This is made manifest by what is said by this court as to the mandatory character of section 1205 of the Political Code, in regard to the method of indicating a vote. [Here a number of cases are cited.] As that section now is, the voter who has omitted to stamp his cross in, or at least partly in, the voting square, opposite the printed name of a particular candidate, has not voted for that candidate. The case is simply one of no vote. As to ballot 'Novato 2–8,' all the crosses, including that in the voting square opposite Sweetser's name, were made with a lead pencil. What we have already said applies also to this ballot. In view of the provisions of section 1205 of the Political Code, the intent of the voter to vote for a particular candidate whose name is printed on the ballot can be expressed only by *stamping* a cross in, or at least partly in, the voting square. Lacking such stamped cross, the ballot cannot be counted for such candidate, even though the courts may feel that the voter in fact intended so to vote. The express language of the law forbids it."

A large number of cases are cited in the opinion just referred to, upholding the mandatory character of section 1205 of the Political Code.

It will be observed that the Sweetser Case is not based upon the provisions of section 1211 of the same Code, but is expressly founded upon section 1205, the language of which is identical with sections 1883 and 1599 of the same Code, governing bond elections in school districts.

[2] Subdivision 1 of section 1211 of the Political Code is unquestionably imperative in its language. It reads:

> "In canvassing the votes any ballot which is not marked by the elector as provided by law shall be void," etc.

But this section is not one upon which the Sweetser Case is decided, and therefore need not be further considered in determining the validity of the two ballots in question now before this court.

The Supreme Court of Colorado, having before it the question of the mandatory character of a similar provision of the Colorado Code, states the law in Wiley v. McDowell, 55 Colo. 236, 133 Pac. 757, in probably as clear and decisive language as is contained in the reports, to wit:

> "'The intention of the voter, as expressed upon the face of his ballot, has always been regarded as the cardinal principal controlling the count. Under a system providing for balloting like the Australian, it is necessary that certain rules be prescribed to prevent confusion and secure uniformity. By this means the intention of the voter is to be ascertained.' These principles have repeatedly been recognized and followed in this jurisdiction. Young v. Simpson, 21 Colo. 460, 42 Pac. 666, 52 Am. St. Rep. 254; Heiskell v. Landrum, 23 Colo. 65, 46 Pac. 120; Rhode v. Steinmetz, 25 Colo. 308, 55 Pac. 814. It appears to be the universal rule in all states which have adopted the so-called Australian system, as said by the Supreme Court of Iowa in Whittam v. Zahorik, 91 Iowa, 23, 59 N. W. 57, 51 Am. St. Rep. 317, whether a ballot should be counted does not depend solely upon the power to ascertain and declare the choice of the voter, but also upon the expression of that choice in the manner provided by the statute. To put it in another way, as was said in Vallier v. Brakke, 7 S. D. at page 354, 64 N. W. at page 184: 'The statute having prescribed the manner in which the elector may designate by marks upon his ballot the candidate for whom he intends to vote, and declared the effect of such marks, neither the judges of election nor the courts are authorized to go beyond those marks in order to ascertain the voter's intention.'"

The same court, in the case of Riley v. Trainor, 57 Colo. 155, 140 Pac., at page 470, quotes with approval the following:

> "There can be no mistaking this language. It requires that in order to designate his choice the voter must use a cross-mark as the law requires."

In that case crosses were not used, and the ballots were held invalid.

The attention of this court is called to the case of Turner v. Wilson, 171 Cal. 600, 154 Pac. 2. The court, however, in that case did not hold that the manner of voting provided for by section 1205 might be dispensed with or that the manner of voting therein indicated was not mandatory. It simply held that writing the words "Yes" and "No" after a certain proposition appearing upon the ballot then under consideration did not invalidate the ballot for other purposes, there being no other evidence of a mark for identification. Nor is the case of Sweetser v. Pacheco, supra, modified or limited in any particular by the decision of the Supreme Court in Castagnetti v. Superior Court, 209 Pac. 549. The use of a pencil instead of a stamp, in making the cross, is upheld in the Castagnetti Case for the reason that section 18 of the Primary Law of the Statutes of 1913, page 1379, providing for indicating an elector's choice by stamping the cross with a stamp, is modified by the further provision that no ballot shall be rejected for a technical error not rendering it impossible to determine the voter's choice, and very carefully distinguishing that case from the holding in Sweetser v. Pacheco; there being a difference between the provisions of section 18, supra, of the Primary Law, and the provisions of the Code governing elections.

In the case of People v. Town of Ontario, 148 Cal. 625, 84 Pac. 205, the form of the ballot, and not the manner of voting, was the question passed upon by the court. It was there held that where the statute provided that the notice of election should contain the form of the ballot as being "For annexation" or "Against annexation," the submitting of a ballot reading "For annexation—Yes," and, second, "For annexation—No," leaving a square opposite the word "Yes" and also opposite the word "No" for the voter to stamp a cross, did not invalidate the ballot, or by reason of the fact that the second call in the ballot, instead of reading "Against annexation," read "For annexation—No," as the statute allowed a form equivalent to that expressed in the statute. The same is true of the questions involved in the case of People v. Los Angeles, 133 Cal. 338, 65 Pac. 749. There the ballot read first, "For annexation"; second, "Against annexation"—leaving a square opposite each call upon the ballot for the voter to indicate his choice, together with a direction as follows: "To vote, stamp a cross (X) in the square opposite the proposition indicating your choice," which was a sufficient compliance with the statute as to the form of the ballot.

In the case of Murphy v. City of San Luis Obispo, 119 Cal. 624, 51 Pac. 1085, 39 L. R. A. 444, a similar question of the manner of voting was before the court, and it was there held that the direction of an ordinance as to how an elector's choice should be indicated was mandatory.

If the holding in the Murphy Case, supra, by the Supreme Court, is correct, it would appear that the trial court was right in denying the writ of mandate herein.

[3] For the reasons hereinbefore stated, and following the authorities cited, we conclude that the provisions of sections 1883 and 1599 of the Political Code, wherein the same words are used as are found in section 1205 of the same Code, and which have been held to be mandatory, must also be held mandatory on account of similarity of use, and the judgment of the trial court should be, and the same is, hereby affirmed.

We concur: FINCH, P. J.; BURNETT, J.

191 Cal. 253

BARBER v. CITY OF LOS ANGELES.
(L. A. 7426.)

(Supreme Court of California. June 1, 1923. Rehearing Denied June 28, 1923.)

1. Municipal corporations ⚷460—City held to have right to levy assessment to pay damages caused to private property by reason of improvement, though charter did not so provide.

Where proceedings by the city of Los Angeles for constructing a tunnel were as of right under Const. art. 11, § 6, carried out under the Improvement Act of 1913 (St. 1913, p. 954, as amended by St. 1915, p. 1217, and St. 1917, p. 970), which authorizes a city to assess property benefited to compensate owners for damages resulting to their property by reason of an improvement, *held*, that the city could levy such assessment to pay the damages notwithstanding Charter of City of Los Angeles, art. 1, § 2, subd. 19, did not specifically provide for such assessment but merely for the levy of an assessment to pay cost of improvement.

2. Municipal corporations ⚷58—Amendment to city charter conferring powers and privileges granted by general laws held not proof that city did not have those rights prior to amendment.

The fact that Charter of City of Los Angeles, art. 1, § 2, subd. 19, was amended (St. 1919, pp. 1430, 1432), and the city expressly authorized to exercise any rights and powers granted by general laws did not indicate that the city previous to the amendment was limited to the express terms of its charter and so deprived of the powers and privileges accorded to cities by the Improvement Act of 1913 (St. 1913, p. 954, as amended by St. 1915, p. 1217, and St. 1917, p. 970).

3. Municipal corporations ⚷58—Failure to mention in charter some power granted to city by general statute held not to constitute a denial of that power.

Where a city has a right to avail itself of the powers expressly granted by the Improvement Act of 1913 (St. 1913, p. 954, as amended by St. 1915, p. 1217, and St. 1917, p. 970), failure to mention in the charter some power granted by the act cannot be held to constitute a denial of that power to the city or limitation upon its right to do any of the things authorized by the statute, and the fact that the charter was subsequently amended to confer on the city power to exercise authority previously conferred only by the state law does not prove that the city was limited to the express terms of its charter.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Action by D. C. Barber against the City of Los Angeles. Judgment for defendant, and plaintiff appeals. Affirmed.

Delmas & Brown and Delphin M. Delmas, all of Los Angeles, for appellant.

Jess E. Stephens, City Atty., L. P. Green, Asst. City Atty., and Charles McCoy, Deputy City Atty., all of Los Angeles, for respondent.

LAWLOR, J. The plaintiff, as a property owner of the city of Los Angeles, whose property was included in the district declared to be benefited by the Second street tunnel, brought this action to recover $19.26 paid for the redemption of his land after it had been sold for taxes upon the nonpayment of the amount assessed against it for the construction of the tunnel. A demurrer to the complaint was sustained and judgment was entered in favor of defendant, whereupon plaintiff took this appeal.

[1-3] To authorize the construction of a tunnel under Second street, in the city of Los Angeles, an ordinance of the mayor and council of that city was passed declaring their intention to do the work, reciting that in their opinion damage would result to private property from such improvement and specifying the exterior boundaries of the district to be benefited and specially assessed to pay the cost of the work and the damages caused thereby. Notice of the intention having been mailed to the property owners affected, an ordinance providing for carrying out the work was passed. Following the award of the contract an assessment was levied amounting to $995,773.21, of which $103,702 was to recover the damage done to private property. Appellant in this suit seeks to have the assessment declared invalid. In the complaint a number of grounds were specified, but upon this appeal the only point urged is that the city was without authority to levy an assessment to pay for damage caused to private property by reason of the improvement, inasmuch as no such power is conferred upon it by the city charter. The ordinances purported to be passed and the proceedings for the improvement taken in accordance with the Improvement Act of 1913 (Stats. 1913, p. 954; amended Stats. 1915, p. 1217; amended Stats. 1917, p. 970).

The Improvement Act of 1913 authorizes the legislative body of any city to improve its streets and to assess the property benefited thereby for the costs thereof, and it expressly provides for the compensation of property owners for damage resulting to their property by reason of the improvement. Therefore the only question presented here is whether the city could order the work done and levy the assessment under a legislative enactment other than the city charter, it being contended by appellant that the charter prohibited the levying of an assessment by the city for the purpose stated.

It was held in Hayes v. Handley, 182 Cal. 273, 187 Pac. 952, a case arising out of the

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

same improvement as the one at bar, that the city might go outside the city charter and levy a special assessment for the improvement under the authority of the Improvement Act of 1913, supra. The court there held that (182 Cal. 281, 187 Pac. 955):

> "It is nevertheless true that the legislative body of the city has power to adopt any state law applicable to its municipal affairs and that in the matter of providing for defraying the expense of the proposed work of construction that was effectively done by the ordinance of intention and the ordinance ordering the work to be done."

Appellant argues, however, that that case is not pertinent here, in that the charter of Los Angeles positively forbids the levying of an assessment for the particular purpose under consideration. The Constitution provides that—

> "Cities * * * heretofore organized by authority of this Constitution, may amend their charters in the manner authorized by this Constitution so as to become * * * empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws." Article 11, § 6.

In the charter of the city of Los Angeles it is provided that—

> "This city * * * shall have the right and power: * * * To provide for * * * the improvement * * * of streets * * * and to * * * levy * * * assessments * * * to pay the cost of any such improvement." Article 1, § 2, subd. 19, Stats. 1917, p. 1691.

It is appellant's contention that the express grant of authority to levy assessments "to pay the cost of any such improvement" excludes the power to levy the assessment for any other purpose. Harward v. St. Clair Drainage Co. 51 Ill. 130, is cited in support of this contention In that case it was held that a provision of the state Constitution that "the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes" was a limitation which prohibited the Legislature from granting the power of local taxation to private individuals or others than the local or corporate authorities. It is claimed the provision of the charter quoted is likewise a limitation on the power of the city. Appellant in addition asserts the city is shown not to have had the authority claimed for it by the fact that in 1919 the charter was amended and the city expressly authorized to exercise any rights, powers, and privileges granted by general laws (Stats. 1919, pp. 1430, 1432), and to levy assessments to pay for damage caused to private property by improvement work.

A complete answer to this argument is that all the proceedings for the work of constructing the tunnel were carried out under the authority of the Improvement Act of 1913, supra, which act authorized the levying of an assessment for the purpose in question. It was clearly decided in Hayes v. Handley, supra, that the city had the right to proceed under that act. The right to proceed under the act included authority to take all the steps therein provided and to levy assessments for all the purposes therein designated. The city thus having the right to avail itself of the powers expressly granted by the Improvement Act of 1913, supra, the failure to mention in the charter some power granted by the act cannot be held to constitute a denial of that power to the city or a limitation upon its right to do any of the things authorized by the statute. In this situation the fact that the charter was subsequently amended to confer on the city power to exercise authority theretofore conferred only by state law does not prove that the city was limited to the express terms of its charter.

The judgment is affirmed.

We concur: WILBUR, C. J.; LENNON, J.; WASTE, J.; MYERS, J.; SEAWELL, J.; KERRIGAN, J.

---

191 Cal. 257

COAST TRUCK LINE v. RAILROAD COMMISSION OF CALIFORNIA et al.

(S. F. 10258.)

(Supreme Court of California. June 1, 1923. Rehearing Denied June 28, 1923.)

1. Public service commissions ⟹14—May decide on facts alleged in complaint where admitted by defendant.

Where a public hearing is had before the Railroad Commission on a complaint containing sufficient allegations, and defendant admits the allegations, the Commission may rule without further inquiry.

2. Carriers ⟹10—Commission held authorized to hear and determine complaints against truck company.

Under the Auto Stage and Transportation Act of 1917, the Railroad Commission has jurisdiction to hear and determine complaints for violation of the provisions relative to procuring a certificate of public convenience and necessity, and, in the proper exercise of such jurisdiction, the Commission may order a transportation company to refrain from unlawful acts; such order not being unauthorized exercise of injunctive powers.

In Bank.

Proceeding before the Railroad Commission by Harry N. Blair, complaining of the

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Coast Truck Line. The Commission entered an order adverse to the Coast Truck Line, and the latter applies for writ of review. Order affirmed.

H. J. Bischoff, of San Diego, for petitioner.

Hugh Gordon and William W. Clary, both of San Francisco, for respondents.

RICHARDS, Justice pro tem. This proceeding was instituted by the petitioner herein seeking to have this court review and annul a certain order of the Railroad Commission made and entered on April 21, 1922, determining that no further transportation of freight shipments shall be made by this petitioner between Los Angeles and points south of Oceanside, to and including San Diego, or the territory from San Diego to Oceanside, when shipments originate at or are destined to the territory between Oceanside and Escondido, and that all rates as now appearing in the tariff of the petitioner for the movement of such shipments between the prohibited territory above mentioned should be canceled, and requiring the said petitioner, Coast Truck Line, to make application for a certificate of public convenience and necessity and to establish the same at a public hearing before accepting or transporting any further shipments between said prohibited points.

The undisputed facts which form the basis of said application and are essential to a consideration of its merits are the following: Prior to March 8, 1921, one Roy Jakeway was engaged in operating motor trucks between San Diego and Oceanside under certain operating rights and franchises. Prior to the same date one Roy Whetstone was engaged in operating motor trucks between Los Angeles, Escondido, and Oceanside under similar operating rights and franchises. On said March 8, 1921, the Coast Truck Line, a corporation, the petitioner herein, acquired by purchase from said Roy Jakeway and Roy Whetstone, the operating rights and franchises held by each, and on said March 8, 1921, these respective transfers of said operating rights and franchises were approved by the Railroad Commission. Immediately thereafter the petitioner herein began the transportation of freight between Los Angeles and Escondido and points intermediate Oceanside and Escondido, and between Los Angeles and San Diego and points intermediate Oceanside and San Diego. On July 11, 1921, one Harry N. Baker filed with the Railroad Commission a complaint against said Coast Truck Line, Incorporated, setting forth, in substance, that the latter was engaged in certain operations as an acceptor and carrier of freight in expansion and excess of the rights and franchises acquired by it from the foregoing transfers, without having applied for or obtained from the Railroad Commission the requisite certificate of public convenience and necessity authorizing it so to do, and that its action in so doing was in violation of the decision and order of the Commission made upon the approval of said transfers. A hearing was had upon said complaint before the Commission, after due notice to the respondent therein, at which hearing the matter was submitted upon the facts set forth in said complaint, whereupon the Commission, on April 21, 1922, made and entered the order, the substance of which is above set forth and which is complained of in the instant proceeding.

The petitioner herein urges three contentions in favor of the issuance of the writ: First, that the Commission had no jurisdiction over the subject-matter of said complaint; second, that the Commission exceeded its authority in the issuance of an injunction herein; and, third, that the decision of the Commission is unsupported by evidence and is contrary to law.

[1] Dealing first with the petitioner's contention that the decision of the Commission is unsupported by evidence, we find no semblance of merit in it. When the matter was called for hearing before the Commission it was expressly and formally admitted by respondent in that proceeding that all of the allegations of fact in the complaint were true. This admission dispensed with the necessity of taking evidence as to those issues of fact, leaving to the consideration of the Commission only such questions of law as arose out of these admitted facts of the case.

[2] As to the other two contentions of the petitioner herein, they both received exhaustive consideration by this court in the case of Motor Transit Co. et al. v. Railroad Commission (Cal. Sup.) 209 Pac. 586, a case in no material aspect distinguishable from the case at bar, and in which case it was held that the Railroad Commission was acting within the scope of its supervisory and regulatory jurisdiction in requiring a certificate of public convenience and necessity as a condition precedent to the carrying on of a transportation and truckage business over certain designated routes or territory, under the provisions of the Auto Stage and Truck Transportation Act of 1917 (Stats. 1917, p. 333), and hence had jurisdiction to hear and determine complaints for the violation of the provisions of said act in that regard. It was also held that in the proper exercise of its jurisdiction over the subject-matter in controversy, accorded it by that decision, the order of the Commission directing the transportation company to refrain from doing the act found by the Commission to have been done in violation of the provisions of the statute requiring a certificate of public convenience and necessity before doing such act, was not an unauthorized exercise by the Commission of injunctive powers. In so deciding this court reviewed practically every

case cited by the petitioner herein in support of its several contentions. We are satisfied with the conclusions arrived at in that case and that they have exact application to the facts of the instant case. We are also satisfied that the Commission, upon the admitted facts of the case, correctly determined that the petitioner herein, in engaging in the operations as an acceptor and carrier of freight between Los Angeles and San Diego, as described in the complaint before it, was acting in expansion and excess of the rights and franchises acquired by it through the transfers above referred to, and in express violation of the terms and limitations contained in the orders of the Commission approving such transfers, and hence that said Commission had jurisdiction and power to make and enter the orders of which the petitioner herein complains.

The order is affirmed.

We concur: WILBUR, C. J.; LAWLOR, J.; WASTE, J.; LENNON, J.; MYERS, J.; KERRIGAN, J.;

(191 Cal. 233)

McKENNA v. STATE INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 10705.)

(Supreme Court of California. May 31, 1923.)

Master and servant ⊂⇒417(8)—Order denying compensation held harmless.

Where one was denied compensation under the Workmen's Compensation Law on the ground that the injury complained of was the result of a previous accident, he was not entitled to a writ of certiorari on the ground that the Industrial Accident Board was without jurisdiction because the accident was within the admiralty jurisdiction, since, if such fact were true, he was not injured by the findings against him.

In Bank.

Petition by Matthew McKenna against the Industrial Accident Commission and others, for certiorari to review an order of the Commission refusing compensation. Writ denied.

Lincoln E. Savage, of San Francisco, for petitioner.

PER CURIAM. The petitioner, Matthew McKenna, was denied relief by the respondents under the Workmen's Compensation Law (St. 1917, p. 831) because they found that petitioner had suffered no injury as a result of the alleged accident, and that the injury he complained of resulted from a previous accident.

The petitioner claims that the respondent Board was without jurisdiction because the accident complained of comes within the admiralty jurisdiction of the federal courts. If this is true, the petitioner is not injured by the fact that the respondent Board found against him. If they have jurisdiction he is concluded by their findings. Not having shown any injury by the order complained of, petitioner is not entitled to a writ.

The petition for a writ of certiorari is denied.

(191 Cal. 202)

HALE CO. v. LEA. (S. F. 9905.)

(Supreme Court of California. May 25, 1923.)

1. Libel and slander ⊂⇒36—Absolute privilege limited to performance of official duty or official proceedings authorized by law; "privileged communication."

Under Civ. Code, § 47, defining "privileged communications," the only publications absolutely privileged are those made in the proper discharge of an official duty and those in a legislative, judicial, or official proceeding authorized by law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Privileged Communication.]

2. Libel and slander ⊂⇒39—Letter of director of state laboratory charging dealing in unfit food products not privileged.

A letter by the director of the state laboratory to the department of agriculture of a sister state, charging that plaintiff was dealing in adulterated, rancid food products, particularly walnut meats unfit for human consumption, *held* not absolutely privileged under Civ. Code, § 47, as a statement made in the proper discharge of an official duty; such communication being no part of defendant's duty under Pure Food and Drug Act March 11, 1907 (St. 1907, p. 208).

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the Hale Company against E. J. Lea. From judgment for defendant on demurrer to complaint, plaintiff appeals. Reversed, with directions.

Norman A. Eisner, of San Francisco, for appellant.

John H. Riordan, of San Francisco, for respondent.

LENNON, J. The adequacy of the allegations of the complaint in this action for libel is the question presented upon this appeal, a judgment for defendant having been entered after an order sustaining a demurrer to the complaint without leave to amend. The complaint under attack contains averments to the following effect: Plaintiff is engaged in the business of importing and dealing in food products and, in particular, walnut meats; defendant is director of the state laboratory of the state of California. For the purpose of sale, plaintiff had imported 280 cases of shelled walnut meats which were placed in cold storage in the city and county of San Francisco. Charging that these nuts were adulterated, rancid, and unfit for human consumption, the defendant, on November 20, 1919, caused the arrest of the manager of the plaintiff corporation and the quarantine of the walnut meats. On December 10, 1919, the manager was tried before a jury which brought in a verdict of "not guilty," with the added recommendation that the nuts which had been introduced in evidence be divided among the jurors. Defendant thereupon caused the quarantine to be lifted, but threatened further arrests if plaintiff attempted to sell the nuts in California. For the purpose of avoiding further annoyance, plaintiff shipped the walnuts in question into the state of Washington, whereupon, on or about December 18, 1919, defendant, it is alleged, "maliciously and with the intent to injure the plaintiff," wrote to the department of agriculture in the city of Seattle, state of Washington, a letter which he mailed and which was received and read by those in charge of this department. In this letter defendant stated that "plaintiff was dealing in adulterated, rancid food products, to wit, walnut meats, which were unfit for human consumption," and further stated that the 280 cases of walnut meats previously referred to were being shipped into the state of Washington, identifying the shipment by particular description, and that they were adulterated, rancid, and unfit for human consumption. It is further alleged that these statements were "false, and were made maliciously to injure the plaintiff," and that "plaintiff has suffered damages by reason of the malicious and false statement of defendant as aforesaid in the sum of ten thousand ($10,000) dollars."

It is defendant's contention that the complaint fails to state a cause of action for libel for the reason that it affirmatively appears that the publication complained of was a privileged communication. The statements contained in the letter alleged to have been written by the defendant are claimed to fall within one or more of the three following subdivisions of section 47 of the Civil Code:

> "A privileged publication is one made—
>
> "(1) In the proper discharge of an official duty.
>
> "(2) In any legislative or judicial proceeding, or in any other official proceeding authorized by law.
>
> "(3) In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information."

[1] The allegations of malice and "intent to injure," necessarily admitted by the demurrer, effectively dispose of the third subdivision above quoted, for the reason that absence of malice is an express limitation upon the privilege therein sanctioned; whereas, in this regard, the exemptions specified in the first and second subdivisions of section 47 are absolute and unqualified. Snively v. Record Publishing Co., 185 Cal. 565, 577, 198 Pac. 1; Stevens v. Snow (Cal. Sup.) 214 Pac. 968.

Whether or not the alleged statement was published in the proper discharge of an official duty or in an official proceeding authorized by law is therefore the only question to be considered.

The office of director of the state laboratory, by virtue of which defendant claims to have been clothed with immunity, is created by an act approved March 11, 1907, commonly known as the Pure Food and Drug Act (Stats. 1907, p. 208), subsequently amended in unimportant particulars. That act reads, in part, as follows:

> "Sec. 9. For the purpose of this act there is hereby established a state laboratory for the analysis and examination of food and drugs, which shall be under the supervision of the state board of health, which laboratory shall be located at such place as the state board of health may select.
>
> "The state board of health shall appoint a director of said laboratory and an assistant to such director, both of whom shall be skilled pharmaceutical chemists and analysts of food and drugs. *Said director shall perform all duties required by this act and which shall be required by the state board of health.* * * *
>
> "Sec. 10. The state board of health or its secretary, shall cause to be made by said director of the state laboratory, examinations and analyses of food and liquor on sale in California, suspected of being adulterated, mislabeled or misbranded. * * *"
>
> "Sec. 13. Whenever said director shall find from his examination and analysis that adulterated, mislabeled or misbranded food has been on sale in this state, *he shall forthwith report to the secretary of the state board of health.*"
>
> "Sec. 15. The said director of the state laboratory shall make an annual report to the state board of health, on or before August first of each year, upon adulterated or misbranded foods or liquors in which report shall be included the list of cases examined by him in which adulterants were found and the list of articles found mislabeled or misbranded, and the names of the manufacturers, producers, jobbers and sellers. *Said report, or any part thereof, may in the discretion of the state board of health, be included in the report which the state board of health is already authorized by law to make to the Governor. The state board of health may, in its discretion, publish any part of said report in any issue of its monthly bulletin.*"

[1] The duties of the director of the state laboratory are, therefore, those "required by this act and which shall be required by the state board of health." The duties set forth in the act are: First, the examination and analyses of foodstuffs; and, second, the is-

suance of reports thereon to the state board of health. In other words, his duties are confined to scientific analyses and deductions. The director has no power to compel the procurement and submission of foods for examination. He examines the samples submitted to him and reports to the board, and here terminates his official activity; he has no part whatever in applying the results of his investigations. The act does not impose any duty upon the director to communicate the facts ascertained by him to any one other than the state board of health. In so far as the ascertained facts are concerned, the discretion to publish or not to publish them is by the act expressly vested in the state board of health, and the act does not confer any authority upon the director to make a publication of the ascertained facts either as an official act or in the performance by him of an official duty.

Whether the director might have sent the letter with immunity if authorized by the state board of health, or whether the letter would have been privileged if sent by the board itself, are questions not within the scope of the present discussion, for neither of these facts is alleged in the complaint. Immaterial, also, is the argument urged by defendant that communications to authorities in sister states concerning the condition of food may be necessary in the proper administration of the pure food and drug acts. However that may be, the act in question manifestly does not invest the director of the state laboratory with authority to communicate the facts ascertained by him to any board or person other than the state board of health; the Legislature having proceeded, obviously, upon the theory that the scientific investigation required by the act should be performed by a person unincumbered with the responsibility of enforcing the law and deciding questions of public policy.

[2] We conclude, therefore, that it does not appear from the complaint that the sending to the department of agriculture in Seattle, Wash., of a letter concerning the condition of foods examined by him, was an official duty of the director of the state laboratory or part of an official proceeding authorized by law, and that the complaint does not allege a privileged publication.

The order striking out portions of the complaint was erroneous except as to the allegations concerning the arrest and trial of the manager of the plaintiff corporation, which are evidentiary and unnecessary to the statement of the cause of action.

The judgment is reversed, with instructions to vacate the order striking out portions of the complaint and sustaining the demurrer and to enter an order in accordance with the foregoing opinion.

We concur: WILBUR, C. J.; MYERS, J.; WASTE, J.; LAWLOR, J.

191 Cal. 234

DRESCHER et al. v. BOARD OF SUP'RS OF BUTTE COUNTY. (S. F. 10706.)

(Supreme Court of California. May 31, 1923.)

Mandamus ⚿76—Not issued to compel appointment to position occupied by one performing duties under claim of right.

A writ of mandamus to compel a county board of supervisors to appoint a member of the board of an irrigation district will not be granted, where the position is being occupied by one performing the duties thereof with the acquiescence of his associates and under a claim of right, as to grant the writ would require the court to try the title to the office, the existence of a vacancy in which must first be established by judicial process.

In Bank.

Application by P. C. Drescher and others for writ of mandate requiring the Board of Supervisors of Butte County to appoint a member of the Board of the Honcut-Yuba Irrigation District. Petition denied.

Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for petitioners.

PER CURIAM. This is an application for a writ of mandamus to compel the respondent board of supervisors to appoint a member of the Honcut-Yuba irrigation district, upon the ground that there is a vacancy in the board of that district representing division 1.

The application shows that the position is now being occupied by one C. F. Cox, who is performing the duties of the office with the acquiescence of his associates and under claim of right.

Under these circumstances, a writ of mandamus should not be issued because, in effect, it would require us to try the title to the office. The writ should not be granted until it has been established by judicial process that there is a vacancy to be filled. Kelly v. Edwards, 69 Cal. 460, 11 Pac. 1.

The petition is denied.

191 Cal. 235

BIRCH et al. v. BOARD OF SUP'RS OF ORANGE COUNTY et al. (L. A. 7168.)

(Supreme Court of California. May 31, 1923.)

1. Taxation 🔑480—Statutory powers given board of supervisors to increase assessment must be exercised according to statute, otherwise acts are void.

The power of the board of supervisors under Pol. Code, § 3673, providing in what manner, after notice given to the property holder, the assessment may be increased, is purely statutory, the proceeding being in invitum, and the board must act in the manner prescribed by the statute, otherwise their action is void.

2. Taxation 🔑482(1)—Order increasing assessment made without notice to owner after submission of petition for reduction held void.

An order of the board of supervisors increasing an assessment made two days after the submission of an owner's petition for a reduction and without notice or suggestion of their intention was void as violating Pol. Code, § 3673, prohibiting an increase without notice to the owner.

3. Taxation 🔑496(2)—Statutory suit to recover increased tax from illegal increase in assessment held not to afford adequate remedy because interest not recoverable.

A taxpayer whose assessment was increased without notice, in violation of Pol. Code, § 3673, does not have a plain, speedy, and adequate remedy by paying the tax and suing to recover under section 3819, obviating the necessity of his resort to certiorari to review the action of the board of supervisors; such suit not being adequate because he is not entitled to recover interest on the increased tax.

4. Certiorari 🔑9—Writ is discretionary.

The writ of certiorari is discretionary.

In Bank.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Proceeding by A. Otis Birch and others, to review the action of the Board of Supervisors of Orange County and others, in increasing an assessment. From a judgment quashing the order of the Board, defendants appeal. Affirmed.

Alex P. Nelson, of Santa Ana, for appellants.

Woodruff & Shoemaker, of Los Angeles, for respondents.

WILBUR, C. J. [1] This is an appeal from a judgment in favor of plaintiffs in a proceeding to review the action of the board of supervisors of Orange county raising the assessment upon plaintiffs' property on the assessment roll of the county for the fiscal year 1920–21 $150,000, after a hearing upon plaintiffs' application for an $800,000 reduction of the assessment upon their property. The question presented for consideration is whether the board of supervisors, after hearing evidence upon the plaintiffs' application for a reduction, had power to increase the assessment above the amount fixed by the assessor without any notice whatever to the petitioners of their intention so to do. The superior court rendered a judgment quashing the order of the board of supervisors increasing the assessment upon the plaintiffs' property. Section 3673 of the Political Code provides that the board of supervisors can increase any assessment shown upon the assessment rolls delivered to them by the assessor within the period fixed for equalization, after notice given to the property holder in the manner provided by the rules of the board of supervisors. It has been held that, in the absence of such notice, trustees of a city, when sitting as a board of equalization under a similar statute, have no jurisdiction to increase an assessment for city taxes. Huntley v. Board of Trustees, 165 Cal. 298, 131 Pac. 859. See, also, Allison R. M. Co. v. Nevada County, 104 Cal. 161, 37 Pac. 875; Farmers', etc., Bank v. Board, 97 Cal. 318, 325, 32 Pac. 312. It has also been held that such proceedings before a board of equalization are judicial in nature (Los Angeles, etc., Co. v. County of Los Angeles, 162 Cal. 164, 121 Pac. 384, 9 A. L. R. 1277) and that they can be reviewed by the court (Huntley v. Board of Trustees, supra).

[2] These propositions are conceded by the appellants, but appellants contend that, upon the application of the plaintiffs for reduction of their assessment it was the duty of the board to hear evidence with reference to values of the plaintiffs' property, and, having done so and having ascertained the values to be greater instead of less than the amount of the assessment, they had jurisdiction to make the order in question upon the theory that the plaintiffs were present upon and participated in the hearing upon the question of valuation, and that they are thus bound by the conclusion and order made upon the hearing. The difficulty with this argument is that the power of the board of supervisors is purely statutory, and that the proceedings are in invitum, and that the board must act in the manner prescribed by statute, otherwise their action is void. Patten v. Green, 13 Cal. 325; Williams v. Bergin, 108 Cal. 166, 41 Pac. 287. In this case it is stipulated that no notice whatever, verbal or written, formal or informal, was given to the plaintiffs of the intention of the board of equalization to consider the question of raising the assessment. The order increasing the amount of the assessment was made two days after the submission of the plaintiffs' petition for a reduction for the consideration of the board and without any notice or suggestion of an intention to increase the assessment, and violates the plain provision of

the statute (section 3673, Pol. Code) prohibiting an increase of an assessment without notice to the owner of the proposal to increase his assessment.

[3, 4] The appellants contend that the plaintiffs have a plain, speedy, and adequate remedy by paying the tax and suing to recover the same under the provisions of section 3819 of the Political Code. It is true that the District Court of Appeal, in Rickard v. Council of Santa Barbara, 49 Cal. App. 58, 192 Pac. 726, declined to set aside an assessment on the ground that the property owners had a plain, speedy, and adequate remedy by paying the tax and bringing suit to recover the same, but the plaintiffs in this case point out that under our decision in Miller v. County of Kern, 150 Cal. 797, 90 Pac. 119, the petitioner is not entitled to recover interest upon the increased tax, which increase is about $4,500, and for this reason that the remedy by suit to recover the tax is not adequate. The writ of certiorari is a discretionary writ. Keys v. Marin County, 42 Cal. 252. The superior court exercised its discretion in favor of the issuance of the writ, and there was no abuse of its discretion in so doing.

Judgment affirmed.

We concur: SEAWELL, J.; KERRIGAN, J.; WASTE, J.; LENNON, J.; MYERS, J.; LAWLOR, J.

(191 Cal. 226)

SAUNBY et al. v. RAILROAD COMMISSION et al. (S. F. 10267.)

(Supreme Court of California. May 29, 1923.)

Electricity ⟹11—Certiorari does not lie to review orders of Railroad Commission in purely procedural matters.

Certiorari will not lie to inquire into the propriety of an order of the Railroad Commission in limiting an investigation as to the reasonableness of the rates of an electric company, and in leaving the final adjustment of the rates to a proceeding to be later instituted by the Commission on its own motion, in view of the broad powers conferred by Const. art. 12, §§ 22, 23, upon the Railroad Commission; the courts being empowered to interfere with the orders of the board only when they violate some constitutional provision, such as denial of due process of law, etc.

In Bank.

Certiorari by Sidney E. Saunby and others against the Railroad Commission of the State of California and another, to review a determination of such Commission in a proceeding to fix the rates of the Southern Calfornia Edison Company. Application denied.

F. S. Brittain, of San Francisco, and William J. Carr, of Los Angeles, for petitioners.

Hugh Gordon, William W. Clary, and Carl I. Wheat, all of San Francisco, and Roy V. Reppy and B. F. Woodard, both of Los Angeles, for respondents.

RICHARDS, Justice pro tem. The petitioners herein applied for a writ of review wherein they sought to have reviewed and annulled a certain decision and order of the Railroad Commission in a proceeding before said Commission for the readjustment and fixation of the rates to be charged its customers by the Southern California Edison Company a corporation engaged in the distribution and sale of electric energy for lighting and power throughout a number of the counties in southern California. The facts preceding and attending said application, so far as the same are deemed necessary for the purposes of this decision are undisputed and are as follows:

Prior to and in the early part of the year 1921 the Railroad Commission undertook and conducted a comprehensive investigation into the properties and operations of the Southern California Edison Company upon the latter's application at the close of which the Commission made its findings with relation to the properties, income, and operating expenses of said corporation, among the latter of which items it included certain estimated expenditures for state taxes, and also an amount of federal income taxes which the corporation had paid, and which latter item the Commission found should be deducted from the gross earnings of the corporation in determining what its rates should be in order to allow a reasonable return upon its investment. Based upon these findings the Commission, on the 31st day of March, 1921, made its order fixing the rates to be charged the consumers of its product by the corporation. This order became final and effective on or about April 21, 1921, and was put into operation by the corporation, no assault having been made thereon by any of the parties affected thereby. In the early part of January, 1922, it was brought to the attention of the Commission that, due to certain changes in economic conditions, the rates as fixed by its aforesaid order would result in a greater return than that found to be reasonable at the time said rates were fixed, and would thus prove a burden upon certain classes of consumers, and that said rates should be modified and reduced. The Commission accordingly made an order on January 22, 1922, reciting the above facts, and stating that it appeared "advisable that the Commission determine at this time to what extent and in what manner the rates of the Southern California Edison Company should be reduced or modified." The Commission therefore ordered that a proceeding be instituted "to determine the just, reasonable, and sufficient rates, charges, rules, regulations, practices, or contracts to be hereafter observed and enforced, and to fix the same by proper order," after a public hearing, to which all interested persons were to be made parties. Such public hearing was set for and was commenced before the Commission upon the 27th day of February, and was thereafter conducted on February 28th and on the 21st, 22d, 23d, and 24th days of March. Upon the opening day of said hearing the presiding commissioner stated for the information and guidance of the parties who had appeared therein that "the Commission felt that it was necessary we have a public hearing at which we would inquire first into the actual rates received by the company during 1921, or that portion of the year which followed the effective date of these new rates; also the operating costs of the company during that period, and if possible, estimates of future revenues and expenses, particularly for the year 1922." On March 22, 1922, upon the opening of the hearing of that day, the presiding commissioner made the following statement on behalf of the Commission as to the scope of the inquiry then in course of conduct and the limitations of the proceedings thereunder, as follows:

> "This hearing will be confined, as originally intended, to the points already brought out in the original order of the Commission calling for this investigation. The fundamentals, such as the rate base, rate of return, taxation, depreciation, severance damages, and those items, will not be considered at this hearing; but we will close this case as quickly as we can, submit it, and give our decision, and then this Commission will announce right now that it will institute a proceeding opening the whole matter wide enough to take in everything you please."

Certain of the parties interested in said proceeding as rate payers of said corporation, through their counsel, objected to this limitation of the said proceedings, and a colloquy ensued between such counsel and the presiding commissioner, in which the former insisted that the investigation conducted in the pending proceeding be sufficiently broad enough to include an inquiry into alleged errors of the Commission in its decision and order of 1921 in regard to the question of the state and federal taxes by the amount and method of the allowances for which the corporation was alleged to have been unjustly enriched at the expense of its consumers. The presiding commissioner stated that the present proceeding was to be regarded as in the nature of an emergency investigation, having for its purpose the immediate relief of the consumers from the higher rates allowed under the previous order, and that therefore such fundamentals as rate base, rate of return, taxation, depreciation, severance damages, and such items would not be considered at this hearing; but he assured counsel for said consumers making said insistence that the matter of taxation, as well as all other matters relative to a full consideration and final fixation of the rates of said corporation, not received for consideration at this hearing, would be given full consideration in another proceeding presently to be instituted by the Commission, wherein the entire subject of rates would be opened for investigation and in which all parties would be given an opportunity to be heard. The Commission thereupon, over the objection and exception of counsel for said consumers, restricted the inquiry to such matters as it deemed germane to its declared purpose of affording the consumers present relief from the former rates, and particularly refused, in the then pending investigation, to go into the question of taxation. After a hearing lasting over the period above indicated, and limited as above set forth, the Commission made its decision and order on April 24, 1922, the effect of which order was to so reduce the rates theretofore effective as to work a saving to the customers of the corporation of a large sum of money, estimated by the respondents herein at $1,600,000 per annum. The decision and order made and filed by the Commission on that day embraced the following statement as to the limitations placed by the Commission upon the scope of the particular proceeding before it, and upon the effect of its said order with respect to its finality regarding the so-called fundamental matters to be postponed to a later and broader investigation, viz.:

> "During the course of the hearings the Commission limited the proceeding to the consideration of what general modifications should be made in existing schedules of rates to eliminate unnecessary or unreasonable burdens where the same might exist, and what reduction should be made at this time to the benefit of the public in general based on the findings in decision No. 8815. C. R. C. vol. 19, p. 595. Consideration of the fundamental issues, such as rate base, rate of return, depreciation allowance, and allowance for taxes, were excluded in this proceeding. The Commission announced that it would institute on its own motion another proceeding in the nature of a regular rate hearing in which all of these fundamental issues would be fully considered."

A petition for rehearing was thereafter presented by those of the customers of said corporation appearing as petitioners herein. In said petition for rehearing the petitioners urged that the said order of the Commission was unlawful in so far as it operated to continue in effect the former order of the Commission as to the amount of taxes to be estimated and allowed the corporation as operating expenses, and also as to the allowance of any portion of the sum paid by the corporation as United States income taxes, as operating expenses. The Commission, in its order denying the petition for rehearing, filed on May 3, 1922, set forth the following as its reasons for denying the same:

> "Case No. 1710 was made in the nature of an emergency proceeding, and limited in its scope in order that certain reductions in rates might be made effective immediately. This course was agreed to in general by attorneys in the proceeding, and was made with the specific understanding that the Commission would, on its own motion, institute a further proceeding to investigate fully the rates, rules, and practices of the Southern California Edison Company. Pursuant thereto the Commission has instituted a proceeding into the entire question of the reasonableness of the rates, rules, and practices of the Southern California Edison Company (Case 1759), and, in view of this fact, and the limitations of the scope of Case No. 1710, it does not appear that there is any justification for granting a rehearing on the grounds set forth in the petition herein."

Thereafter, and on May 3, 1922, the petitioners herein presented their application for a writ of review, wherein the substance of the foregoing facts were set forth, and upon which they prayed for the annulment of the order of the Commission made and entered on April 24, 1922.

The first question presented for our consideration upon this application relates to the regularity of the proceedings and order of the Commission limiting the scope of the investigation pending before it so as to exclude therefrom an inquiry into the lawfulness and propriety of its former order relative to the amount of the taxes, state and federal, which the corporation had been allowed by said former order to charge to the account of operating expenses. It is to be observed that in making said order, having the effect of limiting the scope of the investigation then pending before it, and of preventing a present consideration of the subject of taxation as germane to rate fixation, the Commission was dealing strictly with the matter of its own procedure. It must be held equally clear that, under the enlarged powers with which the Railroad Commission is invested under the provisions of sections 22 and 23 of article 12 of the state Constitution, the said Commission has been intrusted with a very large, if not an almost unlimited, discretion, with relation to the inception, order, and conduct of proceedings before it. Practically the only limitation imposed upon the Commission in matters pending before it of the nature of those under review in the instant proceeding is that imposed by the terms of the federal and state Constitutions, requiring that no person shall be deprived of life, liberty, or property without due process of law.

In the case of San Joaquin Light & Power Co. v. Railroad Commission, 175 Cal. 74, 165 Pac. 16, this court quoted with approval the language of the Supreme Court of the United States in the matter of Knoxville v. Knoxville Water Co., 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371, holding that the function of rate making is purely legislative in its character, and this is true whether it is conferred directly by the Legislature itself or by some subordinate or administrative body to whom the power of fixing rates in detail has been delegated; so that the only ground upon which the courts may interfere with the exercise of this function is that the action in question impairs constitutional rights. It may be conceded that if the record in the instant proceeding disclosed that by the limitations which the Commission placed upon the immediate inquiry before it these petitioners had been finally denied a hearing upon any question vital to a just and proper fixation of rates which this corporation should be allowed to charge the consumers of its product, and that such denial had resulted, or would result, in depriving them of property through the imposition of unjust and irregular rates, they might have recourse to the courts for relief against such unlawful exercise of the granted powers on the part of the Railroad Commission. But the record in the proceeding before us presents no such condition, since it affirmatively appears that the order of the Commission, in limiting the scope of the investigation before it, was but temporary in its operation and effect, and that in making said order the asserted rights of the parties before it were expressly preserved for later consideration in a proceeding which the Commission intended presently to institute, and in which every question involved in a general and final rate-making order affecting said corporation and all its consumers would be accorded full opportunity for consideration. The record further discloses that, as shown by the order of the Commission denying the petition for rehearing, such inclusive proceeding had in fact been instituted by the Commission prior to the making of the said last-named order, and was pending at the time of the inception of the proceedings herein for a writ of review.

Under the conditions as thus disclosed by this record, we are constrained to hold that the order which was made by the Railroad Commission limiting the scope of its inquiry in the proceeding pending before it, so as to exclude for the time being questions of taxes, upon which the petitioners herein were then insistent for a hearing, was fully within the discretionary power of the Commission as to matters of procedure, and that no constitutional rights of the petitioners herein were invaded by the action of the Commission in that regard. This conclusion necessarily puts an end to any further consideration of the other questions attempted to be presented to this court in this proceeding, since, if those questions were properly eliminated by the Commission from the proceeding before it, and if the order which it finally did make after their elimination by its express terms reserved for a more inclusive investigation and for final determination of the very matters which the petitioners herein are insisting should have been considered in the proceeding which they now seek to have reviewed, it follows necessarily that the petitioners have sustained no injury from any lack of jurisdiction in the Commission to make the orders complained of, nor any such injury from their effect as would justify recourse to the limited special proceeding of certiorari to review orders from which the petitioners have suffered no final or irremediable injury, but with regard to which their rights, if any, to ultimate relief, have been expressly reserved to them by the terms of the very orders of which they here complain.

The application is denied.

We concur: WILBUR, C. J.; WASTE, J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.

---

191 Cal. 223

PEOPLE v. ZUVELA. (Cr. 2530.)

(Supreme Court of California. May 29, 1923.)

1. Criminal law 🔑1186(4)—Failure to impose sentence within time prescribed by statute held not error within Constitution requiring new trial.

Failure to impose sentence within the time prescribed by Pen. Code, § 1191, *held* an error of procedure merely, not resulting in a miscarriage of justice within Const. art. 6, § 4½, so as to warrant reversal for purpose of having new trial under Pen. Code, § 1202.

2. Seduction 🔑45—Reply of prosecutrix that she liked defendant held not to negative theory that promise of marriage induced intercourse.

Reply by prosecuting witness, "I liked him," in response to question whether accused's promise of marriage was the only inducing cause of her consent *held* not necessarily irreconcilable with the theory that the marriage promise was the only inducement.

In Bank.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Jerry Zuvela was convicted of seduction, and he appeals. Affirmed.

Harry A. Chamberlin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

LENNON, J. [1] The defendant was convicted in the court below of the crime of seduction under promise of marriage. He seeks to have the judgment there rendered reversed upon the ground that the sentence was not pronounced within the time prescribed by section 1191 of the Penal Code, and that he was therefore entitled to a new trial as a matter of right under the provisions of section 1202 of the Penal Code.

We are satisfied that section 4½ of article 6 of the Constitution operates to prevent the granting of a new trial for the error, if any, specified. This section of the Constitution provides that—

> "No judgment shall be set aside, or new trial granted, in any case, * * * for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

The failure to impose the sentence within the time specified by section 1191 of the Penal Code is clearly an "error" of "procedure." In Rankin v. Superior Court, 157 Cal. 189, 106 Pac. 718, wherein it was sought to prohibit the trial court from imposing sentence after the lapse of time provided by section 1191 of the Penal Code, it was said:

> "If the court should refuse a new trial and render judgment against the defendant after the authorized time has passed, its action would be erroneous and the judgment would be reversed on appeal, if an appeal should be taken. But as it would be a judgment rendered by a court having jurisdiction of the subject-matter and of the person, it would not be void, nor subject to collateral attack upon the ground of its untimely rendition. As the court, even if it does give judgment, as the petitioner alleges it to be about to do, will not be acting without, or in excess of its jurisdiction, prohibition is not maintainable."

We see no good reason for excepting this particular error from the general provisions of section 4½ of article 6 of the Constitution. After an examination of the entire cause, including the evidence, we are satisfied that the error complained of in the instant case did not result in a miscarriage of justice. It will not, therefore, suffice to warrant a reversal of the judgment for the purpose of having a new trial.

[2] The contention of the defendant that there is no evidence tending to prove that the sole and only consideration for the consent of the complaining witness to the sexual in-

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tercourse was the defendant's promise of marriage is without merit. This contention is predicated upon the fact that the complaining witness, when questioned as to whether or not the defendant's promise of marriage was the only inducing cause of her consent, replied, "I liked him." This answer is not, however, necessarily irreconcilable with the theory that the act of sexual intercourse would not have been accomplished without, or in the absence of, such promise, and that the promise was the only inducement. There is in the record before us ample evidence to support the finding that the defendant had on numerous occasions promised to marry the complaining witness, and had discussed the question of marriage with her in the presence of her sisters and her brother-in-laws, and with them. There is also the direct testimony of the complaining witness that on the occasion of the first act of sexual intercourse the defendant took her to a rooming house in Los Angeles, and that at that time "he asked me to give up, that he was going to marry me in a few days."

It was held in People v. Wallace, 109 Cal. 611, 42 Pac. 159, that the evidence was sufficient, in a charge of this character, to support the verdict if the circumstances disclosed be such as to warrant the jury in the deduction that the act would not have been accomplished without, or in the absence of, such promise. Such an inference is, in our opinion, amply justified by the circumstances disclosed by the record before us.

Judgment affirmed.

We concur: WILBUR, C. J.; MYERS, J.; SEAWELL, J.; KERRIGAN, J.; WASTE, J.; LAWLOR, J.

---

191 Cal. 207

Ex parte LEVIN. (Cr. 2560.)

(Supreme Court of California. May 28, 1923.)

1. Habeas corpus 🔑92(3)—Finding that petitioner was able to pay alimony ordered is conclusive in habeas corpus proceeding to secure release from imprisonment for contempt in failure to pay.

In habeas corpus proceedings to secure the release from imprisonment for contempt for failure to pay alimony, the court's finding of fact in its order of commitment that petitioner was able to comply with the order for payment is conclusive.

2. Habeas corpus 🔑3—Grounds for release from imprisonment for failure to pay alimony should be presented first to superior court.

Where release from imprisonment for contempt in failure to pay alimony is sought on the ground of petitioner's inability to pay under Pen. Code, § 1487, subd. 2, the question should be presented first in the superior court.

3. Habeas corpus 🔑92(3)—Recitation in order of commitment not reviewable on petition for habeas corpus to secure release.

The court's recital in its order of commitment for contempt in failure to pay alimony that evidence of petitioner's ability was received is conclusive, and precludes consideration of that question on application for a writ of habeas corpus; such a writ being incapable of use as a basis for review as upon appeal.

In Bank.

Petition by Myer Levin for a writ of habeas corpus. Writ denied.

Hankins & Hankins and Olin F. Nuckolls, all of San Francisco, for petitioner.

R. M. J. Armstrong and A. M. Marks, both of San Francisco, for respondent.

WILBUR, C. J. [1] The petitioner was adjudged guilty of contempt for failure to pay alimony and counsel fees in a divorce proceeding brought against him by his wife. He seeks relief from said imprisonment upon the ground that he was unable to pay said amount at the time of the adjudication of contempt, and that he was deprived of the opportunity of proving his inability to pay said amount upon the hearing of the contempt proceedings. The court found as a fact in its order of commitment that the petitioner was able to comply with the order, and this adjudication is conclusive on habeas corpus. Ex parte Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266, Ex parte Clark, 110 Cal. 405, 42 Pac. 905; Ex parte Cottrell, 59 Cal. 417, 420; Matter of Maginnis, 162 Cal. 200, 206, 121 Pac. 723.

[2] The petitioner also alleges that he is now unable to comply with the order, and for that reason his imprisonment should terminate. Pen. Code, § 1487, subd. 2. This question should have been presented to the superior court in the first instance. Ex parte Wilson, 73 Cal. 97, 14 Pac. 393; In re Wilson, 75 Cal. 580, 17 Pac. 698; Code Civ. Proc. § 1143 et seq.; Spencer v. Lawler, 79 Cal. 215, 21 Pac. 742.

[3] The petitioner claims that he was denied the right to present his evidence as to his inability to comply with the order of the court. It is sufficient on this point to say that the order of commitment recites that evidence was received in support of the charge of contempt, and, in view of this recital, we cannot consider that question. The writ of habeas corpus cannot be used as a basis for review as upon appeal. Ex parte Cottrell, supra, 59 Cal. 422.

The petition is denied, and the prisoner remanded.

We concur: MYERS, J.; KERRIGAN, J.; WASTE, J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.

(61 Cal App. 602)

In re WRENN'S ESTATE.

WRENN v. DORMODY.

(Civ. 2563.)

(District Court of Appeal, Third District, California. April 9, 1923.)

Homestead ⚿142(1) — Homestead covered by declaration held not to continue to exist after death of wife and remarriage and removal of husband.

Where, after the filing of a declaration of homestead by a husband on property then occupied by himself and wife, the wife died, and the husband remarried and removed to another residence, *held*, that, under Code Civ. Proc. 1909, § 1474, or as amended by St. 1911, p. 254, for practical purposes, there was no longer any community homestead in existence upon the property covered by the declaration, and that, after the death of both the husband and wife, the court did not err in setting aside, under authority of Code Civ. Proc. § 1465, the premises last resided in as a homestead for the use of the minor children of the second marriage.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

In the matter of the estate of John Quincy Wrenn, deceased. From a judgment selecting and setting apart a homestead for minor children, William B. D. Wrenn and Martha Agnes Wrenn, upon the petition of their guardian, Nellie E. Dormody, Joseph T. Wrenn, executor, appeals. Affirmed.

E. Fitzgerald, of Placerville, for appellant.

Abe Darlington, of Placerville, and Charles A. Swisler, of Sacramento, for respondent.

HART, J. This is an appeal by the executor of the estate of John Quincy Wrenn, deceased, from a judgment selecting, designating, and setting apart a probate homestead for two certain minor children of the decedent.

The proceeding is founded on section 1465 of the Code of Civil Procedure, which, among other things, provides for the setting apart, under certain indicated circumstances, of a homestead for the use of the minor children, out of the common property, or, if there be no common property, then out of the real estate belonging to the deceased.

The facts are: The deceased, who was a retired physician, was a resident of Placerville, Cal., for many years prior to his death on January 14, 1921. He was twice married. By his first wife, Elizabeth K. Wrenn, he had two children, Florence and Joseph T. Wrenn, of whom the latter alone was living at the time of the filing of the petition herein on the 13th day of August, 1921; the daughter, Florence, having died prior to said time.

On the 17th day of February, 1892, and during the life of his first wife and while they were living together as husband and wife, the deceased filed in the recorder's office of the county of El Dorado a declaration of homestead on lot No. 4, in block No. 43 of the city of Placerville. The deceased and his family were, at that time, residing on said premises. Subsequently to the filing of said homestead, the wife of the deceased, Elizabeth K. Wrenn, died, and thereafter the deceased again married; his second wife being Sarah E. Wrenn. The deceased and his second wife continued to live on the property upon which the declaration of homestead was filed by the former in February, 1892, and occupied said premises until the month of October, 1920, when they removed to a house which deceased purchased in said month situated at 61 Coloma street, in said city of Placerville, several doors above the old family home, and there he and his family took up their residence and continued to reside until January 14, 1921, when, as above stated, he passed out of this life. The issue of the second marriage consisted of two children, to wit, William B. D. Wrenn and Martha Agnes Wrenn, and these children, with their mother, after the death of Dr. Wrenn, continued to reside on the premises at 61 Coloma street until the death of Sarah E. Wrenn on May 18, 1921, which was approximately four months after the death of Dr. Wrenn.

Dr. Wrenn left a will, dated March 4, 1920, in which, after making several bequests to relatives and friends, he devised the old family residence at 49 Coloma street in said city to Sarah E. Wrenn, his wife. The balance of his estate was divided equally between his heirs at law, Sarah E. Wrenn, Joseph T. Wrenn, a son of the deceased by his first wife, and the two children of the last marriage, William B. D. and Martha Agnes Wrenn. As stated, Sarah E. Wrenn died on the 18th day of May, 1921. She left a will leaving all her estate, both real and personal, to her two children, William B. D. and Martha Agnes Wrenn, and naming Nellie E. Dormody as the guardian of their persons and estates and also as the executrix of her will.

On the 13th day of August, 1921, the said Nellie E. Dormody, as the guardian of the persons and estates of the said William B. D. and Martha Agnes Wrenn, filed a petition with the clerk of the superior court of El Dorado county, praying that the family residence at 61 Coloma street be set aside as a homestead for said two children. These children were minors at the time of the filing of said petition.

The petition of the said Nellie E. Dormody alleged, among other things, that no homestead had ever been selected, designated, and set aside by John Quincy Wrenn during his lifetime, and further alleged that said John Quincy Wrenn and his family had resided at 61 Coloma street continuously until his death. It also alleged, although this allegation is not material to the determination of the ques-

---

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes tion submitted here, that Sarah E. Wrenn in her will "requested that the said family home be kept intact and that said minors be kept and maintained therein." The petition was in due time answered by Joseph T. Wrenn, as executor of the will of John Quincy Wrenn, deceased, after a demurrer to said petition had been overruled by the court. By said answer the allegation of the petition that the deceased, John Quincy Wrenn, did not in his lifetime select, designate, and set aside and cause to be recorded a homestead was denied, and in this connection the answer set up the declaration of homestead filed by said John Quincy Wrenn with the county recorder of El Dorado county, and alleged that the said "declaration of homestead has never been canceled, abandoned, or disposed of as the homestead of John Quincy Wrenn." The answer further denied the allegation of the petition that the premises at 61 Coloma street had been used continuously by the deceased and his family up to the time of his death, and alleges that he and "his family had merely moved into the house at 61 Coloma street temporarily or until certain repairs could be made upon the homestead at 49 Coloma street."

Testimony was received in support of and in opposition to the allegations of the petition, and the court made its findings of fact in accordance with the facts as set forth in the said petition. Among other things, the court found that the property described as lot No. 6 in block 43 (known as 61 Coloma street) of said city of Placerville was the community property of said John Quincy Wrenn and his wife, Sarah E. Wrenn; that said lot contains the dwelling house in which said John Quincy Wrenn and his family resided up to the time of his death and in which his famly continued to reside thereafter; that the same is suitable for a homestead for said minors; that the said real property does not exceed in value the sum of $5,000, but is of the value of $3,500.

The single question presented here for decision is whether, as counsel for the appellant contends is true, the trial court transcended its lawful power in setting aside the property at No. 61 Coloma street as a probate homestead for the use and benefit of the two above-named minor children of the deceased by his second wife. The contention of the appellant is that two homesteads cannot be declared and acquired by a party, and that therefore a party having already acquired a homestead, any attempt by him or her to acquire a second homestead while the former is still in force or has not been destroyed by abandonment, as provided by section 1243 of the Civil Code, is absolutely void. The proposition thus stated is sound, if the premise from which it proceeds supports it. See Waggle v. Worthy, 74 Cal. 268, 15 Pac. 831, 5 Am. St. Rep. 445; Estate of Clavo, 6 Cal. App. 774, 776, 93 Pac. 295. There is, however, no question of abandonment in this case; the proposition simply being whether the homestead declared and recorded by the deceased, Dr. Wrenn, in the year 1892, inured as a homestead to the use and benefit of his second wife or the second community. Section 1474 of the Code of Civil Procedure itself seems to determine the proposition adversely to the contention of the appellant. Said section provides:

> "If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both are living, was selected from the community property, or from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, absolutely in the survivor. If the homestead was selected from the separate property of either the husband or wife, without his or her consent, it vests, on the death of the person from whose property it was selected, in his or her heirs, or devisees, subject to the power of the superior court to assign it for a limited period to the family of the decedent. * * *"

It will be observed that under the foregoing section, where the homestead is selected from the community property, or from the separate property of the person selecting or joining in the selection of the same, it vests on the death of the husband or wife absolutely in the survivor. If, however, it was selected from the separate property of either the husband or wife without his or her consent, it vests on the death of the person from whose property it was selected in his or her heirs or devisees, subject to the power of the superior court to assign it for a limited period to the family of the decedent. In this case it does not appear whether the homestead declared by Dr. Wrenn was from his or his first wife's separate property or from the community. The homestead declaration makes no reference to the character of the property from which the homestead was selected, nor did the first wife of the deceased join in the selection of the homestead. But whether it was selected from the community property of the spouses or from the separate property of the one or the other without the consent or the joining in of such selection by the spouse whose separate property it was, the result, so far as this case is concerned, would be the same. If it was community property or the separate property of Dr. Wrenn, then, upon the death of his first wife, the property vested absolutely in him, with power to dispose of it as he might see fit, the property, however, retaining the characteristic of a homestead to the extent that it was exempt from forced sale for the debts of the survivor. Tyrell v. Baldwin, 78 Cal. 470, 21 Pac. 116; Dicky v. Gibson, 113 Cal. 30, 45 Pac. 15, 54 Am. St. Rep. 321. The record does not disclose the date of the death of the first wife, but if it was her separate property, she not having joined in the declaration or the selection of the homestead, the property, if she died prior to the amendment of section 1474 of the Code of Civil Procedure in the year 1911 would go to her heirs (see Deering's Code Civ. Proc. 1909, § 1474), but if she died after the amendment of 1911 went into effect then it would go either to her heirs or devisees (Stats. 1911, p. 254). Thus readily will it be seen that at the time of the marriage of Dr. Wrenn to Sarah E. Wrenn, his second wife, there was, to all practical intents and purposes, no homestead in existence upon the property referred to.

This question, however, has been squarely passed upon by the higher courts. In Estate of Clavo, 6 Cal. App. 774, 93 Pac. 295, supra, one Charles Clavo filed a declaration of homestead during the life of his first wife upon a certain piece of property which belonged to his separate estate. His wife joined him in the execution of the declaration of homestead. Thereafter the said wife died and Clavo again married, and subsequently to his second marriage he alone executed and filed a declaration of homestead upon the same property. The point urged on appeal was that "a party cannot have two homesteads, and if he attempts to acquire a second while the first is in force the second is void." This court held that the force of the homestead first declared had expired by reason of the fact that upon the death of the first wife of Clavo the property upon which the homestead was declared vested under the terms of section 1474 of the Code of Civil Procedure absolutely in the surviving husband, Clavo. It was therein said:

> "Upon the death of the first wife the title to the property became vested absolutely in the husband, and he was clothed with complete dominion over it, but by virtue of the statute it still retained some characteristics of a homestead, among them being exemption from execution. While that exemption continued he could not select another and different homestead. But the title having vested completely in the husband upon the death of his wife, the property could not, in the very nature of the case, continue as a homestead for the benefit of the second community. The unqualified title of one of the spouses to the property is inconsistent with the existence of a homestead for the benefit of both. After his second marriage, in order to clothe the property with all the attributes of a community homestead, it was necessary for the husband to file another declaration. This he did as he had a right to do, and the effect of it was that upon his death the property vested absolutely in his widow as it would have vested in the former wife under the first declaration if she had survived him."

In Zanone v. Sprague, 16 Cal. App. 333, 116 Pac. 989, one Alfred Coad duly declared and filed a homestead upon his separate property. Thereafter said Coad was divorced from his wife and subsequently thereto he again married and resided with his second wife upon the premises upon which the said homestead was filed, until the time of his death in 1906. After the death of Coad an action was brought by the first wife for the purpose of determining her claim that she was the owner of the fee in the premises by reason of the said homestead thereon, the same never having been abandoned. Her claim was not sustained. It was, however, said in the opinion in that case, upon the authority of Estate of Clavo, supra:

> "Of course, it will not be contended that the homestead in question here could inure to the benefit of the second wife."

There are many cases reviewed in Estate of Clavo, supra, and we refer also to those for further light upon the question herein involved. It is very clear that the court below did not go beyond the authority conferred upon it by section 1465 of the Code of Civil Procedure in setting aside the premises in question as a homestead for the use of the minor children of the deceased by his second wife.

The judgment appealed from is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

61 Cal. App. 656

HYMAN v. STERN. (Civ. 4170.)

(District Court of Appeal, Second District, Division 1, California. April 14, 1923.)

Execution ⚷251(1)—Purchase of stock worth $2,000 for $15 at sheriff's sale held void where purchaser knew of its true value.

A purchase by defendant manager and president of corporation, the judgment creditor, of plaintiff's stock therein at a sheriff's sale for $15, the stock being worth $2,000, *held* void where defendant knew the true value of the stock, and plaintiff, through no fault of hers, had no knowledge of the sale, and defendant knew of her address, but failed to notify her, and he and his attorney were the only persons present at the sale.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by Almeda Bresee Hyman against Karl Stern. Judgment for plaintiff, and defendant appeals. Affirmed.

B. W. Shipman and Henry O. Wackerbarth, both of Los Angeles, for appellant.

Kemp & Clewett, of Los Angeles, for respondent.

CURTIS, J. The appellant and respondent were two of the organizers, stockholders, and directors of the Karl Stern Company, a corporation. The defendant was at all times the president, general manager, and a director of said company, and the owner of 1,438 shares

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

of the capital stock thereof out of 1,600 shares of said company outstanding, and was at all times in active management and control of the business and affairs of said company; plaintiff at all times, up to the execution sale herein involved, was the owner of 100 shares of the capital stock of said company, which had a value of approximately $2,000. Plaintiff was the secretary and treasurer of said company from its organization up to April 1, 1919. She was also in the employ of said company from the date of its formation up to the 10th day of August, 1918, at which date she left the employ of the company. About February 11, 1919, she commenced an action in the superior court of the county of Los Angeles against the said Karl Stern Company for moneys alleged to be due her for services rendered. And about June 11, 1919, she recovered judgment against said company for the sum of $838.75 and costs. The company appealed from said judgment and the same was reversed on May 20, 1920. 47 Cal. App. 605, 191 Pac. 47. As a reading ot the opinion will reveal, the judgment was reversed for the reason that the appellate court held the same to be excessive in an amount of approximately between $40 and $50. On the reversal of said judgment, the Karl Stern Company was awarded its costs on appeal, amounting to $97.30, and the cost bill showing said costs was served on plaintiff's attorney in that action on or about July 21, 1920, but said attorney failed to notify plaintiff of that fact, and plaintiff had no actual knowledge thereof until about February 21, 1921. On August 3, 1920, the defendant, Karl Stern, acting as president of the Karl Stern Company, caused an execution to be issued on said judgment for costs on appeal, against said plaintiff, and caused the same to levied on plaintiff's stock in said Karl Stern Company, and said levy was made by the sheriff, leaving a copy of said execution with the defendant, said Karl Stern, as president of said Karl Stern Company, and said defendant as such president signed an answer to said garnishment and delivered the same to the sheriff; thereafter, and on August 11, 1920, said stock was sold on execution sale, and the defendant Karl Stern was the only bidder at said sale, and became the purchaser of said stock for himself, personally, for the sum of $15. Plaintiff did not discover the fact of said judgment for costs or said execution sale until about February 1, 1921, and on February 25, 1921, she tendered to defendant, and offered to pay him, the total amount of said judgment with interest and costs, amounting to $102.40. The evidence shows that the defendant and his attorney were the only persons present at the time of the execution sale, and the defendant made no effort whatever to inform the plaintiff of the judgment against her, and never demanded its payment, either of plaintiff or plaintiff's attorney. Plaintiff, therefore, instituted this action and recovered a judgment against the defendant, Karl Stern, wherein it was decreed that upon payment by said plaintiff to said defendant, or to the clerk of said superior court for said defendant, within 30 days from the docketing of said judgment, of the sum of $15.57 and the balance due on the judgment against said plaintiff and in favor of Karl Stern Company, a corporation, for costs on appeal, then and in that event that the sheriff's sale under execution of said stock be vacated, annulled, and set aside. The defendant appeals from this judgment.

Appellant contends that the most that can be said of plaintiff's case from the foregoing statement of facts is that it is an action to set aside a sheriff's sale, lawfully made, because the price and the value of the property sold is greatly disproportionate, and that under the decisions of our state, mere inadequacy of price is not alone sufficient to set aside such a sale. In support of his contentions he relies upon the cases of Rauer v. Hertweck, 175 Cal. 278, 165 Pac. 946, and Bock v. Losekamp, 179 Cal. 674, 179 Pac. 516. These cases undoubtedly support appellant in his contention as to the law of this state.

There is more, however, in the present case than mere inadequacy of consideration. From a casual reading of the statement of facts it must be apparent that not only did the defendant purchase plaintiff's stock at a price which was grossly inadequate, but he did it knowing full well its true value, and in the absence of plaintiff, who had no actual knowledge of the sale, and whose ignorance in that regard was not due to any fault or negligence on her part. These facts bring the case clearly within the rule laid down in the case of Odell v. Cox, 151 Cal. 70, 90 Pac. 194, where a sale of stock under execution, under facts very similar to those in the present case, was set aside by the court. Mr. Justice Angellotti, rendering the opinion of the court, uses the following language:

> "Under the circumstances appearing, it devolved on Cox, if he proposed to purchase the stock at this practically secret sale, in the exercise of that degree of fairness which both law and common honesty required, to offer a price bearing some semblance to what he knew to be its value, or at least to refrain from taking it for what he knew to be practically nothing."

This language applies with equal force to the case before us. The defendant, who was the president and manager of the judgment creditor, the Karl Stern Company, and who owned 90 per cent. of its capital stock, was, besides his attorney, the only person present at the sale. As we have already seen, he knew the true value of the stock; he was well acquainted with the plaintiff and knew her address; she had no actual knowledge of the sale, and he not only failed to notify her, but in her absence he purchased for $15 the 100 shares of stock, worth approximately $2,000, and from which sale there is no redemption.

Regarding such a transaction we feel that the following words of the Supreme Court of the United States are peculiarly applicable:

> "It would be a reproach to a court of equity if it could not lay hold of such a transaction as this is shown to be, and set aside a sale of property acquired under the forms of law and in defiance of natural justice." Schroeder v. Young, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. Ed. 721.

Appellant further contends that there is no evidence to support certain findings set forth in his brief. We have examined the record before us and find ample evidence therein to support all such findings.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J

---

61 Cal. App. 672

HYMAN v. KARL STERN CO. (Civ. 3783.)

(District Court of Appeal, Second District, Division 2, California. April 16, 1923.)

1. Appeal and error 🔑1097(1)—Previous decision on same issue in prior appeal controls in subsequent appeal.

A decision in a prior appeal on the same issue, arising in a subsequent appeal in the same case, is the law in the subsequent appeal.

2. Appeal and error 🔑1011(1)—Finding by trial court based on conflicting evidence is final.

Where the testimony is conflicting it is the peculiar province of the trial court to weigh the testimony, and its finding thereon is final.

3. Corporations 🔑308(11)—Finding of contract to pay director $25 a week sustained.

In an action by a director for salary due her evidence *held* to sustain a finding of a contract stipulating that she was to receive $25 per week.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by Almeda Bresee Hyman, against the Karl Stern Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Benjamin W. Shipman and Henry A. Wackerbarth, both of Los Angeles, for appellant.

Kemp & Clewett, of Los Angeles, for respondent.

CRAIG, J. This is an action by the plaintiff and respondent against the defendant and appellant to recover a balance of salary claimed to be due her from the defendant. Plaintiff was one of the organizers, a stockholder, and a director of the corporation. She worked for it from April 1, 1917, to August 10, 1918, and was paid $15 per week for the first year and $17.50 per week from April 1, 1918, until August 10, 1918, upon which last date she left the employ of the defendant.

[1] This is an appeal after the second trial of the issues in this litigation. Subsequent to the first trial an appeal was taken, which was passed upon by the District Court of Appeal, Second Appellate District, Division 1, and an opinion filed May 20, 1920 (47 Cal. App. 605, 191 Pac. 47), therein. In that decision the issues of law tendered by appellant on this appeal were determined. It was there said:

> "The first contention of the by-laws declaring that the directors should fix the salaries of officers and employees was not complied with, and that any arrangement entered into between Stern and the plaintiff as to salaries to be paid was invalid. We think there is no merit in this contention. If the two persons who owned and controlled the corporation to all substantial effect agreed upon the salaries to be paid, where the corporate form was adopted only as a convenient agency for the handling of the business, such an agreement we think was valid and binding."

This statement of the law must be accepted as controlling the same issue argued in the appellant's brief in the instant appeal, in which it is contended that the defendant corporation is not responsible for the statements of Karl Stern to the plaintiff prior to the organization of the corporation, and that a resolution of the board of directors is essential.

[2] It is unnecessary to set forth in hæc verba the findings to which exception is taken. The appellant's ground of appeal that the evidence does not support the findings concerns the conversations between the plaintiff and Karl Stern. The matters involved in the claim that the findings are not supported are: 1. Did the conversations take place? 2. If so, did the statements made constitute agreements? 3. If agreements were made, do they bind the corporation? 4. Were the services rendered? There is no dispute as to the fact of the rendition of the services. What we have said previously disposes of the third proposition. As to the first and second, the most that can be claimed on behalf of the appellant is that there was a conflict of evidence. The plaintiff testified to certain conversations between herself and Karl Stern. Granting that the defendant offered evidence to the contrary, it was the peculiar province of the trial court to weigh the testimony, and that of the plaintiff was apparently accepted, and the decision of the trial court in that regard is final.

[3] The court found that the defendant agreed and promised to pay the plaintiff $25 per week the first day of April, 1917, to the first day of April, 1918, and $27.50 per week from the first day of April, 1918, to and including the 9th day of August, 1918. Appellant excepts especially to this finding and claims that the transcript contains no testimony that any contract was ever entered into between the plaintiff and any officer of the defendant corporation in which it was stipulated that she was to receive $25 per week or any other sum for her services. It is true that in the conversation as related by the plaintiff, which she testified took place between Karl Stern and herself just prior to the first meeting of the board of directors, it is not stated that $25 per week or any other sum was specified as the future salary of the plaintiff. However, the trial court found that such an agreement was made, and the inquiry in this court must be directed to a determination of whether or not there is evidence from which an inference of the fact as found might have been fairly drawn. It is apparent that the latter part of the conversation as detailed would have no application if the amount of Mrs. Hyman's salary had not been previously mentioned. She testified that Stern said it would be to the advantage of the corporation to get along on as little money as possible and "leave as much money in the company as we could leave in"; also, that she said she could "get along on $15 per week," and he said he would draw about the same amount himself, and "we would leave the rest in the corporation." Clearly, there had been some discussion as to what salary both parties were to receive.

The plaintiff testified to another conversation, which she said took place at the annual meeting of the corporation in April, 1918. We quote from her evidence as follows:

> "Yes, sir. I asked for an advance in salary, which would make my salary $27.50, and that advance was granted to each one of us, the other salesman, as well as myself; each one received $2.50 per week advance. Then that made me draw out $17.50; that was the advance paid to me on the amount I was drawing out of the corporation. Q. Well, from that time on what did you draw down? A. $17.50 per week."

Here is direct testimony that her salary had been $25 per week. To be sure, it was given as a conclusion of the witness, but no objection or motion to strike was made, and it remains in the record as evidence which the trial court unquestionably considered in making the finding that an agreement had been entered into to pay Mrs. Hyman $25 per week. Although the testimony supporting the finding in question is not as clear or as complete as might be desired, we consider that the transcript contains sufficient evidence in that behalf to sustain it.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

---

61 Cal. App. 724

GRAY v. YARBROUGH et al.
(Civ. 2543.)

(District Court of Appeal, Third District, California. April 21, 1923.)

1. Vendor and purchaser ⇨3(3)—Agreement for sale of property and retention by seller of proceeds above certain amount held to create relation of principal and agent.

A contract between the owner of property and another authorizing such other, referred to as agent, to "undertake the sale" of the property, and to "so continue his efforts to sell * * * until same has been disposed of * * * and * * * said agent shall be entitled to retain all over and above the net price herein named as his fee for negotiating said sale," *held* to create the relation of principal and agent, and not that of vendor and purchaser under an option.

2. Contracts ⇨177—Although relation of parties under contract determinable from terms of contract, some weight must be given to their designation of the relation.

Though the relation of parties is to be determined from the terms of the contract rather than the name they have given the relation, some weight must be given to their designation of it.

3. Principal and agent ⇨71—Fraud of selling agent in inducing owner to accept less than initial payment previously contemplated held actionable.

Under Civ. Code, §§ 2322, 2228, 2229, 2234, 2237, as to duties of agents and trustees, where an agent to sell land was obligated to use his best efforts to obtain for his principal an initial payment of "not less than $1,000 cash net to the owner," but by false and fraudulent representations induced the owner to make the sale on cash payment of only $200, such fraud was actionable, notwithstanding the fact that the agent was entitled to any excess above the fixed price as his commission, the agent's nonliability as to such excess not exempting him from his obligation to secure sale upon the terms named by the owner.

4. Limitation of actions ⇨195(5)—Burden to show discovery of fraud within limitation period held on plaintiff.

In action by principal against agent for fraud in the sale of land, the burden was upon plaintiff to show that he first discovered the fraud within three years prior to the commencement of the action, under Code Civ. Proc. § 338.

5. Limitation of actions ⇨179(2)—Complaint must show facts with relation to the discovery of fraud.

Where an action for relief on the ground of fraud is brought after the expiration of the three-year period of Code Civ. Proc. § 338, the complaint must show when the fraud was discovered, which must be within the three-year period, and why it was not sooner discovered, and the circumstances under which it was discovered.

6. Pleading ⚿433(1)—A defect in complaint not cured by findings unsupported by evidence.

A defect in complaint cannot be cured by findings which are unsupported by evidence.

Appeal from Superior Court, Sacramento County; George H. Thompson, Judge.

Action by Harry J. Gray against P. L. Yarbrough and another. Judgment for plaintiff, and the named defendant appeals. Reversed, with directions.

See, also, 212 Pac. 226.

John R. Connelly and Evan J. Hughes, both of Sacramento, for appellant.

Charles A. Bliss, of Sacramento, for respondent.

FINCH, P. J. The controversy between the parties arose out of the following contract, executed on the day it bears date:

"Sacramento, Cal. Aug. 27, 1917.

"It is hereby agreed this day by and between Harry J. Gray, owner of two quarter sections of land near Lincoln, California, and P. L. Yarbrough, agent, that in consideration of the sum of $300.00 cash in hand aid by said Yarbrough to said Gray, the receipt whereof is hereby acknowledged, that said Gray will have assigned and deliver to said Yarbrough one certain promissory note given by said Yarbrough to Harry T. Fuller.

"And furthermore it is agreed by and between the parties hereto that said agent shall undertake the sale of the westerly quarter section of said land at a net price to owner of $3,200, and of the easterly quarter section of land referred to at a net price to owner of $5,000, and shall so continue his efforts to sell either or both of said quarter sections until same has been disposed of to the satisfaction of both parties hereto and that on the sale of either or both quarter sections said agent shall be entitled to retain all over and above the said net prices herein named as his fee for negotiating said sale.

"It is further agreed by said agent that on the sale of either or both quarter sections aforenamed that the said agent will deduct from his fee thus earned, in excess of abovementioned net price to owner, the amount or sum of three hundred eighteen and 20/100 dollars ($318.20), being the amount of said note, principal and interest discounted to said agent, and that said discount shall be paid to said owner at the time of said sale of land.

"Terms of sale on said land to be not less than $1,000.00 cash net to owner on the westerly quarter section and not less than $1,500.00, cash net to owner on the easterly quarter section and no wood to be removed from land without the written consent of present owner; balance to be paid on or before 5 years with equal annual installments of principal, and six per cent. interest on deferred payments. Harry J. Gray, Owner.

"P. L. Yarbrough, Agent."

The terms of the contract were carried out in a manner satisfactory to the parties thereto, excepting the sale of the parcel of land listed at the price of $3,200. Yarbrough was a real estate agent in Sacramento. One Lamy was the owner of 320 acres of land in North Dakota and an equity in certain property in Alhambra, but it appears that such equity proved to be of no value. F. W. Herbert and C. D. Ackerman resided in Los Angeles. After the execution of the contract the defendant, through Herbert and Ackerman, entered into an agreement with Lamy to exchange plaintiff's quarter section of land to be subject to a mortgage for $3,000, for Lamy's North Dakota and Alhambra properties. In order to carry the deal through, defendant, Herbert, and Ackerman agreed among themselves that Herbert would take title to plaintiff's land and give the latter a promissory note for $3,000, secured by a mortgage on the land, they three to have an interest in the note to the extent of $800. Herbert was then to convey the land to Lamy, subject to the mortgage, and take title to the North Dakota and Alhambra properties and hold the same for the benefit of the three in equal shares. They three further agreed either to advance the $1,000 necessary to make the cash payment to plaintiff, as provided in the contract, or to secure the same by a mortgage to be executed by Herbert on the North Dakota land. The court found, on conflicting evidence, that, after the foregoing understanding had been reached, the defendant informed plaintiff that a sale could be made to Herbert for $4,000, $1,000 cash and the said note and mortgage for $3,000, in which defendant was to have an interest of $800. Plaintiff agreed to the proposition, and defendant so informed Herbert. Herbert then wrote defendant to have plaintiff execute a deed and forward the same to a bank in Hollywood, with instructions to deliver it to Herbert on receipt of $1,000 and his promissory note and mortgage, as agreed upon. Instead of doing this the defendant falsely and fraudulently represented to plaintiff that only $200 could be obtained as a cash payment and proposed that plaintiff accept that sum and Herbert's note and mortgage for $3,000 in full payment for the land, the defendant to have no interest in the note. Believing defendant's representations and relying thereon, plaintiff agreed to the proposition and conveyed the land as proposed. Upon receipt of plaintiff's deed. Herbert conveyed the land, subject to the mortgage, to Lamy and received in exchange therefor Lamy's deed to the North Dakota and Alhambra properties. Defendant denied having made such false representations and testified that the change from a cash payment of $1,000 to one of $200 was made to satisfy plaintiff's wishes, with full knowledge on his part of all the facts, because the plaintiff preferred to have the entire interest in the mortgage. Defendant's testimony in this connection is somewhat discredited by a statement appearing in his letter to Herbert, as follows:

> "I have been so fortunate as to persuade the owner to accept the $3,000 mortgage and $200 in cash in full payment for the land, which obviates the necessity of taking an interest in the mortgage, and of putting 800 in the deal."

In any event, the court's finding on the conflicting evidence is conclusive.

No part of the mortgage debt, either principal or interest, was ever paid, and plaintiff foreclosed the same. No other bidder appearing at the foreclosure sale, the plaintiff bid in the land for the amount of the note, interest, costs, and taxes.

Plaintiff's deed was delivered to Herbert October 20, 1917. Herbert sold the North Dakota land on or about the 1st of May, 1918, for the net sum of $4,720.11. In a suit brought by defendant against Herbert, the former was given judgment on May 2, 1921, for $1,573.37 on account of his one-third interest in the net proceeds of such sale. This action was commenced September 1, 1921. The plaintiff was given judgment for $1,573.37, with interest thereon from October 20, 1917. From this judgment the defendant Yarbrough has appealed.

Appellant contends that the contract of August 27, 1917, "created the relationship of vendor and purchaser with an option and not that of principal and agent between Gray and Yarbrough." In support of this contention he cites Robinson v. Easton, Eldridge & Co., 93 Cal. 80, 28 Pac. 796, 27 Am. St. Rep. 167; Synnott v. Shaughnessy, 2 Idaho, 122, 7 Pac. 82, and Hutton v. Sherrard, 183 Mich. 356, 150 N. W. 135, L. R. A. 1915E, 976. The contracts involved in those cases, while materially different from that here under consideration, authorized sales at fixed prices, the persons effecting the sales to retain as commissions all that was received above such prices. In the first case it is said:

> "The relation of the defendant to the plaintiffs was not that of a mere agent. * * * The relation thus created between them was rather that of a vendor and purchaser under a contract of sale than one of principal and agent, and a sale by the defendant thereunder was in the capacity of a vendor upon its own account, and not for the account of the plaintiffs."

As indicated in the opinion, however, this holding was not necessary to the decision, and it may fairly be said that the decision was based upon the other grounds stated by the court. In a note following the report of the case in 27 Am. St. Rep. 171, the author expresses disapproval of the statement quoted, and the same is expressly disapproved in Burnett v. Potts, 236 Ill. 501, 86 N. E. 259. In Tate v. Aiken, 5 Cal. App. 505, 90 Pac. 836, involving a somewhat similar contract, appellants cited Robinson v. Easton, Eldridge & Co., in support of their contention that such contract was one of option rather than agency. The appellate court held that the contract created the relation of principal and agent, and the Supreme Court denied appellant's petition for a hearing. The Robinson Case is cited in Smith v. Blodget, 187 Cal. 235, 240, 201 Pac. 584, 586, where it is said:

> "Whether an agreement permitting a person 'to sell' land on certain terms creates the relation of principal and agent or that of vendor and purchaser under a contract of sale depends upon the intention of the parties."

Language of similar import to that used in the Robinson Case is found in Synnott v. Shaughnessy, supra; but there, also, such holding was not necessary to the conclusion reached. Hutton v. Sherrard, supra, does not hold that the relation created by the contract involved therein was not that of principal and agent, but that there was no such conflict between the interests of the principal and agent as would prevent the latter from selling the property to himself at the price and on the terms fixed by the contract. The great weight of authority in other jurisdictions is to the effect that an owner's agreement authorizing another to make a sale and retain all of the proceeds above a fixed price creates the relation of principal and agent. Burnett v. Potts, supra; Mulvane v. O'Brien, 58 Kan. 463, 49 Pac. 607; Chesbrough v. Vizard Inv. Co., 156 Ky. 149, 160 S. W. 725; Brittson v. Smith, 165 Mich. 222, 130 N. W. 599; Chezum v. Kreighbaum, 4 Wash. 680, 30 Pac. 1098, 32 Pac. 109; Shepard v. Pabst, 149 Wis. 35, 135 N. W. 158.

[1, 2] The contract in this case was drafted by the defendant. Its terms were essentially different from those in the Robinson contract. The defendant agreed, as agent, to "undertake the sale" of the land and to "so continue his efforts to sell * * * until same has been disposed of to the satisfaction of both parties hereto, and * * * said agent shall be entitled to retain all over and above the said net prices herein named as his fee for negotiating said sale." In the opening paragraph he described himself as "agent" and five times thereafter refers to himself as "agent" and the word "agent" follows his signature to the contract. The instrument is not an option, but a binding contract by which the defendant obligated himself, not to purchase, but to use his best efforts to sell or negotiate a sale of the land. While the relation between the parties is to be determined from the terms of the contract rather than the name they have given

that relation, some weight must be given to their designation thereof. Title Insurance & Trust Co. v. Grider, 152 Cal. 746, 94 Pac. 601. To hold, under all the circumstances of this case, that the defendant was not the agent of the plaintiff would be to trifle with the rights of the parties in disregard of their manifest intention as expressed in the contract between them.

[3] If the sale had been made in accordance with the terms of the contract of agency, any false representations as to what defendant was to receive by reason of the sale would have been immaterial, and not actionable fraud, because plaintiff had no interest in any excess received above the fixed price, and defendant was not plaintiff's agent for the purpose of obtaining such excess, but was acting for himself in that regard and in his own interest, the only restriction being that he must not violate his duty to plaintiff in his efforts to obtain or increase his own compensation. The defendant would have had the right, under the express terms of the contract, to such excess, without the consent and against the objection of plaintiff. The plaintiff knew that the defendant and his associates were to receive property of some character in exchange for the former's land, and the nature, location, or value of such property was not material, nor did the want of knowledge thereof in any manner influence plaintiff's conduct. But defendant was obligated to use his best efforts to obtain for his principal an initial payment of "not less than $1,000 cash net to owner." If he willfully failed to discharge this obligation, and induced the plaintiff, by false and fraudulent representations, to make the sale on a cash payment of only $200, such fraud is actionable. An agent may not "do any act which a trustee is forbidden to do." Civ. Code, § 2322; Calmon v. Sarraille, 142 Cal. 638, 76 Pac. 486; Smith v. Elderton, 16 Cal. App. 424, 117 Pac. 563. "In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind." Civ. Code, § 2228. "A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust in any manner." Civ. Code, § 2229. "Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of a trust." Civ. Code, § 2234. "A trustee who uses or disposes of the trust property, contrary to section twenty-two hundred and twenty-nine, may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and, if he has disposed thereof, to replace it, with its fruits, or to account for its proceeds, with interest." Civ. Code, § 2237. Under the foregoing sections of the Civil Code, it seems clear that plaintiff was entitled to judgment for the profits made by defendant through the sale of plaintiff's property.

The judgment is for $1,573.37, defendant's share of the net proceeds of the North Dakota land, with interest thereon from the 20th day of October, 1917, the date of the sale of plaintiff's land. Since plaintiff is suing for the profits made by the defendant, and it cannot be said that defendant received such profits until May 1, 1918, when they came into the hands of his trustee, Herbert, interest should be computed from the latter date. It may be that the North Dakota land increased in value between October 20, 1917, and May 1, 1918, and it would not be equitable to give the plaintiff the benefit of such increase in value and also interest from the earlier date. If the judgment were based on the value of such land on the 20th day of October, 1917, rather than its selling price May 1, 1918, then interest might properly be computed from the former date. It is to be presumed that the judgment rendered in the suit of Yarbrough v. Herbert awarded the former interest from May 1, 1918, and, therefore, in allowing the plaintiff interest from the same date, the defendant will be required to pay plaintiff the exact amount which he has recovered from Herbert.

[4-6] Appellant contends that the court erred in finding that the plaintiff's cause of action was not barred by the statute of limitations, which the defendant set up as a separate defense. This contention must be sustained. The only testimony introduced to support such finding is that of plaintiff to the effect that he did not discover the fact that defendant had received an interest in the North Dakota land until the latter part of the year 1919. But defendant's fraud did not consist in the receipt of that property, but in the false and fraudulent representations which induced the plaintiff to agree to the terms of the sale of his land. There is no evidence as to when plaintiff discovered such fraud, except that he had no knowledge thereof prior to his conveyance to Herbert. "An action for relief on the ground of fraud" must be commenced within three years after "the discovery, by the aggrieved party, of the facts constituting the fraud." Code Civ. Proc. § 338. This action was commenced September 1, 1921, more than three years after the transaction induced by the fraud. The burden was on plaintiff to show that he first discovered the fraud within three years prior to the commencement of the action. Prewett v. Dyer, 107 Cal. 154, 40 Pac. 105. This he has failed to do. The complaint was defective. "Where an action for relief on the ground of fraud is brought after the expiration of the statutory period of three years, the complaint must show (1) when the fraud was discovered, which, of course, must be within the three-year period;

(2) why it was not discovered sooner; and (3) the circumstances under which it was discovered." Victor Oil Co. v. Drum, 184 Cal. 226, 241, 193 Pac. 243, 249. While it may be argued that the findings cure the defect in the complaint, such result cannot follow where there is no evidence to support the findings.

Some contention is made to the effect that a double judgment was rendered, and the judgment is somewhat ambiguous in this regard; but the error will doubtless not be repeated on the retrial of the case.

The judgment is reversed, with directions to the trial court to grant the plaintiff a reasonable time within which to amend his complaint.

We concur: BURNETT, J.; HART, J.

(61 Cal. App. 754)

LEVY v. LARSON. (Civ. 4405.)

(District Court of Appeal, First District, Division 1, California. April 24, 1923. Hearing Denied by Supreme Court June 21, 1923.)

1. Sales ⚷14—Seller in selling for future delivery held within rights in "shorting" market.

One entering into a contract to sell certain grain bags and twine, which were to be delivered on demand of the purchaser during the following season, *held* within his rights in "shorting" the market so that the contract was not invalidated because the goods sold were not in the seller's possession.

2. Compromise and settlement ⚷8(3)—False representations by seller that goods were ready for delivery, held not fraud defeating agreement.

Where one having contract for the purchase of certain grain bags and twine during a certain year after failure of his crop and representations by the seller that the goods were ready for delivery, entered into an agreement, whereby he gave his note for the difference between contract price and market price at the time of delivery, *held*, that, though the representations by the seller that he had the goods on hand were false, and no actual damages were sustained within the meaning of Civ. Code, § 331, such representations did not amount to a fraud which would defeat liability on the note given in compromise and settlement; the seller being entitled to the profits which he derived from the transaction.

3. Sales ⚷153—Tender by seller held not necessary in order to put buyer in default for nonacceptance.

Where, after the purchase of grain bags and twine to be delivered the following year, the buyer's crop for that year fails and he notifies the seller that he cannot accept delivery, it is not necessary, in order to put him in default for failing to accept such goods, that actual tender be made.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Louis L. Levy against E. Larson. Judgment for plaintiff, and defendant appeals. Affirmed.

Walter E. Drobisch, of San Francisco, for appellant.

Milton Marks, of San Francisco, for respondent.

TYLER, P. J. The complaint herein is based upon a promissory note in the sum of $3,066.43. The answer denies the execution of the note, except under circumstances which are alleged in a special defense, and which it is claimed constitute fraud and misrepresentation in the procurement of the instrument sued upon.

From the record it appears that on December 11, 1920, defendant contracted to purchase and plaintiff to sell certain grain bags and twine for a total sum of $9,030. Delivery was not to be made until June or July of the following year, the exact date of delivery to be at buyer's option. The bags and twine were to be used by defendant in the harvesting of his crop. Thereafter and during the month of May, 1921, and before the earliest date for delivery contemplated by the contract, defendant informed plaintiff that his crop had failed and that he would have no use for the bags and twine for that year, and requested that delivery be postponed until the following season of 1922. Plaintiff refused to accede to this request unless he was indemnified against a decline in the price of the articles contracted for. The defendant refused to enter into such an agreement, and thereafter and some time during the month of July, 1921, in lieu of accepting delivery he agreed to pay plaintiff the difference between the contract price and the then market price of the bags, the price having materially declined, this difference amounting to the sum for which the note in question was given.

As a defense to the action, the defendant in his answer alleges that at the time the note was executed plaintiff represented to him that he had on hand the bags and twine contracted for, and that failure on the part of the defendant to accept delivery would result in the loss to him of the amount of the note. It is then alleged that defendant, believing and relying upon said representations and statements, executed the instrument sued upon. Then follows an allegation that at no time did the plaintiff have on hand the bags and twine, and that he had simply "shorted" the market in anticipation that the price of the articles contracted for would drop prior to the time specified for delivery. It is the claim of the defendant that under these circumstances and at the time he executed the note a fraud was committed upon him, for the reason that the plaintiff had not acquired the bags and twine, and was therefore in no position to place him in default.

[1] No question is here raised that the contract in question is invalid or unenforceable by reason of the fact that the seller at the time of entering into the contract did not have in his possession the subject-matter of the contract. Plaintiff had "shorted" the market; but it is conceded, as indeed it must be, that he was well within his rights in so doing, as the bags and twine were to be used by the defendant in his business. Central Oil Co. v. Southern Refining Co., 154 Cal. 165, 97 Pac. 177; 35 Cyc. 46.

[2] It is insisted, however, that, as the plaintiff did not have the bags and twine on hand at the time the note was given in settlement of the transaction, he suffered no loss in actual money, and had, therefore, no remedy against the buyer, and that the statement by him that he had the goods on hand amounted to a deception and a fraud upon defendant in the execution of the note, such as ought to defeat a recovery. In support of this contention it is claimed that the remedy of plaintiff for the refusal of defendant to accept and pay for the property is clearly defined by section 3311 of the Civil Code, which provides for the measure of damages upon the breach of executory contracts, and that the theory embodied in that section contemplates and has as its very essence and foundation possession of the subject-matter of the contract by the vendor as a condition precedent to his right to indemnify himself for his loss by reason of the refusal of the vendee to take the property.

We see no merit in this contention. There is no question that the section invoked does contemplate possession by the vendor of personal property which has been the subject-matter of an executory contract of sale, as its very object and purpose is to establish a measure of damages in the event of a breach of such agreement, where title and possession of the goods are in the vendor. It by no means follows, however, that the provision was ever intended to exclude a recovery upon a breach of a contract in every case where the seller is not possessed of the property sold. Any property which, if in existence, might be the subject of a sale, may be the subject of an agreement of sale whether in existence or not. Civ. Code, § 1730. True, when delivery is demanded, it is essential for the seller to have possession of the articles contracted for in order to fulfill his obligation.

[3] The case comes here on the judgment roll alone. Defendant does not contend by his pleading that it was inherently impossible for plaintiff to have acquired the bags and twine. In fact the possibility of performance is not questioned, and ability by the seller to procure the articles is in a way acknowledged, for it is alleged by the defendant himself that there was a drop in the market price of the bags and twine contracted for. Had delivery been demanded it would have been the duty of plaintiff to procure the articles contracted for and tender them, but he was not bound to do so in order to put defendant in default when he was notified by defendant that his crop had failed and that he would have no need for the same. The law does not require idle acts. It is manifest from defendant's pleading that he did not desire a delivery; and his very act in entering into a settlement in lieu thereof evidences his intention in that regard. Under such circumstances plaintiff was justified in anticipating a breach of the contract, and was not required to possess himself of the articles contracted for. The rule upon the subject is expressed in 13 C. J. 662–663, where it is said that where the tenderee takes any position which would render a tender a vain and idle ceremony a tender is waived. See, also, 24 R. C. L. [Sales] § 384; Pierce v. Lukens, 144 Cal. 397, 77 Pac. 996; Howard v. Galbraith, 13 Cal. App. 373, 109 Pac. 889.

Appellant complains of the fact that plaintiff suffered no actual loss in money. This may be true, but he certainly was entitled to the profits which he derived from the transaction. The note was therefore supported by a sufficient consideration. It was given in settlement and compromise of defendant's obligation. Wetzel v. Cale, 175 Cal. 208, 165 Pac. 692.

From what we have said it follows that defendant's answer presents no defense to the action, and that the judgment rendered on the pleading should be, and it is hereby, affirmed.

We concur: RICHARDS, J.; ST. SURE, J.

61 Cal. App. 715

CORBIN v. HOWARD et al. (Civ. 4111.)

(District Court of Appeal, Second District, Division 1, California. April 19, 1923.)

1. Appeal and error 🔑1043(7)—Permitting withdrawal of insufficient affidavit for continuance not error entitling appellant to relief.

Where plaintiff moved for continuance because of absence of his attorney of record, and before ruling thereon the attorney, representing plaintiff, withdrew the affidavit, and the court thereafter held that he had no right to represent plaintiff at the hearing, in view of the insufficiency of the affidavit to entitle plaintiff to a continuance, permitting its withdrawal, if erroneous, was not such as would entitle plaintiff to relief on appeal.

2. Attorney and client 🔑75(1)—Appointment of attorney without notice to attorney of record where latter abandoned case.

In view of Code Civ. Proc. § 286, where an attorney of record had abandoned a case by failure to appear at trial, plaintiff could, without notice to the attorney of record, engage another.

3. Appeal and error 🔑966(1)—Continuance 🔑7—Ruling of motion for continuance rests in discretion of trial court and is not reviewable unless abused.

Rulings on a motion for continuance rest almost entirely in the trial court's discretion, and will not be disturbed without a clear showing that there has been an abuse of this discretion.

4. Continuance 🔑20(1)—Denial of not abuse of discretion.

There was no abuse of discretion in denying motion for continuance on account of absence of attorney of record, where there was no showing that counsel was otherwise engaged or had any good excuse for not being present.

5. Judgment 🔑17(4)—Proceeding to trial and judgment without service on unnecessary parties held proper.

In view of Code Civ. Proc. § 579, providing that in action against several defendants the court may render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper, in action to cancel a deed where certain defendants were dummies used to convey the property, and had no interest therein at the time the case was commenced, and were not necessary parties thereto, proceeding to trial and judgment without service on them was proper.

6. Deeds 🔑196(2) — Plaintiff held to have burden of proof as to fraud.

In action to cancel a deed for fraud practiced on grantor, the plaintiff had the burden of showing fraud.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Arthur S. Corbin against Emma E. Howard and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Kennicott & Williams, of Los Angeles, for appellant.

C. C. Mishler and John F. Keogh, both of Los Angeles (Julius V. Patrosso, of Los Angeles, of counsel), for respondents.

CURTIS, J. This action was instituted to obtain a decree canceling a deed given to defendant Emma E. Howard by Frank H. Corbin, of whose estate the plaintiff is the residuary legatee. The ground of cancellation insisted on was that the grantor, to the grantee's knowledge, was mentally incompetent to contract, and that the grantee fraudulently took advantage of the weak mind of the grantor. Frank H. Corbin, by deed executed the 28th day of July, 1916, conveyed to Emma E. Howard certain real property situated in the county of Tulare. Thereafter the said Howard conveyed said land to defendant Lafayette G. Daily, and this defendant, with his wife, the defendant Effie Daily, conveyed the property to defendant A. G. Steuber, who in turn conveyed it to his wife, defendant Laura Steuber. The Steubers borrowed $1,000 from defendant Hellman Commercial Trust & Savings Bank, and gave a trust deed, covering said property, to the bank as security for said loan. The action was commenced in March, 1920. Summons was served upon all the defendants except the two Dailys, who it appears resided out of the state. Defendant Howard made default, and the defendants A. C. and Laura Steuber, and the Hellman Commercial Trust & Savings Bank answered, denying in one defense that any fraud had been practiced, and in another that they had any notice or knowledge of any fraud practiced upon the grantor, the said Frank H. Corbin. The answering defendants on September 20, 1920, had the case set down for trial for December 22, 1920, and on September 28, 1920, duly served notice of trial on plaintiff's counsel. On the day of trial plaintiff appeared, but without his counsel of record. With the assistance, however, of W. W. Middlecoff, Esq., an attorney other than his attorney of record, he made a motion for continuance on the ground of the absence of his attorney of record, which motion was denied by the court. The trial then proceeded and resulted in a judgment in favor of the defendants who had answered in the case, and as to the defendants who had not answered the trial was continued.

[1] Plaintiff appeals from the judgment and assigns as grounds for reversal the refusal of the court to grant his motion for a continuance. During the discussion before the court relative to plaintiff's motion for a continuance, an affidavit in support thereof

had been presented by the plaintiff; afterwards, and before the court had ruled upon the motion for a continuance, the attorney who was then representing plaintiff withdrew this affidavit. The court thereafter held that this attorney had no right to represent plaintiff on the hearing and he withdrew from the case. Plaintiff now contends that as this attorney was acting for him without any right, that he had no authority to withdraw the affidavit and that the court erred in permitting him to do so. The affidavit is set forth in full in the bill of exceptions on file herein. It is clear from a reading of it that it was wholly insufficient to entitle plaintiff to a continuance of the trial of the case. It fails entirely to account for the absence of plaintiff's attorney. It sets forth that on account of sickness of his attorney of record, and on account of his occupation with other business, that he did not prepare the case for trial, but that he had stated to plaintiff that he would have a motion for continuance made in proper time. There was nothing in the affidavit to show that the attorney was then unable to be present in court on account of sickness, or that he was then occupied with other business. The affidavit then proceeds to set forth the names of certain witnesses, and a very imperfect and inadequate statement of the facts which he expected to prove by them, but wholly failed to account for the absence of said witnesses at the trial or for his failure to take their depositions. The affidavit for a continuance was insufficient for any purpose, and being so, the action of the court in permitting its withdrawal, if erroneous at all, was not such error as would entitle plaintiff to any relief on this appeal.

[2] We may further observe, however, that Mr. Middlecoff was authorized to represent the plaintiff, and to stipulate, as he did, that there be a judgment that the plaintiff take nothing as against respondents. The plaintiff's attorney had abandoned the case by failing to appear at the trial. His absence being without excuse, he had ceased to act as such attorney. There remained no reason why the plaintiff could not, without notice to his attorney of record, engage Mr. Middlecoff to represent him at the trial and in all further proceedings of the case. Code Civ. Proc., § 286.

[3] In connection with the objection of the plaintiff that the court erred in denying his motion for a continuance, we might add that the law is well established that the granting or denial of a motion for a continuance rests almost entirely in the discretion of the trial court, and its ruling will not be disturbed without a clear showing that there had been an abuse of this discretion. This question was fully considered in a recent decision of this court, wherein an extended reference was made to the authorities upon this point and the conclusion reached in line with the rule above stated. Flynn v. Fink (Cal. App.) 213 Pac. 716. It will be observed that the case cited was one in which the continuance was asked on account of the absence of counsel who were then engaged in the trial of a case in another court. There was no denial in that case that counsel were so engaged, but the lower court denied the motion for a continuance and its ruling was upheld.

[4] In the case before us, as we have before noted, there was no showing at all that counsel was otherwise engaged or had any good excuse for not being present in court. We are satisfied upon this state of facts that the lower court did its duty in the premises and that no abuse of discretion has been shown.

[5] Plaintiff further contends that the court proceeded to the trial of the action without all of the defendants having been served with summons, and that the case was not then at issue. The defendants not served with summons were Lafayette G. Daily and Effie Daily, his wife. The only mention of these parties in the complaint is that the defendant Howard conveyed to Lafayette G. Daily the real property described in the deed sought to be set aside, and that defendants Lafayette G. Daily and Effie Daily in turn conveyed the property to the defendant Steuber. It is also alleged in the complaint that Lafayette G. Daily had no real interest in the property, but was a mere dummy for the defendant Howard to use in the transaction of her business. The prayer of the complaint is that the conveyances mentioned in the complaint be canceled, that the property be declared to be free of any incumbrance, and that plaintiff's title thereto be quieted. It is evident from these facts that the complaint shows that the Dailys, if they ever had any interest in the property, had none at the time the action was commenced, and that they were not necessary parties to the action, even if they were proper parties. In our opinion they were not even proper parties. Campodonico v. Grossini, 66 Cal. 358, 5 Pac. 609. This being the case, the rights of plaintiff could not be prejudiced by proceeding to trial without the service of process upon the Dailys. As before stated, however, the court expressly continued the case as to the Dailys and Mrs. Howard and proceeded to trial only as to the defendants who had answered, and the judgment rendered is only against these last-named defendants. This procedure was in our opinion justified by the provisions of section 579 of the Code of Civil Procedure, reading as follows:

> "In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper."

[6] It is further contended by the plaintiff that there was no evidence in support of

the court's findings that no fraud was practiced on Frank H. Corbin, nor that the deed was obtained by Howard at a time when Corbin was of a weak mind. This is a negative finding on an issue based upon the affirmative allegation of the plaintiff and the defendants' denial thereof. The burden of proof was therefore with the plaintiff to sustain his allegation. Unless the plaintiff produced evidence sufficient to convince the court of the truth of this allegation, it was the duty of the court to find against him, even if the defendants produced no evidence whatever. Upon this issue there was evidence produced by each party. It was extremely limited in amount and indefinite in character. Taking the testimony of plaintiff alone, we seriously question whether it would have supported a contrary finding by the court, and taking the whole of the testimony upon this issue we are satisfied that the finding of the lower court was correct.

There are other findings of the court which the plaintiff maintains were unsupported by the evidence; but the court having found that the original deed was not tainted with fraud, and that the mind of the grantor therein was sound at the date of its execution, the other findings in the case objected to by the plaintiff became immaterial. These findings relate to the amount of the consideration paid for the land, the value of the land, and the knowledge on the part of the defendants as to the condition of mind of the said Frank H. Corbin at the time he executed said deed. The original transaction having been sustained by the court, all other matters and all subsequent acts of the parties became of no consequence. We cannot say, however, that there was no evidence to sustain these last-mentioned findings. On the other hand, we think the record discloses evidence in support of each of them sufficient to warrant the court in the conclusions reached by it.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

---

61 Cal. App. 777

MARBLEHEAD LAND CO. et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 4143.)

(District Court of Appeal, Second District, Division 2, California. April 25, 1923.)

1. Eminent domain 🔑76—Deposit of single sum of money as security for each separate owner essential.

In condemnation proceedings under Const. art. 1, § 14, the deposit of a single sum of money as security for each separate owner of property sought to be condemned is a condition precedent to the authority of the court to make any order for the delivery of immediate possession.

2. Eminent domain 🔑76—Deposit for damages for taking highway by state must secure each owner of separate interest in one parcel of land.

In view of Code Civ. Proc. § 1248, providing that a decree in condemnation suits must ascertain and assess the value of the property sought to be condemned, and of each and every separate estate or interest therein, and if it consists of different parcels the value of each parcel and each estate or interest therein shall be separately assessed, the security deposited under Const. art. 1, § 14, must be so given, where an order for possession and use is made, as to secure to each owner of a separate interest in one parcel of land a payment of the amount directed to be paid to him under the final decree of condemnation.

Application by the Marblehead Land Company and others against the Superior Court of California in and for the County of Los Angeles, and Frank R. Willis as Judge thereof, for writ of certiorari to review orders of the Superior Court in condemnation proceedings, and motion to amend writ of review. Orders annulled, and motion to amend writ denied.

For former opinion, see 213 Pac. 718.

Grant Jackson and Newby & Palmer, all of Los Angeles, for petitioners.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., C. C. Carleton, of Sacramento, and Lorrin Andrews, of Los Angeles, for respondents.

WORKS, J. The present Constitution of California has always contained a provision to the effect that—

> "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court, for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law." Const. art. 1, § 14.

In fact, this language was the entire text of the section as originally adopted. In 1911 the section was amended in a respect which is not of moment in the present litigation. In 1918 a second amendment was adopted. This amendment opens with the original text as above set forth, the time-honored language being followed immediately by these provisions:

"Provided, that in an action in eminent domain brought by the state, or a county, or a municipal corporation, or a drainage, irriga-

> tion, levee, or reclamation district, the aforesaid state or political subdivision thereof or district may take immediate possession and use of any right of way required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposits as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings."

The section now stands as it was amended in 1918.

On December 13, 1922, the people of the state of California, by the department of public works of the state of California, as plaintiff, filed complaint in eminent domain with respondent superior court. All the petitioners before us for the writ of review were defendants in that action, as were also county of Los Angeles, Reider-Haag Company, a corporation, and eight fictitiously named persons. By the complaint the plaintiff in the action sought to condemn a right of way 19 miles in length for a state highway across that extensive tract of land familiarly known as the Rancho Malibu. After the filing of the complaint, and upon motion to that end, respondent superior court made its two certain orders in the action, each dated December 13, 1922. The first of these, after reciting the fact that the complaint had been filed, and various other matters, including a description of the right of way sought to be condemned, ordered "that the plaintiff * * * deposit in" a certain named bank "the sum of thirty-two thousand one hundred eighty dollars, in a savings account on interest, which sum is to be placed in a special deposit to be paid out only upon the order of the court herein, and to be held as security for payment to the owner or owners of the property sought to be taken as just compensation for the taking of the parcel of land, and any damage incident thereto, including damages sustained by reason of any adjudication that there is no necessity for taking the property as soon as the same can be ascertained according to law," and also "that upon satisfying the court that such has been made in accordance with this order the said plaintiff shall be given an order by the court authorizing it to take immediate possession and use of the right of way hereinabove referred to and described." The second order, after reciting that it satisfactorily appeared to the court that the deposit required by the first order had been made, was to the effect:

> "That the said plaintiff, the state of California, may take immediate possession and use of the right of way described in the complaint and in said order, and which said right of way is described as follows:" (Here followed a description of the right of way.)

It is these two orders which are the subject of the application for the writ of review, and, as we have already remarked, the writ issued.

Respondents made due return to the writ, and the proceeding is now before us upon the question as to what disposition shall be made of the orders sought to be reviewed.

The return shows that the complaint in the condemnation action contained the following allegations concerning the defendants therein:

> "That each, every and all of the said defendants, namely, Marblehead Land Company, a corporation, county of Los Angeles, Hueneme, Malibu & Port Los Angeles Railway, a corporation, Hueneme, Malibu & Southern Railway Company, a corporation, Reider-Haag Company, a corporation, John Doe, Richard Roe, Mary Doe, Jane Roe, John Styles, Richard Styles, Mary Styles and Jane Styles, have or claim to have some right, title, interest, estate or lien in, to or upon the land hereby sought to be condemned and taken, or some part thereof, but the nature and extent of their respective rights, interests, estates or liens are to plaintiff unknown. That the piece or parcel aforesaid sought hereby to be condemned and taken for said public use is a part of a single tract of land."

These are the only allegations of the complaint as to the respective interests of the various defendants in the land sought to be condemned. The prayer of the complaint requests, in part, in entire consonance with the law and practice in condemnation cases:

> "That the respective and separate rights, interests and estates of said defendants be determined by this court and the value of each and every separate estate or interest in and to the property sought to be condemned [be (?)] ascertained and assessed."

[1] One of the contentions by means of which petitioners seek to annul the orders here in question is that respondent court was without jurisdiction to make them upon the giving by the plaintiffs in the action of only a lump sum as the security contemplated by the language of the Constitution. Petitioners contend that separate amounts should have been deposited to secure each of the defendants, and cite Weiler v. Superior Court (Cal. Sup.) 207 Pac. 247, in support of their view. The proceeding in which the opinion there reported was rendered was, like the present one, a proceeding for a writ of review. The order there sought to be annulled

was in all respects like the order made by respondent court in the present instance and which we have referred to as the first order made by that tribunal, except that the order in the case cited was based upon a complaint against several defendants, each of whom was the owner of a distinct parcel of land. The Supreme Court, in disposing of the question presented to it, advanced a variety of arguments which seem to us to be equally applicable to the orders here objected to, and concluded:

> "In view of these circumstances it is our opinion that the deposit of a single sum of money as security for each separate owner of property sought to be condemned is a condition precedent to the authority and power of the court to make any order for the delivery of immediate possession, and that an order made without such separate security is in excess of the jurisdiction of the court, and void."

[2] In view of the rule announced in Weiler v. Superior Court, the only question to be considered by us is whether the defendants in the action in which the orders before us were made occupy a position in any wise different from owners of separate parcels of land who may be made defendants in a condemnation suit. It seems plain to us that they do not. We can see no difference, so far as the right to separate security under the Constitution is concerned, between owners of separate parcels of land and owners of separate interests in the same parcel of land. The owners of separate interests of all kinds, whether they fall within the first or the second classification stated in the last preceding sentence, can be divested of such interests in a condemnation suit only as separate defendants. The interests of defendants in such an action are as separate and distinct from each other in the one class as in the other. Section 1248, Code of Civil Procedure, provides (italics ours) that—

> The decree in every condemnation suit must "ascertain and assess * * * the value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of *each and every separate estate or interest therein;* if it consists of different parcels, the value of each parcel and *each estate or interest* therein shall be separately assessed. * * *"

This being the language of the statute as to the requisites of a final decree in condemnation—and it is founded in natural sense and justice and calculated to secure the separate rights of individuals—the people surely intended, in adopting the amendment of 1918 to the Constitution, that the security to be given thereunder, where an order for possession and use is made, must be so given as to secure to each owner of a separate interest in one parcel of land a payment of the amount directed to be paid to him under the final decree of condemnation. We are convinced that the present situation is ruled by Weiler v. Superior Court.

Petitioners advance various other points against the validity of the orders made by respondent court, but we find it unnecessary to consider them.

The motion to amend the writ of review falls to the ground because of the views we entertain as to the point above discussed.

Each of the orders of respondent court is annulled. The motion to amend the writ of review is denied.

We concur: FINLAYSON, P. J.; CRAIG, J.

191 Cal. 261

STEPHENS et al. v. INDUSTRIAL ACC. COMMISSION et al. (S. F. 10549.)

(Supreme Court of California. June 7, 1923.)

Master and servant 🔑367—One hauling sand held an "independent contractor" and not "employee" within Compensation Act.

Where a bridge contractor arranged with the owner of wagons and horses to haul sand from a designated place to the bridge, to be paid for on the basis of the cubic yard for the amount hauled, and gave no directions other than to show the place from which it was to be taken and where delivered, and exercised no supervision over the wagon owner's movements, such owner was an independent contractor, and not an employee, within the Workmen's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employee; Independent Contractor.]

In Bank.

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act (St. 1917, p. 831) by H. Westlake, compensation claimant, opposed by William Stephens, employer, and the Employers' Liability Assurance Corporation, Limited, of London, England, insurer. The Industrial Accident Commission made an award, and employer and insurer bring certiorari. Award annulled.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioners.

A. E. Graupner and Warren H. Pillsbury, both of San Francisco, for respondents.

WASTE, J. This is a proceeding to review the action of the Industrial Accident Commission in awarding compensation to H. Westlake, the applicant below, who was injured while hauling sand to be used by Stephens, the insured, in the construction of a bridge.

The issue involved is whether or not Westlake was an employee or an independent contractor.

The undisputed facts in the case appear to be that Westlake, the applicant for compensation, had for many years been the owner of wagons of different capacities, and a number of horses. Stephens, one of the petitioners, was a bridge contractor, and had undertaken to construct a bridge at French Gulch. He arranged with Westlake for the latter to haul the required amount of sand from a designated place to the bridge, to be paid for upon the basis of $1.50 per cubic yard for the amount hauled. Westlake testified before the Commission that Stephens had given him "the whole job" of hauling sand, but later told him he wanted another party to haul part of it. Westlake pursued his own course in hauling the sand. Stephens gave him no directions other than to show him the place from which it was to be taken and where delivered. Westlake was free to come and go as he pleased, using as many or as few wagons as he chose. No supervision, direction, or control of any character was exercised over his movements. He was left to do the work in his own way, by his own methods, and with his own teams. Under these facts, concerning which there is no dispute, Westlake was unquestionably an independent contractor. Frieden v. I. A. C. (Cal. Sup.) 210 Pac. 420; Pryor v. I. A. C., 186 Cal. 169, 198 Pac. 1045; Fidelity & Deposit Co. of Md. v. Brush, 176 Cal. 448, 168 Pac. 890; Donlon v. I. A. C., 173 Cal. 250, 159 Pac. 715.

It follows that the award must be annulled, and it is so ordered.

We concur: WILBUR, C. J.; LAWLOR, J.; LENNON, J.; KERRIGAN, J.; SEAWELL, J.; MYERS, J.

191 Cal. 209

CLEMENT v. DUNCAN et al. (Sac. 3214.)

(Supreme Court of California. May 28, 1923.)

1. Appeal and error 🔑870(3)—Interlocutory decree, finding partnership and ordering accounting, is not appealable, so as to preclude review on appeal from final judgment.

In an action for dissolution of a partnership and an accounting, where the defendant denied the partnership, an interlocutory decree, finding the partnership and ordering an accounting, is not one from which an appeal is expressly authorized by Code Civ. Proc. § 963, and does not involve a complete and definite adjudication of all the vital issues of fact, so as to be appealable as equivalent to the final judgment, and therefore that decree was reviewable on appeal from the final judgment after the accounting, though defendant had taken an appeal from the interlocutory decree, which was dismissed on his own motion.

2. Corporations 🔑30(6)—Partner held entitled, after transfer of assets to corporation, only to proportion of stock issued for partnership assets.

Where the assets of a partnership were transferred with the consent of both partners to a corporation in exchange for the corporate stock, all of which was issued to the partner in whose name the title to the partnership assets had stood, the other partner is not entitled to a personal judgment against the partner for the amount of his interest in the assets, but is entitled only to receive the proportion of the stock issued for the assets corresponding to his interest in the assets.

3. Corporations 🔑30(6)—Mode of computing partner's interest in stock issued for corporation's assets stated.

Where the trial court found the amount of partnership profits earned and the amounts dis-

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tributed to each partner, as well as the amount of capital contributed by one partner and the value of the good will of the partnership business, the interests of each partner in the stock of a corporation issued for transfer of the corporation's assets to the corporation would be the amount which the sum of his share of profits not withdrawn by him, his portion of the good will value, and his unreturned contributions to the partnership capital bore to the total value of the partnership assets.

4. Appeal and error 🔑1177(6)—Final judgment cannot be entered on findings based on wrong theory.

A judgment cannot be entered on appeal on the facts stated in the court's findings where it is evident from the whole record that the trial court erroneously considered that the only question involved was the extent of the undivided profits of the partnership.

5. Partnership 🔑75—Partner held not entitled to interest on advancements in absence of express agreement.

Where one partner advances funds and the other his services, skill, and experience, under an agreement that each shall receive one-half of the profits, the party advancing the money is not entitled to interest on it, in the absence of any agreement for interest.

6. Partnership 🔑75—Partner withdrawing funds held chargeable with interest on overdraft.

Where a partner draws from the partnership funds to be applied to his own use and benefit in excess of what he is entitled to withdraw under the agreement of partnership, interest should be charged on such overdraft.

7. Partnership 🔑300—Good will held properly considered in determining assets of partnership in dissolution proceedings.

The good will of a business being property, under Civ. Code, §§ 992, 993, a transfer of a partnership business to a corporation necessarily involves a transfer of the good will, and it was proper in dissolution proceedings to consider such good will as an asset of the partnership.

In Bank.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by B. L. Clement against W. H. Duncan and another. Judgment for plaintiff, and the named defendant appeals. Reversed, with instructions.

Henry B. Neville, of Downieville, H. B. Wolfe, of Quincy, and C. E. McLaughlin and C. P. McLaughlin, both of Sacramento, for appellant.

L. H. Hughes, of Quincy, for respondent.

WILBUR, C. J. This case was transferred to the District Court of Appeal of the Third District, and after the decision by that court, both sides applied for a transfer to this court. In the main we approve of the opinion written by Mr. Justice Hart in that court, and we adopt the statement of facts prepared by him and the legal conclusions reached by him in that portion of the opinion so prepared hereinafter quoted, as follows:

"This action is for a dissolution of a partnership alleged by the complaint to have been formed and existed between the plaintiff and defendant Duncan, for an accounting of the profits accruing to the partnership during its existence, for the appointment of a receiver to take charge of and administer the partnership affairs pendente lite, and for sale of the property of the partnership and a division of the surplus between said copartners after the debts and liabilities of the partnership had been paid and satisfied.

"According to the complaint, the plaintiff and defendant Duncan, in the month of October, 1913, entered into a partnership under the terms of a parol agreement for the purpose of conducting the business of repairing, buying, and selling automobiles and auto trucks, automobile accessories, oils, gasoline, and supplies, in the counties of Plumas and Sierra, in the former county at the town of Quincy, and in the latter at Loyalton. Under said agreement, it is alleged they so conducted said business from the time of the establishment of the partnership relation between them under the firm name and style of the 'Ford Garage'; that said partnership, in conducting said business, acquired real and personal property, together with certain leasehold interests, said business proving profitable during all of the time of the existence of said partnership, 'having been started with no capital, and having earned, over and above all expenses, profits to such an extent that its assets amounted to $50,000 on the 1st day of January, 1918.' It is further alleged that defendant Duncan has had, at all times during the continuance of said business, custody and control of all books and accounts relating to the business of the copartnership, and likewise has kept the same and made all entries therein of the transactions of said business; that all said books, accounts, and papers relating to said business, consisting of deeds, contracts, leases, note and bills 'are now in the possession of said W. H. Duncan.' It is alleged that as a matter of convenience, all conveyances and leases of real property belonging to the copartnership were taken in the name of said Duncan, and that said conveyances and leases were made in behalf of and for the benefit of the copartnership.

"In the month of December, 1917, so proceeds the complaint, Duncan proposed to plaintiff that, for the more convenient and economical management and conduct of the business of the partnership, the said business be incorporated, each of said partners to be entitled to receive stock in such corporation according as his interest in said partnership might appear upon and after an account of said business; that thereafter a corporation was formed under the name of 'Sierra Auto Supply Company,' with a capital stock of $50,000, divided into 500 shares, of the par value of $100 each; that the directors and stockholders thereof named in the articles of incorporation are W. H. Duncan, B. L. Clement, Edith N. Duncan, N. H. Squire, and J. F. Spooner. Said Clement is the plaintiff herein, said W. H. Duncan is the defendant, said Edith N. Duncan is the wife of the defendant of that name, and Squire and Spooner were employees of the plaintiff and the defendant while they were engaged in conducting said business as copartners. It is averred that the defendant corporation, acting under the 'direction and dictation' of defendant Duncan, issued to said Duncan 496 shares of its corporate stock, and to Edith N. Duncan, Squire, and Spooner, 1 share each; that plaintiff has not had issued to him any share or shares or any evidence of his interest in said corporation; that he has never attended a stockholders' or a directors' meeting of such corporation, nor has he ever been notified of any such meeting to be held, or any knowledge of one ever having been held, and that he has never in any manner participated in the management or control of said corporation; that Edith N. Duncan and the said Squire and Spooner have never paid to said corporation the par value of the stock thereof issued to them, or other sum of money or anything of value for said stock; and that said persons are mere 'figureheads and dummy directors' of the said corporation.

"It is alleged that on the 1st day of January, 1918, said defendant Duncan 'fraudulently and unlawfully, and without the knowledge or consent of plaintiff, sold, transferred, and delivered to the defendant Sierra Auto Supply Company all of the property belonging to the copartnership, * * * consisting of real estate, etc., * * * and good will of the business and the Sierra Auto Supply Company now fraudulently and unlawfully pretends to own all of said property.'

"On the 15th day of May, 1918, so the complaint states, the defendants expelled plaintiff from any participation in the affairs of said copartnership, and have ever since excluded him from such participation, and thus have deprived and do still deprive plaintiff of the use and the possession of the property belonging to said copartnership. It is alleged that the defendant corporation is not and has never been the owner of the property of the partnership; that plaintiff has never transferred or conveyed his interest in said property to said or any corporation; that no accounting has ever been had of the affairs of the partnership between plaintiff and the defendant Duncan, or of the respective amounts drawn from the partnership funds by the partners. It is finally charged, upon information and belief, that defendant Duncan, who is president of the board of directors of the defendant corporation, aided by the alleged 'dummy directors,' who, it is alleged, are under the control and domination of said Duncan, intend and design to defraud the plaintiff of his interest in the property and business of said partnership, and that said property and business, being in the full control of said Duncan, 'is in danger of being lost, removed, or transferred to other parties, so as to render any judgment rendered herein ineffectual'; hence, the complaint states, to preserve the said property and business and the interest therein of plaintiff, and to prevent its removal, loss, or illegal sale, it is necessary that a receiver be appointed to take charge of said property and to hold the same pending the determination of this action.

"The prayer is as indicated at the beginning of this opinion.

"The answer denies that a copartnership ever at any time existed between plaintiff and defendant Duncan; alleges that the business and the property transferred to the corporation by Duncan and the business conducted under the name of the Ford Garage and the property acquired and used in connection therewith belonged entirely to said Duncan and that he furnished all the capital for the installation and carrying on of said business; alleges that plaintiff was never at any time more than a mere employee of said Duncan; denies that the latter ever at any time made any proposal to the plaintiff that a corporation be formed for the purpose of taking over the business and property of the alleged partnership; admits that Duncan always kept the books and accounts of the Ford Garage, that all leases, conveyances, notes, etc., were made in his name, not in behalf of or for the benefit of the alleged copartnership, but in behalf of himself and for his own benefit; admits that the corporation referred to was formed, and that the business and property of the Ford Garage were transferred to said corporation, and that such transfer was made with the full knowledge of the plaintiff; alleges that to plaintiff one share of the stock of the corporation was issued, but admits that said share, while accredited to plaintiff on the books of the corporation, was never delivered to him; admits that plaintiff has never attended a meeting of the stockholders or directors of said corporation, but alleges that he could have attended such meetings, had he desired to do so, at the times they were held and participated therein; alleges that plaintiff has at all times mentioned in the complaint been an employee of the defendant Duncan and of said corporation, and has received and been paid a monthly salary for his services; that on the 15th day of May, 1918, 'such employment was terminated and said Clement released therefrom.'

"The answer, proceeding further, sets forth the details of an alleged contract of employment whereby plaintiff was engaged by said corporation as a salesman after the transfer of the property and business of the Ford Garage to the corporation; and alleges that, from the date of the organization of said corporation to the 15th day of May, 1918, the plaintiff's connection with and sole interest in said corporation was only that of a salesman.

"The court, on hearing evidence, made findings upon which it rendered and caused to be entered an interlocutory decree, whereby it adjudged, in harmony with its findings, that a partnership existed between the plaintiff and Duncan since the month of October, 1918, and that the same 'has never been dissolved; that the plaintiff is entitled to an account of all partnership funds and transactions relating thereto and to a dissolution of said partnership; that an accounting is necessary between the plaintiff and the defendant W. H. Duncan, covering all the property and business between them from the time of the commencement of said copartnership.' By said decree Duncan was required to render to the court, within 15 days after the date of the decree, a full and true account of the business of said partnership, and thereupon, and after a settlement of said account, 'the court will enter its final judgment herein.'

"An appeal was taken by defendant Duncan from the interlocutory decree, but was subsequently dismissed on his motion.

"The defendant Duncan reported to the court that 'it is impossible for the said defendant to render and file herein an accounting that will conform to and comply with the terms of the said interlocutory decree,' and thereupon, and at the request of the defendant, the court appointed F. C. Radcliffe, an expert accountant, to examine into and 'report on all the affairs of the said copartnership,' and to return the same to the court. Within due time the said accountant made his report to the court, and said report and all objections or exceptions thereto were heard and determined. Upon this report and the taking of further evidence ultimate findings were made, and these, together with the findings previously made, constitute the predicate for the final judgment which was rendered and entered in favor of the plaintiff, and from which the present appeal is prosecuted by the defendant Duncan.

[1] "The respondent first makes the point that the interlocutory decree involved a full and final determination of all the issues raised by the pleadings, and that it was therefore appealable; that the said defendant, having dismissed his appeal from said judgment or decree, cannot now have the same reviewed on an appeal from the final judgment. The proposition is obviously without merit. There are certain interlocutory decrees from which an appeal will lie by virtue of express authorization therefor by section 963 of the Code of Civil Procedure. But the case here does not come within the terms of said section. There may, however, be cases not coming within the purview of said section, in which an interlocutory decree may involve a full, complete, and definite adjudication of all the material or vital issues of fact arising in the case. In such a case there is no sound reason why such a decree should not be appealable, and, indeed, we would say that it is, since, to all intents and purposes, it would amount to a final judgment. See Clark v. Dunnam, 46 Cal. 204. But this is not such a case. The interlocutory decree 'was based upon findings which determined none of the questions at issue except the fact of partnership and the existence of mutual and undetermined claims and demands, and upon a conclusion of law which declared no more than that an accounting was necessary. The decree, declared by the court itself to be an "interlocutory decree," appointed a referee to state an account, the settlement of which was essential to the fixing of the relative rights of the parties in the partnership property. Under all the authorities, such a decree is not final.' Doudell v. Shoo, 159 Cal. 448, 453, 114 Pac. 579, 581, and cases therein cited. See, also, Gray v. Palmer, 9 Cal. 636, and Gianelli v. Brisco, 40 Cal. App. 532, 181 Pac. 105.

"Upon the merits, the appellant first contends that the remedy of the plaintiff, if any at all he had, was an action against the corporation to compel it to issue to him so much of its stock as his interest in the partnership entitled him to. These general contentions are also pressed: That certain findings are not supported by the evidence; that certain vital findings are inconsistent with each other; that the findings do not support the judgment, and a failure to find on a material issue.

"The court found that the partnership between the plaintiff and the defendant Duncan was formed and existed as alleged in the complaint, and continued to exist until on or about the 1st day of January, 1918; that the plaintiff and said defendant conducted said business under the firm name and style of Ford Garage, and maintained places of business in the counties of Plumas and Sierra, as stated in the complaint; that certain real and personal property, together with certain leasehold interests for garage and shop purposes, were acquired by said copartnership, and that the business was conducted under the joint management and control of the plaintiff and defendant Duncan; that the said Duncan, at all times during the continuance of the business of the partnership, had the custody of all books and accounts relating to the business of said partnership and that said books and accounts were at all times kept and entries made therein by the said Duncan or under his direction; that the conveyances and leases of real property belonging to said partnership were taken for purposes of convenience in the name of said Duncan, and were made in behalf of and for the benefit of the partnership; that the defendant proposed to plaintiff that the said partnership business which they were then conducting and had theretofore conducted as partners be incorporated under the laws of the State of California; that said corporation was formed and organized under the laws of said state under the name of Sierra Auto Supply Company, and that on or about the 1st day of January, 1918, said Duncan, with the knowledge and consent of the plaintiff, transferred and delivered to the said corporation all the property belonging to said partnership; that a full, complete, and true account has been taken of all the business affairs and transactions of said partnership, and that, all the property belonging to said partnership during its existence having been sold and conveyed to the said corporation prior to the commencement of this action, there is not now any property of any kind or nature belonging to, or standing in the name of, the said partnership, and that said partnership has now no assets or liabilities; that the plaintiff, as a copartner in said business, was and is now entitled to one-half of all the profits earned and acquired by said partnership during its existence; that said partnership business was terminated upon the sale and transfer of its assets to said Sierra Auto Supply Company on January 1, 1918; 'that the defendant, W. H. Duncan, at various times, contributed capital in the sum of $24,000 for the operation of the business conducted by said copartnership, but that there was no agreement between said copartners for the payment of interest thereon.'

"It is alleged that the 'good will' of the business conducted by said plaintiff and defendant Duncan was at the time of the transfer of said business to the said corporation of the value of $12,500, and that said good will was an asset of said copartnership business at said time, and that the plaintiff was at said time the owner of one-half of the value of said good will. The court found that the corporation was capitalized for $50,000, divided into 500 shares, of the par value of $100 per share, and that subsequent to its organization the said corporation issued to the defendant Duncan 496 shares of its capital stock, at the par value of $100 per share. It was also found that during the existence of said partnership it was understood and agreed that the plaintiff should have and use from the funds thereof such sums as would be necessary for living and traveling expenses, and that plaintiff did, pursuant to said agreement, withdraw from said copartnership certain funds for his personal use, but that during the existence of said copartnership he withdrew from the funds thereof for his personal use in excess of said allowance, and not expended by him for the benefit of said copartnership, the sum of $9,293.41; that the defendant Duncan, during the existence of said partnership, withdrew from the funds of said partnership for his personal use, and not by him expended for the benefit of said copartnership the sum of $1,198.41. It was found that during the time said copartnership was in existence the partnership earned and acquired in profits, over and above all expenses properly chargeable to said firm, the sum of $33,109.74; that plaintiff was and is now entitled to one-half of said net profits, to wit, the sum of $16,554.87, of which he has received the sum of $9,293.41, leaving the balance now due him of $7,261.46, which, including one-half of the value of good will, aggregates the sum of $13,511.46; that by reason of the sale of the assets of said copartnership by the defendant W. H. Duncan to the Sierra Auto Supply Company the said defendant has received for and on account of the interest of plaintiff in said copartnership the sum of $13,511.46.

"As conclusions of law the court declared the dissolution of said copartnership and found that the accounting taken before the court is a full and complete accounting of all the partnership affairs existing between plaintiff and defendant, and that all interests of said copartners therein have been fully determined and settled; that there are no liabilities outstanding against said copartnership, and that said copartnership has no assets or property, and that said partnership affairs have been fully wound up and closed; that the plaintiff is entitled to judgment against the defendant Duncan in the sum of $13,511.46; that the plaintiff take nothing against the defendant Sierra Auto Supply Company by reason of this action. The judgment awards the plaintiff said amount, together with interest at the rate of 7 per cent. per annum from and after the 1st day of January, 1918, to the date of the entry of the judgment on the 30th day of September, 1920, amounting to the sum of $2,600.98, making the total amount $16,112.44."

In addition to the facts stated in the foregoing quotation from the opinion of the District Court of Appeal, the following facts may be stated:

It was found in the interlocutory decree that the partners had agreed to divide the profits of the business equally between them; that the defendant W. H. Duncan had advanced some of the capital, and that during the month of August, 1917, it had been agreed between the plaintiff and the defendant W. H. Duncan that the business conducted by them should be incorporated; that such corporation was formed under the name of the Sierra Auto Supply Company; that all of the property belonging to the copartnership was by mutual consent transferred to such corporation; and that the corporation has since the 1st of January, 1918, been conducting said business. It was also found by the court that the defendant the Sierra Auto Supply Company is the owner of all the property sold, transferred, and conveyed to it by the defendant W. H. Duncan. The interlocutory judgment recited that the partnership had never been dissolved and required the defendant W. H. Duncan to render an account.

These findings made at the time of the entry of the interlocutory decree were specially referred to and adopted in the final findings of the court. It was also found "that the plaintiff, B. L. Clement, as such copartner, was and is now entitled to one-half of all the profits earned and acquired by the said copartnership during its existence." It was found also that the copartnership business was terminated by the sale and transfer of its assets to the Sierra Auto Supply Company, a corporation, on January 1, 1918.

[2] The fundamental error of the trial court was in rendering a personal money judgment in favor of B. L. Clement and against W. H. Duncan. It appears from the allegations of the complaint, which were admitted by the answer, and also by the findings of the court, that the assets of the copartnership were sold by the copartnership to the defendant corporation, and that the entire stock of that corporation was issued in exchange for such property. It follows from this that whatever rights and interest the respective partners had in the partnership property was by mutual consent converted into the stock of that corporation and that the decree of the court should either have authorized a division of that stock in accordance with the respective interests of the copartners in the copartnership property, or should have ordered the stock sold and the proceeds distributed in that proportion.

[3] There was no express finding by the trial court as to the value of the property transferred by the copartnership to the defendant corporation. The court found that the profits of the copartnership were $33,109.74; that $10,491.82 of these profits had been distributed to the copartners—$9,293.41 having been distributed to the plaintiff and $1,198.41 to the defendant Duncan. The court also found that the value of the good will belonging to the copartnership was $12,500, and that the defendant W. H. Duncan had contributed $24,000 in capital to the copartnership. It was not expressly found whether any of his capital investment had been returned to W. H. Duncan. If no part of this capital had been returned to W. H.

Duncan, then the property transferred to the defendant corporation included $22,617.90 undivided profits, $12,500 good will, which also represented an undivided profit or increment, and $24,000, the amount of capital invested by Duncan; the total property value transferred by the copartnership to the corporation would be the sum of these items, amounting to $59,117.90.

The respective interests of the copartners in their property thus transferred was as follows: Plaintiff's portion of this residue of the property would be his half interest in the good will, $6,250, plus the balance of his half of the profits not withdrawn, namely, $7,261.46. The defendant Duncan's share in this residuum would be $15,356.40 (being his half of the undivided profits, less $1,198.43 withdrawn), plus his one-half of the value of the good will, $6,250, and the capital of $24,000, making a total of $45,606.45. From these calculations it would follow that the 500 shares of stock of the defendant corporation should have been divided between the former partners in the proportion which $13,511.46 bears to $45,606.45, belonging to the defendant; that is to say, the plaintiff was entitled to $13,511.58, divided by 59,117.90, multiplied by 500 shares, and the defendant Duncan was entitled to $45,606.45, divided by 59,117.90, multiplied by 500 shares; that is, the plaintiff would be entitled to 114.27 shares and the defendant to 385.72 shares.

[4] A judgment might be entered upon the findings in accordance with the foregoing suggestion, were it not for the fact that it is evident from the whole record that the trial court considered that the only question involved was the extent of the undivided profits, to one-half of which the plaintiff was entitled. The judgment did not undertake to fix the rights of the defendant Duncan, except by inferentially holding that Duncan was entitled to whatever was left after the plaintiff got all that he was entitled to.

[5] In connection with a new trial and for the purposes thereof, we adopt the following portion of the opinion of the District Court of Appeal:

"In connection with the proposition just disposed of, it should be stated that whether said Duncan is entitled to interest on the money which was advanced by him depends upon whether there was or was not an express agreement to that effect. The settled rule is stated as follows in Tirrell v. Jones, 39 Cal. 655, quoting the syllabus: 'In a contract between two parties, in which it is conditioned that one shall advance the necessary funds in the execution of the contract, and the other his services, skill and experience, and that each shall receive an equal portion of the profits, the party advancing the money is not entitled to interest on the same in the absence of any agreement that he should receive interest.' See, also, Carpenter v. Hathaway, 87 Cal. 435; Price v. Olcovich, 142 Cal. 47, and Ann. Cas. 1913A, p. 173.

[6] "As a guide to the court in the retrial of the case, it is proper to say that as to interest on the overdrafts by the partners, the rule is as it is stated by Justice Shaw in Forsyth v. Butler, 152 Cal. 396, 402, 403, 93 Pac. 90. The rule, generally stated, seems to be that, where a partner draws from the partnership funds to be applied to his own use and benefit an amount in excess of that which he is entitled to withdraw under the agreement of partnership or any other agreement between the partners, interest should be charged on such overdraft. This proposition depends on the condition on which, or the circumstances under which, the overdraft may be made. As to the overdrafts made by the plaintiff and the defendant Duncan in this case, the evidence is so unsatisfactory that we are unable to determine whether it was proper for the court to charge against the partners interest on the amount drawn by each of them from the partnership fund in excess of what they were entitled to.

[7] "The appellant challenges the finding relative to the good will of the partnership business. The court found that the good will of said business was of the value of $12,500. We cannot say that this finding is not supported. In fact, it is not necessary for us to go into the evidence for the purpose of determining that fact, since, as seen, the cause must be sent back for retrial on another ground. But we refer to the finding only because it seems to be the view of the appellant that good will did not enter as an element into the business affairs of the partnership, or, in other words, is not an asset of the partnership which may be taken into consideration in this case. Under our Code the good will of a business is property, transferable like any other; it being 'the expectation of continued public patronage.' Civ. Code, §§ 992 and 993. The transfer of the partnership business to the corporation necessarily involved a transfer of the good will of the business, and it was proper for the court to consider and determine the value of said good will as an asset of the partnership, in ascertaining and settling the value of the business and the profits which came therefrom in the years during which the partnership existed."

Judgment reversed, with instructions to the trial court to ascertain the relative rights of the parties in the stock of the defendant corporation, and to partition such stock between the parties in accordance with their respective rights. The interlocutory finding and judgment that the plaintiff is entitled to one-half of the profits of the copartnership, and that the relation between plaintiff and defendant W. H. Duncan was that of copartners, to stand as a basis for the settlement of the account. The dividends derived from the stock, if any, to be divided in the same proportion as the stock, neither party to have any interest upon the moneys due them unless upon a new trial the court, acting in pursuance of this opinion, finds that the defendant W. H. Duncan is entitled to interest upon the $24,000 capital advanced by him. If such interest is allowed, such interest shall be included in the amount going to the defendant W. H. Duncan from the copartnership at the time the property of the copartnership was transferred to the corporation and his share of the stock will be proportionately increased. No interest shall be allowed to either of the partners from and after the date of such transfer.

The trial court may also determine what part of the $24,000 advanced by the respondent, if any, has been repaid, and shall proportionately diminish his share of the stock.

We concur: WASTE, J.; KERRIGAN, J.; MYERS, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.

61 Cal. App. 574

PEOPLE v. BROWN. (Cr. 955.)

(District Court of Appeal, Second District, Division 1, California. April 6, 1923. Hearing Denied by Supreme Court June 4, 1923.)

1. Forgery 🔑34(8)—Evidence held sufficient to sustain conviction of passing fictitious check under count not amended by insertion of correct name of purported signer.

In a prosecution under Pen. Code, §§ 470, 476, for forgery, and for making, passing, etc., a fictitious check, which, as set out in each count, purported to be signed by "J. Burke & Co.," but was described as signed by "J. Burke," testimony of an officer of the bank, on which it was drawn, that he found no account in the name of either "J. Burke & Co.," or "J. Burke," *held* sufficient to sustain conviction under the count charging passage of a fictitious check, though only the count charging forgery, which was dismissed, was amended to read "J. Burke & Co."

2. Criminal law 🔑829(1)—Refusal of instruction fully covered by one given not error.

Refusal of an instruction fully covered by one given is not error.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

John C. Brown, otherwise known as Thomas Morgan, was convicted of passing a fictitious check, and he appeals. Affirmed.

C. C. Trott, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CURTIS, J. In this action the defendant was convicted, under section 476 of the Penal Code, of making, uttering, publishing, and passing a fictitious check. The information contained two counts. In count 1 the defendant was accused, under section 470 of the Penal Code, of the crime of forgery. And in count 2, under section 476, of the crime of making, etc., a fictitious check. The check, as set out in full in each count of the information, purported to be signed by "J. Burke and Co." In the body of the information, however, and in each count thereof the check was described and referred to as a check "purporting upon its face to be signed by a certain person and individual named J. Burke." The check, when introduced in evidence, had the name of "J. Burke & Co." signed thereto. After the close of the testimony of the people the district attorney asked leave to amend the information so that the same should read "J. Burke & Co." instead of "J. Burke." Count 1 of the information was amended by substituting the words "J. Burke & Co." for the words "J. Burke." No amendment, however, was made to count 2 of the information. The defendant was convicted under count 2, and thereafter, upon motion of the district attorney, count 1 of the information was dismissed.

The first point made by appellant on his appeal is that there is a material variance between the allegations of the information and the evidence introduced in support thereof, in that, while there was testimony to the effect that there was no such person or association of persons as "J. Burke & Co.," there was no evidence that there was no such person as "J. Burke" in existence. It is true, as we gather from the record before us, the case was tried upon the theory that the fictitious check purported to be the check of "J. Burke & Co.," and not that of "J. Burke." By an apparent oversight, however, of both court and counsel, count 2 of the information was not amended. The trial of the case proceeded upon the theory that it had been. The evidence of the officer of the bank was that he had searched the records of the bank upon which the check had been drawn and found no such account as "J. Burke & Co."

[1] Appellant, however, insists that, as count 2 was never amended, the proof in the action must conform thereto, and that the prosecution must show that there was no such person as J. Burke in existence. We would question very much the correctness of this contention, in view of the proceedings had in this case. However, we are of the opinion that even under appellant's contention the evidence in the case is sufficient.

The officer of the bank not only testified that he had searched the records of the bank upon which the check had been drawn, and found no such account as "J. Burke & Co."; he went further and testified in substance that he found no account in the name of "J. Burke," and that if there was any such account he did not see it. He also testified that the records of the bank searched by him were those of the main bank, and that the check in evidence was drawn upon the main bank.

We think this testimony was sufficient to show that there was no account in the bank in the name of "J. Burke." Such testimony is prima facie evidence of the fictitious character of the check. People v. Eppinger, 105 Cal. 36, 38 Pac. 538.

The point, therefore, made by appellant that there is a variance between the allegations of count two of the information and the proof is not, in our opinion, well taken.

The appellant further assigns as error the ruling of the court requiring the defendant to answer on cross-examination certain questions over the objection of his counsel, and also the giving by the court of an instruction on behalf of the prosecution, and the refusal of the court to give an instruction offered by the defendant. We find nothing in the admission of this testimony, nor in the action of the court in giving plaintiff's instruction, nor in refusing to give that offered by the defendant, that in any way prejudiced defendant's legal rights. The most objectionable of the questions asked of defendant on cross-examination, and the one upon which appellant appears to place the most reliance for a reversal of the case, seems never to have been objected to by defendant, and the others were not of such a character as would render them objectionable upon the ground that they required the defendant to be a witness against himself.

[2] As to the rulings of the court upon the instructions we find that defendant's instruction No. 2, which was refused by the court, is fully covered by defendant's instruction No. 1. And we are further of the opinion that the jury could not have drawn any inference, unfavorable to the defendant, from that portion of the court's general instruction objected to by the appellant when read in connection with the whole of this instruction.

The judgment appealed from is therefore affirmed.

We concur: CONREY, P. J.; HOUSER, J.

---

61 Cal. App. 783

EISEMAN v. DAUGHERTY, Commissioner of Corporations. (Civ. 4123.)

(District Court of Appeal, Second District, Division 2, California. April 25, 1923. Hearing Denied by Supreme Court June 21, 1923.)

Certiorari ⚷60—**Application for review of order revoking license which had expired discharged.**

An application for certiorari to review an order of the commissioner of corporations revoking petitioner's license as a broker for the year 1917, which, under St. 1917, p. 677, § 5, had expired before all the briefs were filed, will be discharged, the question being moot.

Application for certiorari by J. J. Eiseman to annul an order of Edwin H. Daugherty, as Commissioner of Corporations for the State of California, revoking petitioner's license as a broker. Writ discharged.

Roy A. Bronson and R. L. Carlisle, both of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and John W. Maltman and H. H. Linney, Deputy Attys. Gen., for respondent.

WORKS, J. In this proceeding for review, petitioner seeks to annul an order made by respondent and revoking petitioner's license as a broker, granted to him under the terms of the Corporate Securities Act, so called. The writ of review issued, and respondent has made due return thereto.

The license was for the calendar year 1922. The Corporate Securities Act contains a section to the effect that every certificate licensing a broker "shall expire on the thirty-first day of December next after its issuance, unless sooner revoked." Stats. 1917, p. 677, § 5; Deering, Consol. Supp. Gen. Laws, 1917–1921, p. 1450. Petitioner's application for the writ of review was filed November 8, 1922; his opening brief in support of the petition was filed December 27, 1922; respondent's brief was filed January 23, 1923; and petitioner's reply brief was filed March 2, 1923, after which last date we made our order submitting the proceeding for decision.

Respondent contends that the proceeding is now moot. Under exactly similar conditions a court of another jurisdiction said, after stating the facts:

> "It appears, therefore, that this court, upon a writ of certiorari, is without power to give any substantial relief, even should we reach the conclusion that the relator was not properly deprived of her license. A license which expired by express provisions of the statute on the first Tuesday of May, 1907, could not be given any vitality by an order of this court after that date." People v. Bogart, 122 App. Div. 872, 107 N. Y. Supp. 831.

This court has said, upon facts which make the case applicable here:

> "The writ of review will not be granted where no beneficial result will follow." Manoogian v. Superior Court, 48 Cal. App. 609, 192 Pac. 168.

The only contention made by petitioner in response to the point presented by respondent is that if the order revoking the license is allowed to stand it will be difficult for him to procure a license as a broker for this or for future years, the alleged manner in which he conducted his business under the license being the cause for its revocation. This we cannot assume. On the contrary, we are bound to assume that respondent will issue to petitioner a broker's certificate at any time that he shows himself entitled to it. However, whatever we may assume on this question is beside the mark. The only point really before us is whether petitioner was legally and constitutionally deprived of his license for the year 1922. As, even if the order of respondent had not been made, his certificate would have expired with that year, there is no substantial question left for us to decide. The writ of review should be discharged, as that is the proper practice in such a situation. Visalia Water Co. v. Superior Court, 120 Cal. 219, 52 Pac. 485.

Writ discharged.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

61 Cal. App. 732

TURNER, KUHN & FRASER, Inc., v. JONES et al. (Civ. 4469.)

(District Court of Appeal, First District, Division 1, California. April 23, 1923. Hearing Denied by Supreme Court June 21, 1923.)

1. Sales 🔑199—Parties may agree when title shall pass.

Under a sale contract the parties may agree when title shall pass, and if they expressly do so the contract controls, even though the subject-matter has only a potential existence.

2. Sales 🔑197—Rule as to passing of title in completed and executory contracts stated.

Where contract fails to express intention as to when property shall pass, the presumption is that the contract is an actual sale, if the specific thing is agreed on and is ready for immediate delivery, but that the contract is only executory when the goods have not been specified, or if, when specified, something remains to be done to put them in a deliverable shape or to ascertain the price.

3. Sales 🔑199—Whether title passed is question of intention, where contract does not so indicate.

Where a contract does not so indicate, the question whether title has passed is one of intention of parties, to be gathered from the language as expressed in the contract, considered in the light of the circumstances.

4. Sales 🔑199—"Cotton contract purchase" held not conclusive as importing present sale of cotton.

The mere use of words of present sale is not absolutely controlling, unless the contract shows such intent, and hence the fact that a contract was headed "Cotton Contract Purchase" was not in itself conclusive on the subject.

5. Sales 🔑214 — Cotton purchase contract held not to complete transfer of title.

Where the seller of cotton was called on to mature, harvest, gin, bale, and deliver it at a future date, at certain places, and only on payment of the price and on proper segregation, the contract was for a future sale, notwithstanding that a considerable portion of the purchase price was paid at the time the contract was made.

6. Evidence 🔑471(29) — Evidence to show that present transfer of cotton was intended by contract inadmissible.

Where evidence would have amounted to no more than witness' conclusion as to the intent of the contract to show a present sale, there was no error in refusing to permit its introduction.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Turner, Kuhn & Fraser, Inc., against W. F. Jones and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Samuel French, of Los Angeles, and Harris & Hayhurst, of Fresno, for appellant.

Lindsay & Conley, of Fresno, Edward F. Treadwell, of San Francisco, F. W. Docker, of Fresno, and Joseph C. Sharp, of San Francisco, for respondents.

TYLER, P. J. This is an action for damages against the sheriff of Fresno county and the surety on his official bond for the value of certain cotton levied upon by him under a writ of attachment and sold under execution in the attachment suit. The process issued out of an action in which Miller & Lux, Inc., was plaintiff and one A. H. Calkins defendant. Calkins was the lessee of a certain tract of land situated in the county of Fresno, which he had planted to cotton. In the month of July, 1919, he entered into a written contract with Turner, Kuhn & Fraser, Inc., a corporation, appellant herein, with reference to the sale of a portion of his crop. Under the terms of this agreement, which is denominated a cotton purchase contract, Calkins undertook to sell to the corporation 100 bales, each of 500 pounds in weight, of the cotton growing on the property, which at the time of the agreement had not been matured, picked or harvested. The quality of the commodity contracted for was described in the agreement as being from the low-middling to good-middling grades first ginned from the crop, at a price of 32 cents a pound for middlings, with an allowance for the other grades off and on. The sum of $7,000, or $70 per bale, was paid on account of the purchase price, such sum being approximately one-half of the amount due under the contract, the balance to be paid for upon delivery.

At the time of the execution of the agreement Calkins was of the opinion that his harvest would amount to some 300 bales. He agreed to mature, harvest, and gin the quantity of cotton contracted for and deliver the same within the period intervening the date of the contract and December 25, 1919, in the city of Oxalis, county of Fresno, at any cotton yard there situated, the balance of the purchase price of each bale to be paid upon delivery as delivered. In the attachment suit above referred to the sheriff levied upon the whole crop of cotton as the property of Calkins. Appellant made its third party claim, and the plaintiff in the attachment suit thereupon indemnified the sheriff and the attachment held. When the entire crop was harvested, contrary to expectation it amounted to but 36 bales, all of which were within the grades stipulated for in the contract of purchase. Plaintiff again gave notice to the sheriff claiming these 36 bales under its contract, but the sheriff proceeded to sell the cotton under execution in the attachment suit. The sale was made to Miller & Lux, Inc., the plaintiff therein, for the sum of $5,462, and this amount is conceded to be the reasonable market value of the product at that time.

Turner, Kuhn & Fraser thereupon brought this action in conversion against the sheriff and his bond. Trial was had without a jury. Judgment went for defendants, and this is an appeal therefrom.

[1] The sole question here presented is whether or not title to the property in question passed to plaintiff under the agreement above referred to. Under a contract of sale the parties may agree when title shall pass. If they expressly do so, their contract controls, even though the subject-matter has only a potential existence. If they do not so previously agree, and a dispute arises as to the true character to the agreement, the question is one rather of fact than of law.

[2] In discussing this subject Mr. Benjamin, in his work on Sales, in substance states that it not infrequently happens that parties fail to express their intentions as to when property, the subject of a sale, shall pass, or that they manifest them so imperfectly as to leave it doubtful what they really mean, if indeed they have any definite intentions, for the reason that the question was not brought up to them. In such cases courts have adopted the construction that, when there has been no clear manifestation of intention the presumption of law is that the contract is an actual sale if the specific thing is agreed upon and is ready for immediate delivery; but that the contract is only executory when the goods have not been specified, or if, when specified, something remains to be done to put them in a deliverable shape, or to ascertain the price. In the former case there is no reason for imputing to the parties any intention to suspend the transfer of the property, inasmuch as the thing and the price have been mutually assented to and nothing remains to be done. In the latter case, when something is to be done to the goods it is to be presumed that the parties intended to make the transfer of the property dependent upon the performance of the things yet to be done, as a condition precedent. Of course, these presumptions yield to proof of a contrary intent. Benjamin on Sales, §§ 308, 312.

[3] Such, in effect, is the rule which has been adopted in this state upon the subject by a long line of authorities. Accordingly, it has been held that there can be a present transfer of title of the product of crops growing and unmatured where the contract conclusively indicates that the transaction constitutes a sale. Hamilton v. Klinke, 42 Cal. App. 426, 183 Pac. 675. Where, however, the contract does not so indicate it is well settled that the question whether title has passed is one of intention of the parties. And such intention is to be gathered from the language as expressed in the contract considered in the light of all the circumstances. Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199; Globe Grain Co. v. Drenth, 36 Cal. App. 156, 171 Pac. 821; Bill v. Fuller, 146 Cal. 50, 79 Pac. 592; Madison v. Weyl-Zuckerman, 48 Cal. App. 308, 192 Pac. 110. The intent of the parties is the controlling element. If the agreement contains provisions definitely settling the matter such provisions, of course, control. Potts Drug Co. v. Benedict, 156 Cal. 322, 104 Pac. 432, 25 L. R. A. (N. S.) 609. On the other hand, where the intentions of the parties regarding the matter cannot be ascertained from the agreement the courts have enforced the general rule that title will not pass until the thing is identified for delivery and perhaps tendered. Farmer v. Leaf, 46 Cal. App. 542, 189 Pac. 735.

[4] The written contract here involved is headed "Cotton Contract Purchase," and the parties thereto are designated as "seller" and "buyer." This phraseology, however, is not in itself conclusive upon the subject, and, indeed, it is not even so contended. There is no question but that such language has a certain persuasive force in determining the intention of the parties, as it imports a present sale. Bill v. Fuller, 146 Cal. 50, 79 Pac. 592; McRae v. Heath (Cal. App.) 212 Pac. 228. But the mere use of words of present sale is not absolutely controlling unless the contract shows such intent. Potts Drug Co. v. Benedict, 156 Cal. 322, 329, 104 Pac. 432, 25 L. R. A. (N. S.) 609; Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199. And the same may be said of the fact that a considerable portion of the purchase price was paid. Gianelli v. Globe G. & M. Co., 48 Cal. App. 103, 191 Pac. 720. Other features of the contract, which we do not deem necessary to consider, are suggested by appellant as indicating that the sale was an executed one.

[5] Here the contract requires many things to be done by the seller, which negative the idea of an absolute sale. He is called upon to mature, harvest, gin, bale, and deliver the cotton; such delivery is at a future date, at certain places, and only upon payment of the price upon proper segregation, all of which circumstances present features of a contract

for a future sale and not of a present one. There can be no question that these elements, though not conclusive upon the subject, present the same persuasive force as opposing the theory of a completed transfer, as the indicia relied upon by the appellant and above referred to support its claim of a present sale. Taking all the conditions of the contract, therefore, into consideration, and viewing them in the light of the evidence and surrounding circumstances, we are of the opinion that the trial court was justified in concluding that the plaintiff was not the owner of the cotton, and its determination upon the subject is conclusive here.

[6] The further claim is made that, even assuming that the instrument does not show a present sale, the plaintiff should have been permitted to present parol evidence to the effect that such a one was intended. We see no merit in this contention. The trial court did permit, at appellant's request and over the objection of defendants, evidence of the facts surrounding the execution of the contract for the purpose of showing the intention of the parties. It is true that certain questions calling for the opinion of a witness as to the effect of the contract were rejected. The answers thereto would have amounted to no more than his conclusion upon the subject, and objection thereto was properly sustained. No other questions are presented.

From what we have said, it follows that the judgment should be and it is hereby affirmed.

We concur: RICHARDS, J.; ST. SURE, J.

62 Cal. App. 3

BRYDEN v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 4093.)

(District Court of Appeal, Second District, Division 2, California. April 27, 1923.)

Master and servant 🔑373—Injury from holdup held not compensable, as "arising out of employment."

Where an employee guarding employer's property suffered an injury resulting from a holdup during working hours, the criminals not being after anything except the contents of his pockets, the injury did not arise out of his employment within the Workmen's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

Application by Robert Bryden for a writ of review to annul an order of the Industrial Commission of the State of California, denying compensation for injuries, opposed by this Commission, A. J. Pillsbury and others, constituting the members thereof, the Pan-American Petroleum Company, and the State Compensation Insurance Fund. Award affirmed.

Olin Wellborn and Stephen Monteleone, both of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

WORKS, J. Petitioner was an employee of respondent Pan-American Petroleum Company and suffered certain injuries during the period of his employment. Because of these injuries he presented to respondent Industrial Accident Commission his application for compensation under the provisions of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831). After due hearing the commission made its order or award that petitioner take nothing by reason of his claim. Petitioner applied for a rehearing before the commission, and, his application being denied, he filed his petition in this court for a writ of review. The writ issued, and to it respondents have made return.

The facts upon which our inquiry is to be based, taking them from the testimony of petitioner himself, are as follows: Respondent Petroleum Company operated a certain property consisting of several pumping plants, for the production of oil. Petitioner was employed at one of the pumping plants, his rating or position being that of fireman. He was in charge of this particular pumping plant during one shift in each 24 hours, his period of duty being from 4 p. m. to 12 midnight. Other men had charge of the plant on shifts covering the remainder of each day. In the discharge of his duty, or, rather, in awaiting the necessity for a performance of it, petitioner sat on a bench in a small box-like structure known as the "dog house," provided by the employer. Petitioner made the following statements in his testimony:

> "I was watching boilers, watching a flowing well and pumps. I was hired to watch these boilers and flowing wells and look out for everything around there, such as tools, and to order anybody off the property that came around there that was not working there. * * * These boilers were to make steam for the pumps and for rotary drilling, but they were not drilling at this time. * * * Q. How far were you from any of the other buildings of the company? A. I should think about half a mile. Q. You say that in addition to watching the plant and the flowing well you also had to watch and guard tools and implements? * * * A. Yes; the men that were working around there putting in pipe lines would bring their tools up to the dog house, and I would watch them. Q. They would turn

> them over to you, and you would watch them to see that they were not taken away maliciously? A. Yes. * * * Q. Were you the only employee of the company engaged in guarding the company property at this place? A. Yes. * * * Q. Did you have firearms in this dog house? A. No, sir."

Petitioner was injured at night at the dog house mentioned in his testimony. The structure was by the side of a well-traveled road. Petitioner testified as follows:

> "I was sitting in this little dog house, and two shots were fired, one hitting in my arm and the other in the side and through the kidney. After they were fired, I looked up and saw two men with masks on standing there. I stood up and held up my hands, and they came in and looked through my pockets and took what money I had and left. * * * Q. These men that appeared in front of this dog house and commanded you to hold up your hands, were they masked? A. Yes. Q. Did they take anything other than the $20 and some odd cents that you had on your person? A. No."

It is contended by respondents that the injuries of petitioner did not arise out of his employment under respondent petroleum company, and this is the theory upon which respondent accident commission made its award. The award must, of course, stand if there is in the record any substantial evidence which supports the findings upon which it is based. We think such evidence is found in the testimony of petitioner, which is above quoted. Under that evidence petitioner's case is not like those of watchmen who are injured in endeavoring to protect the money or other property of persons who employ them to watch such money or property and to protect it from theft. It is evident from the facts that the assault upon petitioner was purely personal to him and was not engendered because of any desire upon the part of the marauders to molest the property of petitioner's employer. The assault was but an ordinary case of holdup, and, so far as the liability of the employer to make compensation is concerned, might as well have occurred on the road near the dog house, or out in the open country, or on the streets of the nearest city. The criminals were after the contents of petitioner's pockets, nothing more, and when they had taken what he had they decamped. Petitioner was not entitled to compensation. No cases are cited to us like the present, but our views receive a general support from Schmoll v. Weisbrod & Hess Brewing Co., 89 N. J. Law, 150, 97 Atl. 723, and State v. District Court, 140 Minn. 470, 168 N. W. 555, 15 A. L. R. 579.

Award affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

61 Cal. App. 758

SCHNEIDER et ux. v. HENLEY et al.
(Civ. 4174.)

(District Court of Appeal, First District, Division 1, California. April 25, 1923. Hearing Denied by Supreme Court June 21, 1923.)

1. Appeal and error 🔑171(1)—Plaintiff cannot change theory of case on appeal.

Plaintiffs cannot change the theory of their case on appeal.

2. Corporations 🔑121(1)—Buyer rescinding sale of stock could not recover from third parties, among whom seller divided money received from buyer.

A buyer of stock, seeking rescission of the sale, may not recover against third parties between whom the seller divided the money he received from the buyer.

3. Contracts 🔑270(1)—Party discovering fraud and aware of his right to rescind must act promptly.

To take advantage of the remedy afforded by Civ. Code § 1691, subd. 1, to rescind a sale, a party must act immediately when he discovers the facts which entitle him to rescind, and he is aware of his right.

4. Notice 🔑6—Notice of facts putting man on inquiry equivalent to knowledge which inquiry would disclose.

Notice of facts and circumstances which would put a man of ordinary prudence and intelligence on inquiry is equivalent to knowledge of all of the facts a reasonably diligent inquiry would disclose.

5. Corporations 🔑121(3)—Buyer failing to rescind purchase of stock for several months after discovery of fraud held guilty of laches.

Where a buyer of stock took no steps to rescind the sale until several months from the time he was entitled to rescind, *held* that, under Civ. Code, § 1691, subd. 1, he was guilty of laches where the delay was not excused.

6. Corporations 🔑117—Buyer could not rescind sale of stock on ground of seller's representations, where buyer did not rely on them.

Where, in purchasing stock, a buyer did not rely on the representations of the seller but on other considerations, he could not rescind the sale on the ground of the seller's representations.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Emil Schneider and wife against Joseph D. Henley and others. From a judgment of nonsuit in favor of named defendant and Leo Schoenfeld, and from a judgment for defendant R. T. Shannon, plaintiffs appeal. Affirmed.

Jos. A. Sanford, and Glensor, Clewe & Van Dine, all of San Francisco, for appellants.

Aaron Sapiro, Milton D. Sapiro, Sapiro & Levy, James M. Thomas, and Abram M. Marks, all of San Francisco, for respondents.

ST. SURE, J. This is an action to rescind a sale of shares of stock in a mining corporation, upon the ground of fraud, and to recover from defendants the sum of $1,000, the price paid for the stock, with interest.

Plaintiffs appeal from a judgment of nonsuit in favor of defendants Henley and Schoenfeld, and also from a judgment in favor of defendant Shannon. The two appeals were consolidated for hearing by order of this court.

Plaintiffs, in asking for a reversal, say, at the outset, that they rely upon the decision of the Supreme Court in the case of Beeman v. Richardson, 185 Cal. 280, 196 Pac. 774. An effort is made to draw a parallel between the case cited and the one before us. We cannot see it. The facts and circumstances of these cases are dissimilar. The evidence here shows that defendant Shannon was the owner of 5,000 shares of the capital stock of the United Metals Company, a Nevada corporation; that the stock had formerly been owned by one Blum and had been by him deposited in the office of one Emanuel, a stock broker; that defendant Henley was employed as a bookkeeper in Emanuel's office and knew about the stock; that defendant Schoenfeld had theretofore been employed as a bookkeeper by Emanuel; that defendant Henley had known all of the parties to the action for several years, and that he had become acquainted with Schneider while in Emanuel's office, and by reason of the fact that Schneider had been a client of the latter; that defendant Shannon desired to sell the stock, and Henley suggested names of persons who might buy, among them that of plaintiff Schneider; that Schoenfeld, who, like Henley, had met Schneider in Emanuel's office, introduced Shannon to Schneider, and a sale of the stock was effected.

Schneider testified that he had known both Schoenfeld and Henley about eight years, but that he had never met Shannon "until he was brought into my place of business in July, 1918." Shannon represented that the mine was a valuable producing one; that the ore from the mine was then being shipped and sold at a profit; that Emanuel was about to become president of the United Metals Company; that the stock offered was treasury stock of the company, had a value of 20 cents a share and was then selling in the eastern markets at that figure.

"Mr. Schoenfeld told me that Mr. Henley had some stock and knew all about the affair," testified Schneider. "He told me I should go down there and get some more information and ask them how good it was. The next day I went down, but I did not go down to see Mr. Henley on the question, but I went to see Mr. Emanuel. Mr. Emanuel happened to be sick, so I spoke to Mr. Henley and asked him about the matter. I said, 'Mr. Schoenfeld sent me down to see about the stock, you were interested and had stock too?' He said, 'Yes,' and he gave me some information about the stock. * * * What made me buy the stock, Mr. Henley told me that Mr. Emanuel was interested in the company, and he was to be president. Of course, I thought if Mr. Emanuel was interested in the affair it must be good."

Upon cross-examination Schneider further testified:

"I knew Mr. Emanuel and relied upon him very much for advice. I relied upon him when I bought real estate and when I bought stock I relied upon him. At the time Mr. Henley told me of the information he had, he told me it was obtained from Mr. Price, and when I received those certificates of stock, I saw the name of Mr. Price written there. I didn't write to Mr. Price."

Emanuel testified, in part, as follows:

"I have had the stock in my possession. It belonged to Mr. Blum and some of his friends. I had a conversation with Mr. Henley in regard to the United Metals Company stock at the time it was in my possession—I think it was in May, 1918. Mr. Blum at that time asked me to hold the stock in escrow, and I gave the stock to Mr. Henley to put in the safe. Mr. Henley was present at the conversation—what I mean, he wrote out the agreement, at the time Mr. Henley put it in the safe—he said that the stock was very low, that he bought it as a friend of Mr. Sanford, and that he would like to dispose of it, and that he had given some one an option, and I was to hold it in escrow, and Mr. Henley remarked that he could sell it too."

Defendant Henley testified, in part, as follows:

"I had a conversation with Mr. Shannon possibly a month before the stock was sold to Mr. Schneider, and also with Mr. Schoenfeld, probably a month. I possibly suggested the name of Mr. Schneider as a buyer of that stock. I could not testify positively whether I did or not. I suggested other names. Mr. Shannon asked if I had a purchaser for the stock and asked if I knew any one who would invest, and I told him I thought I had. I did not know the value of the property and don't know now. I think it is a valuable stock today. I did not tell Mr. Schoenfeld and Mr. Shannon they could refer Mr. Schneider to me for information. Mr. Schneider came to the office when Mr. Emanuel was sick. * * * He wanted to know if I knew anything about the property Mr. Shannon was selling or anything about the property of the United Metals Company, that Mr. Schoenfeld and Mr. Shannon had been up there a day or two before, and he come to see me about it. I had 6,000 or 8,000 shares of stock in it at the time, and I told him that I heard some mining engineers who had come in to see Mr. Emanuel and said it was a wonderful piece of property—the best piece of property around there. And I found out from others. I will tell that to Mr. Schneider to-day."

[1] The action is for rescission. The trial was had on the theory presented by the pleadings, that the stock was the property of the

three defendants and was sold to plaintiffs by defendants. The court, as we have seen, granted a nonsuit as to defendants Henley and Schoenfeld. The stock was owned and sold by Shannon. Plaintiffs urge, for the first time, upon this court, that the sale was made pursuant to a plan formulated and carried out by the three defendants. When plaintiff Schneider was being examined in the court below by his counsel, the record shows the following occurred:

> "Q. Now go ahead and tell everything that Mr. Schoenfeld said or Mr. Shannon said to you.
>
> "Mr. Sapiro: We object to anything Mr. Shannon said on this occasion.
>
> "The Court: I will let you do this: I will let you conduct the inquiry along very broad lines, simply because you rely upon fraud and conspiracy on the part of the defendants; and of course you can't do it all at one time; and then later I can perhaps determine what the fraud or conspiracy was, if any was committed, and by whom.
>
> "Mr. Glensor: I don't claim conspiracy, your honor."

[2] Plaintiffs cannot change the theory of their case on appeal. Blanc v. Connor, 167 Cal. 719, 726, 141 Pac. 217; Merrill v. Kohlberg, 29 Cal. App. 382, 387, 155 Pac. 824. And, while the profits of the enterprise were divided between the three defendants, the evidence clearly establishes the fact that Shannon bought the stock from Blum, sold it to Schneider, received Schneider's check therefor and himself divided the money. It would seem that plaintiffs' right, under the theory of the case first adopted by them, was to recover their money from the seller of the stock to whom it had been paid. They could not recover against third parties. Bosley v. Monahan, 137 Iowa, 650, 112 N. W. 1102; Wright v. Day, 59 Misc. Rep. 76; 111 N. Y. Supp. 1105.

[3-5] Plaintiff Schneider testified that he ascertained the true facts concerning the representations made about December 1, 1919. "From August, 1918, until I went to see Mr. Emanuel, approximately the latter part of November, or the first of December, 1919, I did not do anything with reference to the stock," testified Schneider. "I made no inquiries, I merely placed the stock somewhere and left it by itself." On June 3, 1920, about 6 months later, plaintiffs took steps to rescind the sale. Subdivision 1 of section 1691 of the Civil Code requires prompt action in case of rescission. To take advantage of this remedy a party must act immediately when he discovers the facts which entitle him to rescind and he is aware of his right to rescission. Maginess v. Western Securities Corp., 38 Cal. App. 56, 59, 175 Pac. 277. Notice of facts and circumstances which would put a man of ordinary prudence and intelligence on inquiry is, in the eyes of the law, equivalent to knowledge of all the facts a reasonably diligent inquiry would disclose. Garstang v. Skinner, 165 Cal. 721, 727, 134 Pac. 329. It appears from the complaint that plaintiffs had actual knowledge of the fraud and of their right to rescind several months before suit was brought. Defendants in their answer allege laches on the part of plaintiffs as a bar to their right to rescind. In Marten v. Burns Wine Co., 99 Cal. 355, 33 Pac. 1107, it was held that a delay of 3 months was too long. In the case of Bailey v. Fox, 78 Cal. 389, 20 Pac. 868, a delay of 4 months was held to be fatal, and in Gamble v. Tripp, 99 Cal. 223, 227, 33 Pac. 851, the Supreme Court said that a delay of 4½ months, in the absence of some excuse shown therefor, was certainly not the prompt action required by the Code. From an examination of authorities, it would appear that 30 days is about the utmost length of time which the courts are disposed to allow to the purchaser for rescission, unless there are unusual circumstances in the case excusing longer delay. 2 Black on Rescission and Cancellation, § 542, p. 1279. There was no relation of confidence induced or existing between the plaintiffs and defendants, and nothing at all which would excuse plaintiffs for failure to obey the mandatory provisions of the statute relative to rescission after discovery of the fraud. Plaintiffs neither alleged nor proved any excuse in justification of their long delay in rescinding, and under the law they were guilty of laches.

[6] In its judgment in favor of defendant Shannon, the trial court found that certain representations, hereinbefore mentioned, were made by him, but, in this connection, further found:

> "It is not true that the plaintiffs then and there or at all relied on the inducements or representations found to have been made, nor did said representations induce plaintiffs to part with anything whatever of value, nor were they deceived or misled by any said representations, nor did plaintiffs act upon any of said representations to their detriment, nor did they part with anything of value because of said representations."

In view of what we have said upon the subject of laches, we deem it unnecessary to enter into a critical discussion as to whether or not the evidence is sufficient to support the judgment of the trial court. Suffice it to say, we have carefully read the record, and our impression is that the conclusion reached by the able trial judge is right. Plaintiff Schneider testified that he did not buy the stock upon any statements or representations made to him by defendant Shannon. He bought the stock because he thought Emanuel was a stockholder in the company, and if the investment was good enough for Emanuel it was good enough for him.

For the reasons given, the judgment of nonsuit in favor of both of the defendants Henley and Schoenfeld, and also the judgment in favor of defendant Shannon, are affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

---

62 Cal. App. 52

WATSON v. DUARTE. (Civ. 4447.)

(District Court of Appeal, First District, Division 2, California. May 1, 1923.)

1. Brokers 🔑65(6)—Stipulation to release broker for responsibility for fraud inducing contract not binding.

Where a contract to pay a broker's commission for the exchange of real property was obtained by fraudulent misrepresentations on the part of the broker, a stipulation therein releasing the broker from all responsibility for representations or statements made was not binding on the purchaser.

2. Brokers 🔑65(6)—Owner not estopped to set up broker's fraud because of release.

That an owner, induced by fraudulent misrepresentation, stipulating for the exchange of his property, released the broker and the other party from all liability for misrepresentations, does not bring the case within the doctrine of estoppel, under Code Civ. Proc. § 1962, subd. 3, providing that one who has led another to believe a particular thing to be true, and to act on such belief, cannot be permitted to falsify his declaration or act relied on, and therefore the owner can set up the broker's fraud as a defense to an action for commission.

3. Brokers 🔑54—Broker entitled to commission, without proof of ability of purchaser to complete transaction.

Where a broker's contract to procure an exchange of property stipulated that he should be entitled to his commission on the acceptance of the agreement by the other party, he was entitled to his commission when the contract was accepted, irrespective of the ability of the second party to complete the exchange.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by B. J. Watson against M. G. Duarte to recover commissions due under a contract for exchange of real property. Judgment for plaintiff, and defendant appeals. Reversed.

J. C. Saylor, of Fresno, for appellant.

Briggs & Sorensen, and W. P. Thompson, all of Fresno, for respondent.

NOURSE, J. Plaintiff sued to recover the sum of $612.50 on a written contract executed by the defendant, whereby the plaintiff and his assignor were employed as real estate brokers to exchange a piece of real property owned by the defendant for certain real property owned by one D. Sirkegian. By the terms of the contract the commission was agreed to be paid upon the acceptance of the terms and conditions of the exchange by the said Sirkegian. The contract contained a waiver of the defendant's right to attack the contract upon the ground of misrepresentation in its execution, which read as follows:

> "It is further understood and agreed that we have investigated and examined the property last above herein described, know the value thereof, and hereby release said J. O. Kerrick and B. J. Watson from all responsibility and liability for representations or statements as to the same."

The plaintiff sued in the usual form for the recovery of the amount stipulated to be paid in the contract. As a special defense the answer alleged that defendant's signature to the contract was secured by false and fraudulent representations on the part of plaintiff, consisting in (1) a representation that the land was worth $40,000 and would readily sell for same on the market; that the plaintiff then had a sale ready and waiting at said price of $40,000, whereas in truth and in fact the land was not worth over $25,000, and that it had been frequently priced at said sum around the time of the execution of the agreement; (2) that plaintiff represented that there were 1,500 peach trees on the premises, whereas there were but 900; that there were 14 acres of Muscat grapes, whereas there were only 11 acres of Muscat grapes; that there were 12 acres of Thompson grapes, whereas there were only 2 acres of Thompson grapes; (3) that said land was clear from alkali, whereas it was in fact situated in an alkali district and contained alkali; (4) that the yield from said crop on said ranch was $6,000 a year, whereas the yield therefrom was in fact less than $2,000 a year; (5) that said land was level, whereas in truth it is rough and uneven. Upon this issue it was further alleged that the defendant was crippled, and was therefore unable to examine the land; that he went with the plaintiff to see a small portion of the land near the house, and relied solely upon the representations of the plaintiff with reference to the property; that he was unable to read or write the English language; that he had never read the contract, nor had any one else read the same to him, but that he executed it, relying upon the friendship of plaintiff for himself and his family and on the further representation of plaintiff that it would not bind him to trade his property, unless he so desired.

The trial court found in favor of plaintiff upon all the allegations of his complaint, and specifically found that all the allegations above referred to as constituting fraudulent misrepresentations were not true. These findings, so far as they relate to the defense of fraud are not supported by any evidence, as the trial court consistently refused to permit any evidence to be received upon that issue.

216

On this appeal this action of the trial court is assigned as error, and the further point is made that the judgment is erroneous, because respondent failed to show that he had obtainer a party ready, able and willing to exchange the property in question.

On the first point it appears that the appellant offered to prove all the allegations of misrepresentation contained in his answer, but the offer was objected to on the ground that the appellant had specifically contracted with reference thereto, and that he must be deemed to have waived in the agreement itself all claim of false and fraudulent misrepresentations incident to its execution. The question was propounded to appellant's witness (the daughter of the appellant):

> "Did Mr. Watson make any representations to you or to your father? A. Yes; he did. Q. About the ranch? A. Yes; he did. Q. What did he tell you about it?"

Hereupon objection was made by counsel for respondent upon the ground that the evidence was inadmissible by reason of the stipulation in the contract above referred to. This objection was sustained, and all other offers of proof were rejected.

[1] It seems to be the position of respondent that the case rests upon the question whether appellant was aware of the stipulation in the contract. No attempt is made to defend this stipulation. Assuming that the appellant had full knowledge of all the terms of the contract, and was aware of the fact that this stipulation prevented him from raising the defense of fraud in this action, the issue, nevertheless, is whether such a stipulation in a contract is valid. In American National Bank v. Sommerville, 64 Cal. Dec. 393, 395,[1] the Supreme Court, in a case involving a similar stipulation in a contract for the sale of an automobile, said:

> "It has also been repeatedly held that, if one be fraudulently induced to enter into a contract and to execute it, he is not bound by a stipulation or concluding clause of the same against setting up the fraud. If the instrument be void for fraud in its execution, the stipulation has no more binding force than if the contract had no existence, or were a mere piece of paper. J. A. Fay & Egan Co. v. Independent Lumber Co., 178 Ala. 166, 168. 'It would be carrying this doctrine [estoppel] to a preposterous extent to hold that a party is estopped from claiming that the very instrument claimed to estop him was obtained from him by fraud.' Wilcox v. Howell, 44 N. Y. 398, 402."

The Supreme Court granted a rehearing in that case, and it is now pending before it, so that it is not now authority. However, the language quoted is appropriate and the authorities therein cited fully support the rule announced. Here the answer alleged that the appellant had been fraudulently induced to enter into the contract and to execute it. He cannot therefore be bound by a stipulation which was itself obtained by fraud.

[2] The case does not come within the doctrine of estoppel as defined by subdivision 3 of section 1962 of the Code of Civil Procedure, which reads:

> "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

The respondent was not led to believe anything to be true by any statement which the appellant made, and he did not act upon the belief that the alleged misrepresentations were true because the appellant stipulated to release him from liability therefor. The offer of the appellant to prove that he was induced to execute the contract by false and fraudulent representations on the part of the respondent was therefore an offer to prove a triable issue in the case, and its rejection by the trial court was error.

[3] There is no merit in appellant's contention that the respondent was not entitled to recover the agreed commission until he produced a party ready, able, and willing to make an exchange of the properties involved. The contract provided that the respondent should be entitled to payment of his commission upon the acceptance of the agreement. Proof was made that the agreement was accepted in accordance with the terms of the contract. The commission was then due irrespective of the ability of the second party to complete the exchange. Jauman v. McCusick, 166 Cal. 517, 521, 522, 137 Pac. 254.

Judgment reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

62 Cal. App. 63

MURPHY v. DAVIDS et al. (SAN BERNARDINO NAT. BANK, Intervener).
(Civ. 4494.)

(District Court of Appeal, First District, Division 2, California. May 1, 1923. Hearing Denied by Supreme Court June 28, 1923.)

1. Judgment ⚷883(10)—Assignees' rights not affected by orders applying assigned judgment to satisfaction of debtors' judgments against creditor.

Under orders applying a judgment debtor's property, consisting of another court's judgment for him against assignees of judgments against him, to satisfaction of such judgments, only his property in the judgment, and not that of others, to whom he assigned it, could be so applied.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] Rehearing granted.

2. Appeal and error 🔑931(4)—Assumed, in support of refusal to compel entry of satisfaction of judgment applied on judgment debtors' judgments against judgment creditor, that court found latter had no interest applicable to such judgments.

On appeal from an order denying a motion to compel entry of satisfaction of a judgment, on payment of the difference between the amount thereof and sums allowed appellants in satisfaction of judgments against appellee, whose judgment against appellants had been applied to satisfaction of their judgments, after appellee's assignment of his judgment to a bank, which intervened, it must be assumed, in support of the order, that the court found, as alleged by the bank, that appellee had no interest in his judgment which could be so applied.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by M. A. Murphy against E. M. Davids and others, in which the San Bernardino National Bank intervened. Judgment for plaintiff affirmed (181 Cal. 706, 186 Pac. 143), and, from an order denying a motion to compel entry of satisfaction thereof, defendants appeal. Affirmed.

Abrahams, Moore & D'Orr, of Los Angeles, for appellants.

Byron Waters, of San Bernardino, Anderson & Anderson, and Victor T. Watkins, all of Los Angeles, and Ralph E. Swing, of San Bernardino, for respondents.

NOURSE, J. This is an appeal from an order denying a motion to compel the entry of satisfaction of judgment.

Briefly, the facts of the case are that on November 17, 1916, plaintiff Murphy obtained a judgment against the defendants Davids and Lindsay in the sum of $15,000 for malicious prosecution. An appeal from said judgment was noticed on the 24th day of November, 1916, and the judgment was affirmed by the Supreme Court on December 17, 1919. 181 Cal. 706, 186 Pac. 143. Immediately following the notice of appeal and on the 27th of November, 1916, the plaintiff Murphy assigned the whole of said judgment as follows: An undivided one-fourth to his attorneys, Anderson & Anderson; an undivided one-third to the San Bernardino National Bank; and the remainder to his wife. Though notice of this assignment was not personally served upon the defendants, the assignment was filed with the county clerk and placed among the papers in the case. On the 19th of January, 1920, at the time when the remittitur in the original case was issued, the defendants Lindsay and Davids took from the owners thereof assignments of four several judgments rendered in the superior court in San Francisco county against Murphy, the plaintiff in this action. These judgments then aggregated, with interest, something over $16,000. On the 21st day of January, 1920, following, the defendants herein were personally served with notice that the entire judgment in the original case had been assigned by the plaintiff Murphy to the San Bernardino National Bank, the intervener herein. On the 31st day of January, 1920, defendants herein gave notice of a motion to offset the four San Francisco judgments against the judgment in this action. This motion was duly heard before the superior court in Los Angeles county and was denied on the 14th of August, 1920. An appeal from the order denying said motion was taken by the defendants herein to the District Court of Appeal, Second Appellate District, and on November 29, 1921, said order was by that court affirmed. 203 Pac. 802. A petition for a transfer of said cause to the Supreme Court was in due time denied, and the remittitur upon said appeal was handed down and filed in this case on February 1, 1922. Immediately thereafter, and on the 6th day of February, 1922, these defendants appeared before the superior court in San Francisco county upon an ex parte motion in each of the four San Francisco actions in which they held the assigned judgments "for an order of this court to apply certain property of the judgment debtor, M. A. Murphy, herein to the satisfaction of the judgment herein." Thereupon the superior court of San Francisco county made its order in each of these four actions ordering "that the said property of the said M. A. Murphy, to wit, said judgment rendered in the superior court of Los Angeles county," be applied to the payment of the judgment in said action, "and that the amount so applied be and the same hereby is credited upon said judgment in favor of said M. A. Murphy." The amount of the Los Angeles judgment against the defendants Davids and Lindsay at that time had accrued, with the interest, to something over $20,000. The difference between the sums allowed in satisfaction of the San Francisco judgments was by these defendants paid to the county clerk of Los Angeles county, with instructions to apply the same upon the Los Angeles judgment and enter satisfaction in full. This having been refused, the defendants noticed their motion in this case for an order compelling the entry of satisfaction of the judgment herein. The motion was denied and this appeal is prosecuted from the order denying the same.

[1] In support of their appeal these appellants argue that the San Francisco orders crediting the portion of the Los Angeles judgment in payment of the San Francisco judgments are final and conclusive orders in each of the four San Francisco cases and

216

---

are not subject to attack in a collateral way in this proceeding pending in Los Angeles county. But it is to be noted that in each of the four orders made by the San Francisco court the property of the judgment debtor M. A. Murphy was alone involved. The notice of motion specifically called for an order to apply the property of that judgment debtor, and the order related solely to the application of his property. In none of the San Francisco cases did that court endeavor to determine the question of Murphy's ownership of any property, and, of course, the San Francisco court did not attempt to determine any existing rights in the Los Angeles judgment. Naturally, this could not have been done without first giving to the claimants thereof their day in court. The effect of the orders of the San Francisco court is, therefore, that whatever property the judgment debtor M. A. Murphy had in the Los Angeles judgment, and that property alone, was to be applied in satisfaction of the four several judgments in the San Francisco actions.

[2] When, therefore, these four orders were presented to the Los Angeles court on the motion which is now before us, one of the questions presented to that court was: What property did M. A. Murphy have in the Los Angeles judgment which was to be applied in satisfaction of the San Francisco judgments? This issue was squarely joined by the answer of the intervener, San Bernardino National Bank, and, in support of the order of the superior court denying the motion, it must be assumed that the court found the facts alleged by the intervener to be true and that Murphy had no interest in said judgment which could be applied in satisfaction of the San Francisco judgments. But, irrespective of any hearing on this motion, the precise question was finally determined by the same court in its order of August 14, 1920, when it denied the motion to offset the San Francisco judgments against the judgment in this case.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

62 Cal. App. 81

REMPEL v. KELLS et al. (Civ. 4492.)

(District Court of Appeal, First District, Division 2, California. May 3, 1923.)

1. Brokers 🔑65(5), 72—Not entitled to credit for cost of alterations and repairs after fraudulent transfer to agent, nor to commission on resale after wrongfully taking title in themselves.

Brokers employed only to negotiate a sale of realty *held* not entitled to credit for expenditures in making alterations and repairs, after they fraudulently caused title to be vested in their agent, nor to a commission on a resale to others, after they wrongfully took title in themselves.

2. Brokers 🔑38(4)—Brokers fraudulently selling to themselves and reselling at advanced price, without informing owner, presumed to have acted with intent to defraud.

Brokers fraudulently selling property to themselves and reselling it at an advanced price for their own advantage, without informing the owner, need not be shown to have acted with intent to defraud her, such act being unlawful in itself (Pen. Code, §§ 115, 470), and hence presumed to have been done with an unlawful intent (Code Civ. Proc. § 1963, subd. 2).

3. Brokers 🔑31—Brokers wrongfully taking title and reselling for secret profits held precluded from asserting right to accept transfer from purchaser declining to take property.

Brokers executing a receipt for an amount deposited as part payment on property intrusted to them for sale, but claiming that they received a check, payment of which was stopped, cannot contend, in the owner's action for secret profits made by them on a resale, after wrongfully taking title in themselves, that when the original purchaser declined to take the property they could accept a transfer from her, in the absence of evidence that she ever in good faith entered into a contract to purchase.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Florence Rempel against H. R. Kells and C. W. Grant, copartners under the firm name of Kells & Grant, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Farrand & Slosson, of Los Angeles, for appellants.

Cornelius M. Enns and M. G. Ferrahain, both of Los Angeles, for respondent.

STURTEVANT, J. The plaintiff, as principal, commenced an action to recover a judgment for secret profits against the defendants as her agents. The plaintiff had judgment in the trial court, and the defendants have appealed.

The trial court made findings which are not challenged, except as hereinafter stated. The findings refer to certain documents which are pleaded in haec verba in the complaint. For the purpose of brevity, we have substituted the document for general reference, and, without making any other changes, the findings tell the following story:

"That the defendants H. R. Kells and C. W. Grant are, and at all the times hereinafter mentioned were, copartners, and as such doing business as realtors in the city of Los Angeles in said county and state, under the firm name of Kells & Grant. That William Huntting Cooper and Harvey Crane at all the times herein mentioned were salesmen and agents of said firm in their said business. That defendant Annabel Grant is the sister of said C. W. Grant, and is, and at all times herein mentioned was, the agent and assistant of said firm, and that Lulu B. Cooper is the wife of said William Huntting Cooper.

"That on the 3d day of February, 1920, the plaintiff consulted said Kells & Grant, experienced real estate men of her neighborhood, regarding the value and selling of her then home and residence property, 527 South Hobart Boulevard in the city of Los Angeles in said county and state, who then examined said property, estimated its selling value at $18,000, and entered into a written agreement with her to find a purchaser for her in 30 days, which agreement fixed the minimum price at $15,000, plus $750 as commission to said agents.

"That after the expiration of said 30 days said Kells & Grant continued as agents for the sale of said property by mutual consent. That during said agency said Kells & Grant and their said salesman Cooper submitted to plaintiff the offer of one customer to buy said property for $15,000, which plaintiff declined, and on April 1, 1920, the day before plaintiff's departure for her new home in Vermont, urged her to approve and sign an agreement for the purchase of said property at $14,000, made by them with Elizabeth F. Davies as buyer. That plaintiff then yielded, approved, and signed said agreement to sell at such reduced price and to pay said Kells & Grant a commission of $700 out of the proceeds of such sale, then also signed and acknowledged a grant deed and other papers prepared by her said agents to be used in such sale, intrusted said deed and papers to her said agents, to be used by them in the consummation of said sale, and thereupon departed for Vermont.

"That, after plaintiff's departure, the said buyer Elizabeth F. Davies, discovering that there was a dispute with regard to the division of said commission between said Kells & Grant and an agent who had first showed her said property from the list of said Kells & Grant, and fearing a lawsuit, on the 5th day of April, 1920, stopped the payment of her $500 check given to the order of said Kells & Grant as initial payment on her said contract, never received her copy of said contract, and repudiated said contract, so notifying said Kells & Grant, who, in the name of the plaintiff and as her agents, acquiesced and canceled said contract, and on the 29th day of April, 1920, telegraphed the plaintiff as follows:

"'Sorry to report that your deal is not yet closed. Original buyer failed to consummate. We have resold, and deal will close within next few days. Kells & Grant.'

"That on May 1, 1920, while the absent plaintiff was waiting for a report of the price and terms of said resale, having complete confidence in her said agents to care for her interest, the said Kells & Grant, without knowledge of plaintiff and in violation of their said agency and in fraud of plaintiff's interests, with the deliberate aid of their said agents Harvey Crane, Annabel Grant, and Wm. Huntting Cooper, and of the latter's wife, Lulu B. Cooper, sold said property to themselves and said Annabel Grant, to own and use said property and sell the same at an advanced price for their own advantage, and they accomplished such sale to themselves and concealed the same from plaintiff, as found below.

"That, upon failure of said Davies contract, said Kells & Grant, in conference with their escrow clerk, decided not to write to plaintiff and not to ask her for the deed to a new customer, but to alter the deed made for said Elizabeth Davies, which plaintiff had intrusted to them, and thereupon caused the name of Elizabeth F. Davies to be erased from said deed and the names of their said salesman Wm. Huntting Cooper and his wife, Lulu B. Cooper, to be inserted as grantees in said deed, although said Coopers never obligated themselves to buy said property nor paid anything to make such purchase.

"That said Coopers on May 1, 1920, executed their grant deed to Annabel Grant, conveying said property of plaintiff, and delivered such deed to defendants Kells & Grant and Annabel Grant.

"That defendants Kells & Grant and Annabel Grant then placed said altered deed to the Coopers and said deed from the Coopers to Annabel Grant in one escrow with the Title Insurance & Trust Company, Los Angeles, Cal., supplied for such escrow the funds needed for a sale of said property at the price of $14,000, and at the closing of said escrow, received said deeds and under them took, managed, used, and enjoyed said property as their own.

"That defendants never reported to plaintiff the price and particulars of the resale mentioned in their said telegram, nor did they report to her any of the facts found above in this paragraph, except that they, after such successful destruction and appropriation of plaintiff's legal title to said property, caused said title company to send to plaintiff an escrow statement, as follows:

"'Escrow Statement of Florence Rempel. Escrow No. 160549.

"'In account with Title Insurance & Trust Company.

"'In Escrow with Kells & Grant.

Demand by deed		$14,000 00
Credit % insurance pro rata		42 98
Guaranty	50 00	
Escrow fee	14 00	
Revenue stamps	14 00	
Insurance transfers	1 00	
Commission—Kells & Grant	700 00	
Check herein for balance	13,263 98	
Total	14,042 98	$14,042 98

"'Los Angeles, Cal., 5/11/20.

"'Title Insurance & Trust Company,
"'Settlement Department.'

"And caused said title company to disburse said $14,000 and the unearned insurance premium of $42.98, in accordance with said escrow statement as follows: For title certificate, escrow fee, rev. stamps, insur. transf., $79; to Kells & Grant as commission, $700; to plaintiff the balance of said $14,042.98, to wit, $13,263.98.

"That on the 29th day of June, 1920, said defendants Kells & Grant and Annabel Grant, without knowledge of plaintiff, in violation of law and in breach of the trust imposed on them by the law in favor of plaintiff, sold and conveyed said property as their own property to Rudolph C. Fritz and Lena Fritz, his wife, for the consideration of $19,000, delivering to said buyers the deed of said Annabel Grant, the holder of the record title, dated June 29, 1920, and recorded July 19, 1920, and the said buyers, having no notice of plaintiff's rights in said property, have paid the whole of said consideration to said defendants.

"That plaintiff, in May, 1920, received and retained said remittance in the belief that her said agents had faithfully represented her and had obtained for her the best customer and the best price obtainable. That plaintiff has had little experience in real estate transactions. That she did not suspect or learn that her said deed had been altered until January, 1921, and did not learn the said facts resulting in the transfer of her said property to the defendants and in its later transfer to said Fritz and wife until March, 1921. That she then demanded an explanation and settlement from said Kells & Grant, who answered that they had taken over said property for themselves and denied any liability to plaintiff.

"That plaintiff has elected as the measure of her damages caused by defendants the proceeds of said sale to Fritz and wife with interest thereon, under section 2237 of the Civil Code.

"That at the time of such taking over by defendants, said property was in good and saleable condition, was not in need of repairs or alterations. That said defendants did not expend $2,500 or any other sum in repairing and altering said property. That defendants did not pay $950 or any sum as real estate broker's commission on such sale to Fritz and wife, and that the expenses for title certificate, revenue stamps, and fees attending such transfer to said Fritz and wife did not exceed the sum of $85.96."

[1] The appellants complain because the trial court, in framing its judgment, did not credit the appellants with amounts claimed to have been expended by the appellants in making alterations and repairs. It will be noted that the appellants caused the title to be vested in their agent under a deed dated May 1, 1920. They offered no evidence at the trial showing that any repairs were made prior to that date. The appellants were employed to negotiate a sale. The respondent never at any time conferred on the appellants any authority to make alterations or repairs. Any expenditures made by the appellants for the account of the respondent after May 1, 1920, were made by the appellants as volunteers. The same claim is made by the appellants regarding a commission on the sale to Mr. and Mrs. Fritz, but it appears that the sale was made nearly 60 days after the appellants had wrongfully taken title in themselves.

[2] The appellants further contend that the record does not show that they acted with intent to defraud the respondent, but the act of the appellants was in itself unlawful. Pen. Code, §§ 115 and 470. It is presumed that an unlawful act was done with an unlawful intent. Code Civ. Proc. § 1963, subd. 2.

[3] The appellants contend that when Mrs. Davies declined to take the property they had the right to accept a transfer to themselves from Mrs. Davies. A complete answer is that Mrs. Davies never executed a transfer. When the sale was negotiated, the appellants executed to Mrs. Davies a receipt that they had "received from Elizabeth F. Davies the sum of $500 as deposit and part payment. * * *" They now claim that they received a check, and that the payment of the check was stopped, etc. It is not made to appear, and probably the trial court did not accept as a fact, that Mrs. Davies ever in good faith entered into a contract to purchase.

The record shows no error, and the judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

CALIFORNIA REPORTER

216 PACIFIC REPORTER

216

191 Cal. 263

PAGE v. MAYORS. (L. A. 7215.)

(Supreme Court of California. June 12, 1923.)

1. Highways 🔑183—That plaintiff, injured in automobile collision, did not have operator's license, did not bar recovery.

In an action to recover damages for a head-on collision on a highway between defendant's automobile, traveling on the left-hand side of the road, and plaintiff's automobile, that plaintiff did not have an operator's license did not deprive him of the right of recovery; such fact having nothing to do with the collision.

2. Appeal and error 🔑909(1)—Supreme Court will assume that automobile lights complied with statute, in view of judgment.

In an action for damages from collision between defendant's automobile, traveling on the left-hand side of the road, and plaintiff's automobile, defendant claiming that his agent, driving the car, was blinded by the automobile lights of plaintiff's machine, *held*, in the absence of evidence that such lights did not comply with the statute, the Supreme Court, in view of a judgment for plaintiff, will assume that they did.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by L. Page against M. H. Mayors. Judgment for plaintiff, and defendant appeals. Affirmed.

E. R. Simon, and H. L. Welch, both of El Centro, for appellant.

Harry G. Sadicoff, of Los Angeles, and H. H. Myers, of Calipatria, for respondent.

PER CURIAM. This is an action in which the plaintiff sought to recover damages for a head-on collision, occurring upon a public highway between an automobile operated by defendant's agent, traveling on the left-hand side of the road, and plaintiff's automobile. The trial court found in favor of the plaintiff that there was no contributory negligence, and that the defendant was guilty of negligence and awarded damages in the sum of $425, although the plaintiff had claimed $10,000 damages. The defendant appeals, and claims that the judgment is erroneous, for the reason that the evidence shows that the plaintiff did not have an operator's license at the time of the collision and that the defendant's agent was blinded by the automobile lights of the plaintiff's machine.

[1] With reference to the question of the operator's license, it is sufficient to say that it had nothing to do with the collision. We are not disposed to hold that the presence of the plaintiff upon the highway was unlawful, and that this was thus a proximate cause of his injuries or to deprive him of the right of recovery.

[2] As to the fact that the defendant's servant's eyes were blinded by plaintiff's lights, there is no evidence that these lights did not comply with the statute, and in view of the judgment we must assume that they did.

The judgment is affirmed.

191 Cal. 265

PHILLIPS v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 10729.)

(Supreme Court of California. June 14, 1923.)

Courts ⚿475(2, 3)—Court appointing general administrator authorized to require special administrator appointed by another court to account.

After a general administrator had been appointed by the superior court of one county, the jurisdiction of the estate vests in that court, and it has authority to require a special administrator appointed by the superior court of another county to account to the general administrator; hence an application by the special administrator for a writ of prohibition to prevent such an accounting will be denied.

In Bank.

Application by Frank H. Phillips, as special administrator, etc., for a writ of prohibition, prayed to be directed to the Superior Court of the City and County of San Francisco and Thomas F. Graham, judge thereof, to restrain the hearing of an order to show cause why the special administrator should not account. Writ denied.

Fred. S. Howell, of Petaluma, for special administrator.

PER CURIAM. This is an application by petitioner, as special administrator of the estate of Margaret Quinn Springfield, deceased, for a writ of prohibition, prayed to be directed to the superior court of the city and county of San Francisco, and Thomas F. Graham, judge thereof, to prevent that court from proceeding with the hearing of an order directed to petitioner to show cause why he should not file an account of his administration of said estate in the superior court of the city and county of San Francisco.

Following the death of Margaret Quinn Springfield, petitioner, on July 21, 1920, applied to the superior court of Sonoma county for appointment as special administrator of the estate of said deceased, and was regularly appointed and thereafter qualified, and special letters were issued to him under the seal of said court. Petitioner took into his possession and custody all of the property and estate of deceased and has ever since continued to administer the same. Subsequently to the appointment of petitioner as special administrator, a document purporting to be the last will and testament of Margaret Quinn Springfield, in which one Mary B. Farrell was named as executrix, was filed in the superior court of the city and county of San Francisco. On or about January 18, 1921, this will was admitted to probate, and Mary B. Farrell was appointed executrix thereof and letters testamentary were issued to her.

On or about May 18, 1923, petitioner filed with the county clerk as ex officio clerk of the superior court of Sonoma county, in which the special administration was pending, a verified account of his administration, praying for settlement thereof. Upon the date set for hearing of said petition, June 1, 1923, the matter was continued at the request of the attorney representing the executrix, Mary B. Farrell, and on June 2, 1923, said executrix, through her attorney, presented an affidavit and application and secured the issuance from the superior court of the city and county of San Francisco, of an order and citation directed to petitioner as special administrator, to show cause why an account of his administration of said estate should not be rendered by him, filed, served, and settled in and by said superior court of the city and county of San Francisco, and all of the property of said estate delivered to Mary B. Farrell as executrix of the last will and testament of Margaret Quinn Springfield.

Petitioner asks that this writ issue upon the ground that special administration proceedings now pending in the superior court of Sonoma county will be unlawfully obstructed and interfered with if the superior court of the city and county of San Francisco is permitted to proceed further with the hearing of the order to show cause.

It is the contention of petitioner that, the superior court of Sonoma county having first acquired jurisdiction of the special administration proceedings, its jurisdiction became exclusive; that its order appointing special administrator is, in the absence of appeal, conclusive and final, and cannot be impeached in any collateral proceeding; that the superior court of San Francisco is without jurisdiction and authority to require the special administrator to render account to it of his stewardship; and that prohibition is the only speedy and adequate remedy available to petitioner to restrain this attempted unauthorized exercise of jurisdiction.

The application for a writ of prohibition is denied, for the reasons stated in the concurring opinion of Justice Shaw in the case of Miller v. Superior Court of Yolo County, 186 Cal. 453, 458, 199 Pac. 805, 808.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

191 Cal. 238

YELLOW CAB CO. OF SAN DIEGO v. SACHS et al. (L. A. 6970.)

(Supreme Court of California. June 1, 1923. Rehearing Denied June 28, 1923.)

1. Trade-marks and trade-names and unfair competition 🔑28—Foreign taxi manufacturing company held not to have acquired rights to trade-name or slogan.

A foreign corporation engaged in the manufacture of taxicabs which had adopted a trade-name and trade slogan which it permitted corporations, organized in the various cities to operate taxicabs purchased from it to use did not acquire any rights to the exclusive appropriation of either the name or slogan in a city in which it had never engaged in business, and, therefore, could not transfer any rights to a corporation subsequently formed in that city to operate its cabs.

2. Trade-marks and trade-names and unfair competition 🔑68—Relief against unfair competition rests upon deceit and fraud.

Relief against unfair competition by the use of trade-names other than trade-marks really rests upon the deceit or fraud which the later comer into the business field is practicing upon the earlier comer and upon the public.

3. Trade-marks and trade-names and unfair competition 🔑73(1)—Defendant's prior use of trade-name and slogan originated by foreign corporation held not unfair competition.

Where defendants had adopted a trade-name and slogan in their taxicab business which had been originated by a foreign corporation engaged in the manufacture of taxicabs before such name and slogan were used by any one else within the locality, their continued use of the name and slogan after a local corporation had been formed which purchased its taxicabs from the foreign corporation cannot be restrained as unfair competition with the new local corporation.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action for injunction by the Yellow Cab Company of San Diego against Samuel Sachs and another, copartners doing business under the name and style of the Yellow Taxicab Company of San Diego. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Haines & Haines, of San Diego, for appellant.

A. Rosenthal, of San Diego, for respondents.

RICHARDS, Justice pro tem. The plaintiff in this action sought to have the defendants enjoined from the further use of a certain trade-name and slogan in the city of San Diego, to the use of which the plaintiff claimed to be exclusively entitled. The trial court granted the defendants' motion for a nonsuit at the close of the plaintiff's case, and thereupon ordered and entered its judgment in the defendants' favor. It is from such judgment that this appeal has been taken.

The following are the facts educed at the trial, and which for the purposes of this appeal are taken to be true: For several years prior to 1920 the Walden W. Shaw Company, a corporation having its principal place of business in Chicago, Ill., was engaged in the business of manufacturing, operating, dealing in, renting, and repairing automobiles, taxicabs, motor cars, and like vehicles for the transportation of passengers and goods. In the development of this business it came to devote its particular attention to the production of a standardized form of taxicab for urban use. In the month of August, 1920, this corporation, by proceedings duly taken, caused its name to be changed to "Yellow Cab Manufacturing Company," and devoted its attention to the manufacture wholesale of these particular cabs, organizing a subsidiary corporation for the purpose of operating a system of these taxicabs in the city of Chicago. It also extended its operations to other cities by encouraging therein the organization of local taxicab corporations or concerns to which it would sell its standardized product, to be operated upon the system adopted by it in Chicago, which involved the uniforming of drivers and their training in courtesy to the public, a particular method of keeping track of the tariffs charged and of bookkeeping generally, and, among other things, the use of a certain trade slogan invented or adopted by the parent corporation and reading: "The cab that took the tax out of taxi." The prevailing color of the taxicabs thus introduced in various communities was yellow, though other colors were employed in the larger cities where more than one subsidiary concern was put in operation. The relation between the Chicago corporation and the local corporations or concerns was not otherwise financial, the only interest of the so-called parent corporation being that of encouraging the organization of these local enterprises in order to expand its trade in its particular style of taxicab. In the month of May, 1920, a corporation was organized in Los Angeles under the name of the "Yellow Taxicab Company of Los Angeles," for the purpose of putting into operation yellow cabs in that city purchased from and under the trade-name, slogan, and system of the Chicago concern. In the meantime, and for some time prior thereto, the defendants herein had been engaged in conducting a taxicab business in the city of San Diego under the name of "Smith Taxicab Company"; but in the summer of 1920 said firm decided to change its name to "Yellow Taxicab Company of San Diego," and to operate a system of yellow cabs under said name. The firm began such operation about the 1st of September, 1920, in said city, and on October 7, 1920, adopted

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

as its trade slogan the phrase, "The cab that takes the tax out of taxi," causing an advertisement to be inserted in the local telephone directory of their said name and slogan. They also, and in December, 1920, began advertising their business in the newspapers of said city under said name and slogan, and continued to do business thereunder until stopped by the preliminary injunction issued in this case in the latter part of January, 1921. In the meantime, and during the month of October, 1920, one M. T. Uhler began negotiations looking to the establishment of a yellow taxicab service in the city of San Diego under the system adopted and expanded by the Chicago corporation, and on the 29th day of November, 1920, caused to be filed articles of incorporation of a corporation to be known as "Yellow Taxicab Company of San Diego," to which corporation said Uhler assigned a contract which earlier in that month he had obtained from the Chicago corporation for the purchase of certain of their taxicabs. Having done this, he proceeded to finance said corporation through the sale of stock in the city of San Diego for the purpose of completing the purchase of said taxicabs and of installing said Chicago system of operation in said city. In pursuance of said purchase the corporation thus organized sought public support through advertisements inserted in the local newspapers explaining its said purposes and using the phrase adopted by the Chicago concern: "The cab that took the tax out of taxi." This corporation did not, however, actually engage in the business of operating yellow taxicabs or of using said trade slogan in connection with their said operation until the 23d day of February, 1921, when it put in operation 3 of the 26 taxicabs which had been thus ordered by and shipped to said Uhler under his contract with the Chicago concern, but which were not to be released for operation except as they were paid for. The present action was commenced by said corporation on January 24, 1921, about a month prior to the actual beginning of the operation and use of any of the plaintiff's said taxicabs or of said trade phrase or slogan in connection with their said operation and use. In its complaint herein the plaintiff set forth with much of detail the history and development of the business and system of the Chicago corporation and of its use of the trade-name, "Yellow Cab Manufacturing Company," and of the trade phrase or slogan, "It took the tax out of taxi." It also set forth in detail the activities of the said M. T. Uhler in his endeavor to introduce said system of taxicab service under said trade-name and slogan into the city of San Diego. It also set forth in its complaint the history of the activities and operation of said defendants under the firm name of "Yellow Taxicab Company of San Diego," and with the use of the trade phrase or slogan, "It takes the tax out of taxi," which acts, as plaintiff alleged, interfered with the exclusive rights which the Chicago corporation had acquired and to which the plaintiff had succeeded to the use in the said city of San Diego of said trade-name and said trade phrase or slogan. Upon filing said complaint it procured a preliminary injunction temporarily preventing the defendants from the further operation of their said business under said trade-name and by the use of said trade-phrase or slogan. Upon the trial of the cause the facts as above set forth were presented in evidence in support of the plaintiff's case, at the close of which the defendant moved for a nonsuit, which motion being granted, and judgment thereon entered, this appeal was taken.

[1, 2] It may be stated, upon the threshold of our consideration of the issues involved in this appeal, that no question relative to trade-marks or the rights to particular designations or slogans which may be acquired thereby under state or federal enactments is involved in this appeal. Neither the plaintiff nor the Chicago concern under whose encouragement it was organized had or could probably have acquired any exclusive trade-mark rights in or to the use of the name "Yellow Taxicab Company," or in or to the use of the slogan, "it took the tax out of taxi." The only rights which the plaintiff or its quasi parent, the Chicago corporation, could have or could assert in this action would be those arising out of the actual appropriation and use of such trade-name and trade-phrase or slogan in the particular locality and out of the defendants' fraudulent interference with the plaintiff's business growing out of such use through unfair competition. In so far as the Chicago corporation is concerned it is clear that it never acquired any rights in or to the exclusive appropriation of either said name or slogan through any use thereof in the city of San Diego; and, never having acquired such rights, it is plain that it neither did nor could transfer any such rights to the plaintiff herein. The law governing the use of trade-marks, trade-names, and trade-slogans is fairly well settled in this state. As to trade-marks, Civil Code, § 991, clearly defines and limits the kind of designations which may be appropriated and protected under its terms and under the provisions of the Political Code and Penal Code relating to trade-marks (Pol. Code, §§ 3196–3198; Pen. Code, §§ 350–354); and, as we have seen, the plaintiff claims no rights under these Code provisions. As to trade-names, this court, in the recent case of Dunston v. Los Angeles Van, etc., Co., 165 Cal. 89, 131 Pac. 115, has declared the principle governing the appropriation and use of trade-names other than trade-marks, and has collated the authorities supporting it as follows:

> "As the judgment cannot thus be supported upon the theory of an invasion of an exclusive right to property in a trade-mark, the only ground for the support of the judgment

is that which has come to be known as 'unfair trade dealing.' This is but a succinct statement of the principle that in the interest of fair commercial dealing courts of equity, where one has been first in the field doing business under a given name, will protect that person to the extent of making competitors use reasonable precautions to prevent deceit and fraud upon the public and upon the business first in the field. Spieker v. Lash, 102 Cal. 38, 36 Pac. 362; Waltham Watch Co. v. United States Watch Co., 173 Mass. 85, 73 Am. St. Rep. 265, 43 L. R. A. 826, 53 N. E. 141; Shaver v. Shaver, 54 Iowa, 208, 37 Am. Rep. 194, 6 N. W. 188; Newman v. Alvord, 51 N. Y. 189, 10 Am. Rep. 588. But, as has been intimated, relief in such cases really rests upon the deceit or fraud which the later comer into the business field is practicing upon the earlier comer and upon the public."

The case of Eastern Outfitting Co. v. Manheim, 59 Wash. 428, 110 Pac. 23, 35 L. R. A. (N. S.) 251, may also be cited as illustrating the application of the foregoing principle to a state of facts somewhat resembling those of the case at bar. In that case the plaintiff, the Eastern Outfitting Company, a California corporation, had for some years been engaged in business in the city of Seattle, Wash., under its corporate and trade-name. The defendant, Manheim, had established and was conducting a similar business in the city of Spokane, Wash., under the name of "Eastern Outfitting Company." The plaintiff undertook to secure an injunction preventing the defendant from the use in Spokane of said trade-name. The Supreme Court of Washington, in denying such application, held that the plaintiff, not having been engaged in the actual business of selling its goods in Spokane, and having no customers there, could not enjoin the defendant from the use in the latter place of the same trade-name, since in order to the application of the doctrine of unfair competition there must have been competition at said point through which the plaintiff had suffered by an unfair use on the part of the defendant of its trade-name. In the case of Sartor v. Schaden, 125 Iowa, 696, 101 N. W. 511, the court gave application to the principle in the terse statement that "there cannot be unfair competition unless there is competition," while in the case of Maxwell v. Hogg, L. R. 2 Ch. 307, it was said:

> "The mere declaration of an intention, however public, to publish a magazine or any manufactured articles, bearing a particular name or mark, notwithstanding such declaration is accompanied by expenditure in connection with the intended article, cannot create a right to the exclusive use of a name or mark as a trade mark."

See, also, 38 Cyc. 670:

[3] Applying the principle as set forth and illustrated in the foregoing cases to the facts of the case at bar, it would seem clear that the plaintiff had acquired no right to the exclusive use of the trade-name "Yellow Taxicab Company of San Diego" in connection with any business actually carried on under said name in the city of San Diego prior to the defendants' appropriation and use of said trade-name in the business which they had established and were conducting therein at the time of the institution of this action. The same doctrine must be given application to the defendants' appropriation and use of the trade phrase or slogan "It takes the tax out of taxi," since no distinction in fact or principle can be found between a trade-name and a trade slogan. Whatever rights the Chicago corporation may have gained to the use of the trade slogan, "It took the tax out of taxi," in places where it was actually engaged in disposing of its distinctive product, as against those who might attempt to deceive the public by making and selling taxicabs identical or similar in color and form with its distinctive type, and by using said trade-name or trade slogan in that sort of unfair competition, it is clear that it had no rights which it could assert or transfer to this plaintiff as against these defendants, who were not engaged in the manufacture or sale of a like article in San Diego or elsewhere, and, hence, were not in competition with the Chicago concern. The plaintiff herein was in no sense a successor or a licensee of the Chicago corporation in the use of either said name or slogan, and could acquire no right to the exclusive utilization of either except through priority of use.

The judgment is affirmed.

We concur: LENNON, J.; LAWLOR, J.; WASTE, J.; MYERS, J.; KERRIGAN, J.

---

191 Cal. 245

GOATMAN et al. v. FULLER et al.

(L. A. 7090.)

(Supreme Court of California. June 1, 1923.)

1. Judgment 🔑321—Amendment of judgment for error outside of record must be ordered within reasonable time.

In a suit to have plaintiffs declared owners of a certain lease of real property and to compel transfer of the lease, plaintiffs' attorney copied a purported copy of the lease into his complaint and discovered after affirmance of an interlocutory decree for plaintiffs that "NE ¼" had been erroneously substituted for "NW ¼." A motion to amend complaint, findings, and decree was made 21 months after trial. *Held*, that this was too late; that, the error not appearing on the record, section 473, Code Civ. Proc., applied, limiting the court's jurisdiction to allow such relief to 6 months at most after trial.

2. Appeal and error 🔑1170(12)—Reversal not defeating enforcement of judgment denied.

Where the court 21 months after trial granted plaintiff's motion to amend the complaint, findings, and judgment, all based upon an erroneous description of the land in the complaint, notwithstanding section 473, Code Civ. Proc., the judgment being enforceable in any event, the order will not be disturbed in view of section 475.

3. Judgment 🔑18(3)—Error in complaint held immaterial.

In an action to compel surrender of a lease where the allegations of the complaint were sufficient to identify the lease intended, an error in the specific description of the land is immaterial to the enforcement of the judgment based on such complaint.

4. Appeal and error 🔑1167—Reversal of order denied where equity would grant relief sought.

Where the only effect of an order reversing an erroneous order would be to force plaintiff to seek the same relief in equity, where it would clearly be granted, reversal will be denied.

Myers, J., and Wilbur, C. J., dissenting in part.

In Bank.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Suit by William Goatman and another against O. B. Fuller and others. From an order amending the complaint, findings, and judgment, defendants appeal. Affirmed.

U. T. Clotfelter and E. T. Lucey, both of Los Angeles, for appellants.

Anderson & Anderson, of Los Angeles, for respondents.

LAWLOR, J. This action was originally brought by the plaintiffs to have themselves declared to be the owners of a certain lease of real property; to compel the defendants to transfer the lease to them and to account to them for all the rents, issues, and profits of the leased premises. Pursuant to findings of fact and conclusions of law made and filed by the court, an interlocutory decree was entered in favor of the plaintiffs on July 7, 1919, which decree was subsequently affirmed on appeal. 50 Cal. App. 403, 195 Pac. 256. No question of the merits of the case is involved in this proceeding.

In their complaint plaintiffs incorporated what purported to be a copy of the lease, containing the following description of the land:

> "The NE¼ of section 30, containing 160 acres, the NE¼ of section 29, containing 160 acres, in township 4 south, range 11 west, S. B. B. and M., less that portion included in the county roads."

This description was adopted in the findings of fact by reference to the paragraph of the complaint in which it appeared. It was set out verbatim in the interlocutory decree. On April 25, 1921, after the affirmance of the decree on appeal and 21 months after its rendition, the plaintiffs moved the court to amend the complaint, findings, and decree by nunc pro tunc order, so that whenever in them occurred the words "the NE¼ of section 29, containing 160 acres," they be changed and amended to read "the NW¼ of section 29, containing 106 acres."

An affidavit by counsel for the plaintiffs was filed in support of the motion, setting forth that when the complaint was drafted by him he was supplied by the plaintiffs with what purported to be a correct copy of the lease, which copy was set forth in the complaint; that the copy was not a true copy of the original, in that it contained the error in description now sought to be corrected; that the error persisted in all subsequent papers in the case and became a part of the findings and judgment; that his attention was first called to the scrivener's mistake by counsel for the defendants after the affirmance of the interlocutory decree on appeal; that the case was tried by all the parties upon the assumption and belief that the property actually involved was that described by the lease; that the defendants were at all times in possession of one of the originals of the lease, had full knowledge of the true description of the property, and could not have been misled by the partial misdescription. An affidavit in opposition to the motion was filed by the defendants' attorney, in which he set up that the proceeding was barred by section 473 of the Code of Civil Procedure; that the ends of justice would not be served by the amendment, in that the defendants would be compelled to surrender possession of 160 acres of land not described in the complaint and would be punished for a fault of the plaintiffs; that it is immaterial whether or not the defendants were misled, for they had the right to stand on the case made out by the complaint; and that the situation in which the plaintiffs now find themselves is wholly due to their inexcusable neglect and mistake, as they were in possession of an original duplicate of the lease at the time of the trial and inserted a full copy of it in the transcript on appeal. The court granted plaintiffs' motion and ordered the complaint, findings, and decree amended as prayed. From that order defendants take this appeal, insisting this is not a case in which the court has inherent power to amend its judgment, and that, as more than six months had elapsed since its rendition, no such power is granted by section 473 of the Code of Civil Procedure, which provides:

> "The court may * * * upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; provided, that application therefor be made within a reasonable time, but in no case exceed-

ing six months after such judgment, order or proceeding was taken."

Respondents' position is that the decision of the court upon which the decree was given was for an assignment by appellants of the lease actually executed, and for possession by respondents of the property described in the lease, not of that misdescribed in the copy contained in the complaint; that the error of misdescription entered into the judgment itself; and that the judgment therefore did not speak verity as to what was in fact decided by the court. They further insisted that the issue in the suit was the ownership of the lease in question; that the effect of the decree was that the lease belonged to them and should be turned over to them; that the land covered by the lease should be put in their possession; and that the correction was merely of a clerical error and in no sense altered the substance of the judgment.

In Scamman v. Bonslett, 118 Cal. 93, 50 Pac. 272, 62 Am. St. Rep. 226, the plaintiff sued to foreclose a mortgage. No deficiency judgment was asked and none was originally granted. About 17 months after the judgment was rendered, it was amended to include a deficiency judgment against one of the defendants. The amendment was held to be void. With respect to the right of a court to amend its judgment, it was said:

> "A court may at any time render or amend a judgment where the record discloses that the entry on the minutes does not correctly give what was the judgment of the court. Morrison v. Dapman, 3 Cal. 255.
>
> "Any error or defect in a record occurring through acts of omission or commission of the clerk in entering or failing to properly enter of record the judgment or proceedings of the court—in short, what may be termed clerical misprisions—may, the record affording the evidence thereof, be corrected at any time by the court upon its own motion, or on motion of an interested party either with or without notice. Where, however, an inspection of the record does not show the error, and resort must be had to evidence aliunde, courts will require notice to be given of a motion to amend a judgment to the parties to be affected thereby, and a motion for the amendment of a judgment in such last-mentioned case must, under section 473 of the Code of Civil Procedure, be made within six months, except in cases where personal service of summons has not been had, in which cases the court may grant relief within one year after the entry of judgment. [Citing cases.]
>
> "Again, amendments to judgments can only be allowed for the purpose of making the record conform to the truth, not for the purpose of revising and changing the judgment. (Black on Judgments, § 156.) The same author adds:
>
> " 'If, on the other hand, the proposed addition is a mere afterthought, and formed no part of the judgment as originally intended and pronounced, it cannot be brought in by way of amendment.' "

This case was cited with approval in Herd v. Tuohy, 133 Cal. 55, 61, 65 Pac. 139, and in City and County of San Francisco v. Brown, 153 Cal. 644, 651, 96 Pac. 281, and the rules therein declared were also followed in Dreyfuss v. Tompkins, 67 Cal. 339, 7 Pac. 732; Fallon v. Brittan, 84 Cal. 511, 24 Pac. 381; Bemmerly v. Woodward, 124 Cal. 568, 57 Pac. 561; Fay v. Stubenrauch, 141 Cal. 573, 75 Pac. 174; Takekawa v. Hole, 170 Cal. 323, 149 Pac. 593; Mader v. Christie, 52 Cal. App. 138, 198 Pac. 45; and numerous other cases to which we need not refer.

In Estate of Potter, 141 Cal. 424, 75 Pac. 850, the trial court had amended a judgment previously rendered by allowing costs. The modification was ordered stricken from the judgment, this court declaring that—

> "The object of entering judgments and decrees as of some previous date is to supply matters of evidence and to rectify clerical misprisions, but not to enable the court to correct judicial errors. If the court has not rendered a judgment that it might or should have rendered, or if it has rendered an imperfect or improper judgment, it has no power to remedy such errors by ordering an amendment nunc pro tunc of a proper judgment. [Citing authorities.]"

It was held in First National Bank of Fresno v. Dusy, 110 Cal. 69, 42 Pac. 476, that an improper amendment of a judgment was "unauthorized and beyond the jurisdiction of the court, and therefore void," and in Byrne v. Hoag, 116 Cal. 1, 47 Pac. 775, that the court was without jurisdiction to make such an amendment.

In the case at bar the error is in no way disclosed by the record. The complaint stated a cause of action to secure the assignment of a lease and to recover possession of the land covered thereby. The description of the land is set out in the judgment roll but twice; once in the complaint and once in the judgment. In other places the land is simply referred to as that described in the complaint. Nowhere is it described by metes and bounds or in any other manner by reference to which the error in the description sought to be corrected might be made to appear. See Fallon v. Brittan, supra; Bemmerly v. Woodward, supra; Halpern v. Superior Court (Cal. Sup.) 212 Pac. 916. The misdescription was neither a judicial error nor clerical misprision. It was a mistake on the part of the plaintiffs.

[1] The findings were based upon the facts as stated in the complaint and the judgment granted the relief prayed for. In the last recital of the judgment, the court declared the lease covered the land described, and gave the description contained in the complaint. As far as appears from the record, the court decided the issues as they were presented to it and rendered its judgment accordingly. There is no clerical misprision

and no difference between the decision of the court as rendered and the record of that decision as embodied in the judgment. The only evidence tending to show there is any irregularity in the record appears aliunde in the affidavits of the respective parties. Under the authorities cited above, the court had no power in such a situation to amend the judgment upon its own motion or upon motion of a party, for more than six months had elapsed after the judgment was entered before steps were taken to amend it.

[2, 3] However, we have reached the conclusion that the rights of the appellants could not have been prejudicially affected by the amendment and that it is unnecessary, under section 475 of the Code of Civil Procedure, to reverse the order.

This action was originally brought, not to recover the real property described nor to quiet title thereto, but to compel appellants to assign a certain lease, and in our view sufficient facts appear from the record to entitle respondents to enforce their rights. The lease itself is fully identified in the complaint, answer, findings, and judgment. It is described as one dated September 24, 1917, executed by the Artesian Land Company to O. B. Fuller.

It was alleged in the complaint that the lease was one made in favor of Fuller solely as security for money due to him from one Peter Karales; that Fuller took and held the lease in trust for that purpose for Karales, his successors and assigns; that on December 4, 1918, the obligations of Karales to appellants were discharged and that Karales assigned to respondents all his interest in the lease and the leased premises; that respondents demanded the lease of appellants, which appellants refused to deliver; and that appellants still hold the lease and possession of the premises described therein. Respondents prayed that they be adjudged the owners of the lease and entitled to the rents and profits of the demised premises and to any and all subleases appellants might have executed; that appellants be directed to account to them for such rents and profits and to produce and assign all subleases to respondents; and that appellants be required to set out any claims they might have in the premises adverse to respondents.

Appellants alleged in their answer that the Artesian Land Company executed and delivered the lease mentioned in the complaint, but that O. B. Fuller did not take it as trustee for Karales. They admitted by not denying that they had possession of the leased premises and denied their obligation to turn over the lease. The court, in its findings of fact, conclusions of law, and judgment, followed generally the terms of the complaint. The relief prayed for was granted, and at the end of the judgment the statement was inserted that the lease covered the land erroneously described.

In view of these facts there can be no uncertainty in the minds of any of the parties as to the identity of the lease in question. The decree did not purport to quiet title to the land nor to remove a cloud from respondents' title. The subject-matter of the suit was the lease itself, which was sufficiently identified without reference to the description of the land. The description may, therefore, be regarded as surplusage. Under these circumstances, appellants are entirely unwarranted in refusing to deliver up the lease described, and respondents are entitled to the assistance of the court in compelling them to do so.

A further question is presented in this connection by the fact that in addition to ordering the surrender of the lease, the court ordered appellants to surrender possession of the land covered thereby. For the respondents to be able to enforce their rights the judgment must, of course, be definite enough to enable the sheriff to put respondents in possession of the land. But it is not necessary to accomplish this that the land be described in the judgment. It was held in Kelly v. McKibben, 54 Cal. 192, that—

> "The mode of describing the property recovered in the judgment is not one that we can conscientiously recommend as a precedent. But the description is not uncertain. Certum est quod certum reddi potest. The reference in the judgment to the finding, and in the finding to the complaint, for a description of the property, is inexcusably circuitous, but not ambiguous."

The judgment in the case before us was therefore sufficient without the description, for by reference to the lease, which was ordered delivered up, the description could be ascertained. The amendment only served to make more certain that which already appeared by reference. No other effect could have been given to the judgment as amended than to it as it originally stood. It makes no difference to either party, therefore, whether or not the court assumed jurisdiction when it had none and corrected tne error. What it did was a nullity which cannot affect the enforcement of the judgment, and in such a situation the question in reality becomes moot.

We are aware of no authority holding that the action of a trial court might be upheld notwithstanding that it acted without jurisdiction. However, In re McGrew, 183 Cal. 177, 181, 190 Pac. 804, 806, wherein the trial court vacated an order of adoption more than six months after it was rendered, upon appeal from the second order, it was said:

> "She [appellant] contends that the six months allowed by section 473 of the Code of Civil Procedure within which to apply for relief by motion or petition in the case itself had fully expired before the petition was filed, and that the only other mode by which relief on the ground

of fraud or mistake can be obtained is by an action in the nature of a bill in equity. If the point were good, a proposition which it is not necessary here to determine, it would not be sufficient as ground for reversal, since it would be an error in procedure and pleading only. (Const. art. VI, § 4½.)"

This statement, athough not necessary to the decision of the case, would indicate that the provision does not affect the court's jurisdiction, but is simply a matter of procedure, an error or defect in which, if not prejudicial, would not warrant a reversal.

[4] Moreover, there is no contention in this case but that the description of the land originally contained in the judgment is erroneous. Therefore the only effect of a reversal of the order would be to remit respondents to an action in equity, in which they unquestionably would be entitled to have the judgment amended. Young v. Fink, 119 Cal. 107, 50 Pac. 1060; In re McGrew, supra. To obviate any such further proceedings, let the order be affirmed.

We concur: LENNON, J.; WASTE, J.; KERRIGAN, J.; SEAWELL, J.

MYERS, J. I concur with the judgment, but I dissent from that portion of the main opinion which holds that the court had no power to amend its judgment under the circumstances here obtaining after six months had elapsed. I think that a court of record always retains the jurisdiction and power to correct its own records so as to make them speak the truth in those cases wherein the error corrected consists merely of a clerical error or misprision, provided there are no intervening rights of innocent third parties to be affected thereby. I think that this rule applies equally whether the clerical error was one made by the clerk or by the judge, but I agree that it does not apply to amendments made for the purpose of revising or changing the judgment, or of adding something thereto which formed no part of the judgment as originally intended and pronounced. This was a case of clerical error made by the judge in embodying in the decision of the court a misdescription of the premises. He was induced thereto by the original error of the scrivener in making a copy of the lease, but it was nothing more than a clerical misprision which resulted in the fact that the decision signed and filed by the judge did not truly set forth the decision actually rendered by him. Under these circumstances, I think the trial court acted within its jurisdiction and power in making the correction complained of.

I concur: WILBUR, C. J.

(191 Cal. 287)

PEOPLE v. YOSEMITE LUMBER CO.

(Sac. 3378.)

(Supreme Court of California. June 15, 1923.)

1. Master and servant 🔑347—Workmen's Re-education Act held invalid.

St. 1919, p. 274, §§ 5, 6, in so far as they attempt to invest the Industrial Commission with jurisdiction to create or enforce a liability on the part of employers to compensate the workmen of other employers, or dependents of such workmen, or to require the employers of workmen killed during the course of their employment, but leaving no dependents, to pay into the state treasury a sum named, for the rehabilitation and re-education of persons injured in the service of other employers, is invalid under Const. art. 20, § 21, as amended in 1918.

2. Taxation 🔑40(2)—Workmen's Re-education Act held a tax measure, subject to principles governing taxation, particularly uniformity within a proper classification.

St. 1919, p. 273, requiring employers to pay the sum of $350 into the state treasury for each fatal compensable injury suffered by any of their employees who do not leave surviving dependents, *held* a tax measure, which, in order to be valid, must be found to conform to the essential purposes governing taxation, particularly uniformity, upon all those who come within a proper classification subject to the burden of the particular tax.

3. Master and servant 🔑347—Taxation 🔑42(1)—Workmen's Re-education Act held tax measure invalid for lack of uniform classification.

St. 1919, p. 273, requiring employers to pay the sum of $350 to the state treasury for each fatal compensable injury suffered by an employee who did not leave surviving dependents, and providing for the use of such money for the rehabilitation and re-education of persons injured in the service of other employers, *held* a tax measure, and invalid because not based on any reasonable classification, nor can it be sustained as a regulatory measure not for the purpose of revenue, nor did the fact that there existed a state compensation insurance fund to which employers might resort for protection operate to relieve the law of its defect in lack of uniformity.

4. Statutes 🔑64(2)—Workmen's Re-education Act held invalid as whole, on adjudication that certain sections were invalid.

St. 1919, p. 273, because of its close connection with the Workmen's Compensation Act, and its adoption of definitions contained in that act, and its supplementary connection, *held* intended by its framers to stand or fall as a whole, so that the whole must be deemed invalid on adjudication of invalidity of sections 5 and 6.

In Bank.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by the People of the State of California, by the State Controller and the Industrial Accident Commission, against the Yosemite Lumber Company, a corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., and A. E. Graupner and Warren H. Pillsbury, both of San Francisco, for appellant.

Arthur W. Bolton, of San Francisco, for respondent.

RICHARDS, Justice pro tem. This is an appeal from a judgment in the defendant's favor, in an action instituted in the name of the people of the state of California by the state controller and the Industrial Accident Commission, to recover from the defendant the sum of $350 upon an alleged liability created under the provisions of chapter 183 of the Statutes of 1919. Stats. 1919, p. 273. The identical facts which form the basis of this action were presented before this court in the case of Yosemite Lumber Co. et al. v. Industrial Accident Commission et al., 187 Cal. 774, 204 Pac. 226, 20 A. L. R. 994, with the exception that in that proceeding the Manufacturer's Indemnity Exchange, the insurance carrier of the Yosemite Lumber Company, was joined as a party with the latter, but omitted here, while in this action the state controller is united with the Industrial Accident Commission as one of the parties instituting the same. This difference in parties in interest does not, however, affect the identity of the main questions discussed in that proceeding and presented upon this appeal. The former proceeding arose out of an application for a writ of review, wherein this court was asked to review and annul an order of the Industrial Accident Commission requiring the Yosemite Lumber Company to pay to the state of California the sum of $350 for the death of one John Moore, one of the employees of said corporation, who died from an injury received while in its employ and arising out of and in the course of said employment; the said John Moore leaving no dependents surviving him. The said order for said award was made under the provisions and by the authority of the act of 1919 above referred to. At the outset of its consideration of the questions involved in that case, this court stated that the sole question for decision was as to whether the said act gave to the Commission jurisdiction to adjudicate the liability of the employer to the state. In deciding that question this court held that, under the amendment of section 21 of article 20 of the state Constitution, adopted in 1918, investing the Legislature with power to create a system for the enforcement of workmen's compensation through and by means of an Industrial Accident Commission, the powers of the Legislature in that regard were limited thereby to the investment of the said Commission, with jurisdiction to create and enforce a liability on the part of employers to compensate their workmen and surviving dependents for injuries sustained or death incurred by such workmen in the course of their employment, and that such constitutional grant of power to the Legislature did not authorize it to invest said Commission with jurisdiction to create or enforce a liability on the part of employers to compensate the workmen of other employers, or dependents of such workmen, or to require the employers of workmen killed during the course of their employment, but leaving no surviving dependents, to pay into the state treasury the sum provided in said act of 1919 for the rehabilitation and re-education of persons injured in the service of other employers than those upon whom the liability to make said payment was by said act imposed; and that said act, in so far as it attempted, in sections 5 and 6 thereof, to invest such Commission with such jurisdiction was unconstitutional and void.

After the decision of this court in that proceeding, and to that effect, became final, the present action was commenced by the state of California at the instance of the state controller and the Industrial Accident Commission, in the superior court of the county of Sacramento, for the purpose of collecting directly from the Yosemite Lumber Company the sum of $350 alleged to be due and payable to the state under the provisions of the act of 1919, not directly held to be void by the decision of this court in said former proceeding, but arising out of the identical facts considered therein with relation to the injury and death of John Moore while an employee of said corporation, leaving no surviving dependents. It was and is the contention of the plaintiff, in instituting and maintaining this action and in taking and prosecuting this appeal that the decision of this court in said former proceeding declaring sections 5 and 6 of said act of 1919 to be unconstitutional and void, did not have the effect of rendering nugatory the remaining sections of said act, and that, under the provisions thereof not affected by said decision, a liability was created for the payment by said corporation to the state of California of the sum of $350, by reason of the injury to and death of said John Moore while an employee of said corporation and in the course of his employment, leaving no surviving dependents; and that said liability was susceptible of being enforced by the state of California in this form of action.

To the complaint seeking this recovery the defendant corporation presented a demurrer upon the ground that the court had no jurisdiction of the subject-matter of said action, and also upon the general ground that the said complaint did not state facts sufficient to constitute a cause of action. The defendant also presented an answer in several counts, in all of which the averments of fact in said complaint were admitted, but in which all liability on the part of the defendant arising out of said facts was expressly denied. The defendant also, in certain of said counts in its said answer, set forth with more of detail the facts as to the employment, injury, and death of said employee and as to his having left no surviving dependents entitled to compensation or to the benefits under the provisions of the Workmen's Compensation Insurance and Safety Act (St. 1917, p. 831). Several grounds of alleged unconstitutionality of said act were specified in the defendant's said answer. The trial court sustained the defendant's demurrer and granted its motion for judgment on the pleadings; and, upon the plaintiff's refusal to amend, judgment was entered in the defendant's favor. It is from such judgment that this appeal has been taken.

[1] One of the first but not most strenuously urged contentions of the plaintiff upon this appeal is that the decision of this court in the matter of Yosemite Lumber Company et al. v. Industrial Accident Commission et al., supra, holding sections 5 and 6 of the act of 1919 to be unconstitutional and void, was founded in error and should be overruled. It may be suggested, incidentally, that one of the results of sustaining this contention would be to render good the defendant's ground of demurrer to the effect that the superior court had no jurisdiction over the subject-matter of this action, since, by the provisions of the Constitution and statutes dealing with compensable injuries to workmen, the courts, except through the limited processes of writs of review, have been deprived of jurisdiction of such matters, while the particular statute under review herein in those sections thereof, which the appellant now insists we have erroneously held to be void, invests, not the courts, but the Industrial Accident Commission, with full jurisdiction over the very matter of which the plaintiff and appellant in this action is seeking to have the superior court and this court assume jurisdiction. But, however this may be, this court remains satisfied with the reasoning and conclusions of its decision in said former proceeding as to the invalidity of said sections 5 and 6 of said act of 1919, and hereby expressly approves and reaffirms the same.

The next and main contention of the appellant herein is that, notwithstanding the former decision of this court holding sections 5 and 6 of said act of 1919 to be unconstitutional and void, the main body of said act was not affected by said ruling, but remained in full force and effect, and, so remaining, was susceptible of enforcement through the medium of the courts and in this form of action. This contention on the part of the appellant is founded in the assertion and argument that the state of California has power independently of its express constitutional and statutory provisions relating to compensable injuries or fatalities to workmen, but under its general police powers, to provide for the rehabilitation and re-education of persons disabled in industry, by creating a fund for such purposes; and that, possessing such power, it has also the power to impose the burden of providing and maintaining such fund upon employers as a class. In making this contention, the appellant, among other authorities, relies upon the following language used by this court in the case of Yosemite Lumber Co. et al. v. Industrial Accident Commission et al., supra, wherein this court says:

> "It may be conceded that under its general powers the Legislature might provide a fund for the benefit of persons disabled in industry in this state and commit the administration of the fund to the Industrial Accident Commission and might also levy a tax in some form to raise such fund."

The respondent herein, however, strenuously contends that this concession may not properly or safely be made, and the argument which it puts forth to sustain its contention in this regard is this: That the general or police powers of a state are only those powers which can be exercised under and in harmony with its Constitution, and that when the state Constitution has spoken with respect to how far its Legislature may go in the enactment of laws upon a particular subject the Legislature may not go beyond the limits thus prescribed by the Constitution under the guise of exercising general or police powers in relation to that subject. The state Constitution has spoken upon the subject of workmen's compensation and upon the extent of the liability and burden to be laid upon employers as a class for the payment of awards for injuries received by their workmen while in their employ, and that the limitations upon legislative power in that regard are to be found in section 21 of article 20 of the Constitution, which declares the policy and defines the powers of the state acting through its Legislature upon that subject, and in so doing has delegated to the Legislature the power, and the power only, "to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability and * * * for [their] death incurred or sustained by the said workmen in the course of their employment." It is the respondent's contention that the language of the Constitution above quoted, upon the principle of expressio unius est exclusio alterius, places a limitation upon the power of the Legislature to impose any further liability upon employers for injuries to their employees arising in the course of industry than that expressed in said section of the Constitution, and hence that the Legislature had no power to go beyond that limitation with respect to employers' liability under the guise of the exercise of general or police power. The respondent cites in support of this contention the language of this court used in said former proceeding, wherein this court, in construing the above-quoted provision of the Constitution, said:

> "The next phrase of the new act empowers the Legislature 'in that behalf to create and enforce a liability on the part of any and all persons to compensate any and all of their workmen for injury or disability, and their dependents for death incurred or sustained by the said workmen in the course of their employment.' This does not authorize the creation of a liability on the part of any person to compensate the workmen of other persons, nor the dependents of workmen of other persons. The phrase 'their workmen' necessarily confines the persons to be compensated to workmen who are in the employ of the person who is made liable. This is also shown by the provision that if the workman is killed by an injury in the course of his employment, the compensation is to be made to his 'dependents,' thus excluding any idea of liability in such a case to provide for the welfare of workmen in general, or of a particular class of disabled workmen, in no way connected with the employer who is made liable for the particular injury. * * * The use in this clause of the words 'any and all persons,' in describing those made liable, and the words 'any and all of their workmen,' in describing those to be compensated, do not show an intent to empower the Legislature to enlarge the liability against a particular employer for a particular injury so as to include compensation to workmen in general as a class or a contribution to a fund to be applied to the benefit of a class of persons, instead of to the dependents of the workman who may be killed by the injury. Nor is such enlarged meaning given to the section by the use of the phrase 'complete system of workmen's compensation,' in the opening clause or by the elaborate definition of that phrase which follows the first sentence. The section mentions and describes but one kind of liability: The liability of 'any or all persons' to compensate 'any or all of their workmen.' * * * The language of neither one of these parts of the section shows or expresses an intent to add another liability to that expressly stated. In these circumstances the maxim 'expressio unius, est exclusio alterius,' is applicable, and the meaning to be inferred is that only which is explicitly stated. And particularly it should not be inferred or implied from such language that so novel and different a thing was intended as the liability to the state which is imposed by the Act of 1919."

The argument which the respondent predicates upon the foregoing language of this court in said former proceeding is plausible and has much persuasive force, and if given full effect would not only render the act of 1919 wholly void, but would set a constitutional limitation upon the power of the Legislature to enact any law providing a fund for the benefit of persons disabled in industry which would place the burden of its maintenance upon employers, except in so far as that liability related to their own individual employees. We do not deem it incumbent upon us by the exigencies of this case to go thus far, since we think the statute of 1919 must be held void for infirmities which will hereinafter be made to appear. Passing, therefore, this question and coming to the consideration of those provisions of the act of 1919 upon which, regardless of our former ruling, the appellant relies for its right to maintain this action, we are first led to consider the nature of the burden which said act imposes upon those who are by its terms required to pay into the state treasury the sum of money demanded of this defendant.

[2] By the terms of section 1 of said act, employers are required to pay into the treasury of the state of California the sum of $350 for each fatal compensable injury suffered by any of their employees who do not leave surviving dependents entitled to death benefits under the provisions of the Workmen's Compensation Act. Said moneys, when so paid into the state treasury, are to be placed in a special fund to be known as "the industrial rehabilitation fund," and are to be used for the purposes set forth in section 2 of said act, which provides that said fund may be drawn upon by the Industrial Accident Commission for the promotion of vocational reeducation and rehabilitation of persons disabled in industry in this state. It will thus be seen that the source of the fund to be thus accumulated in the state treasury is that of a compulsory payment of a definite sum by a certain class of persons known as employers; and that the destination of said fund is that of benefits conferred upon a certain other class of persons in this state who have been disabled in industry. That the liability thus imposed by the state upon employers is a charge upon persons or property cannot be controverted; and that the purpose to which the public fund, when thus accumulated, is to be devoted is a public purpose, would seem equally impossible of denial. The imposition is therefore a tax, and the statute which imposes it and provides for its collection and distribution is a tax measure within the accepted definition of that term. It was, in fact, so expressly held to be by this court in the former proceeding wherein the following language was used:

> "In so far as the act purports to exact from employers a sum to be used by the state for disabled workmen in general, it is in reality a taxing law, a revenue measure. It requires any employer to pay to the state the sum of $350

whenever one of his workmen who has no dependents is killed by an injury received in the course of his employment, and the fund thus raised is to be used for vocational re-education of workmen not connected in any way with such employer, and the surplus, if any, to go to pay the expenses of the state in carrying on the department or bureau administered by the Industrial Accident Commission, all of which are public purposes. This is purely a tax. 'A tax is a charge upon persons or property to raise money for public purposes.' (Perry v. Washburn, 20 Cal. 350.) A tax 'includes every charge upon persons or property, imposed by or under the authority of the Legislature, for public purposes.' (Madera v. Black, 181 Cal. 310, 184 Pac. 400; 1 Cooley on Taxation, p. 6.)"

[3] The act of 1919 having been thus determined to be a tax measure it must, in order to be valid, be found to conform to the essential purposes governing taxation. Chief among these essential purposes is that of uniformity. A tax measure imposing a tax for revenue must, in order to be valid, lay its burdens uniformly upon all those who come within a proper classification of the persons to be subjected to the burden of the particular tax. 1 Cooley on Taxation (3d Ed.) p. 4; Kansas City v. Whipple, 136 Mo. 295, 38 S. W. 295, 35 L. R. A. 747, 58 Am. St. Rep. 657. The class of persons to be subjected to the tax in question are employers. The law, considered as a revenue measure, must, in order to be valid, bear uniformly, either upon all employers in this state, or upon some portion of them who may be found to come reasonably within a narrower classification. The act of 1919, considered as such a tax measure, attempts to make such narrower classification by confining the application of its burden, to those employers only whose workmen killed in the course of employment leave no surviving dependents. Such a classification, in order to be valid, must have some reasonable basis for this differentiation. The only basis which is or can be urged in its support consists in the occasional and purely accidental circumstance that such employers happen to have such workmen having no dependents, killed in the course of their employment. It should require neither argument nor authority to show that such a purely adventitious condition could form no reasonable basis for the classification attempted by this act, particularly in view of the other provisions thereof, by the terms of which the proceeds of this tax are to be devoted to the benefit, not of the employers required to pay the tax, nor even of their employees, but to the benefit and betterment of a class of persons bearing no relation to either, but who have been injured in other employments in the general course of industry. The appellant contends that the act in question, though conceded to be a tax measure, is to be regarded as levying such tax for regulation and not for revenue, and hence not to come within the rule requiring uniformity. This contention is sought to be supported by the argument that one of the purposes of the act is that of preventing selfish employers from employing workmen having noncompensable dependents, in order to avoid the much larger awards of death benefits to deceased workmen leaving dependents, which are allowable under the provisions of the Workmen's Compensation Act. The difference in amount between the particular charge imposed by the act in question and the very much larger awards to those workmen who leave surviving dependents, allowable under the Workmen's Compensation Act, should suffice of itself to reduce this argument to a degree of refinement which leaves it with no persuasive force; but in addition to that it may be noted, as a fact of universal acceptance, that workmen who have wives and families "have given hostages to fortune" and are as a rule more careful, more dependable, and less liable to avoidable injuries than are those who have no such social or domestic ties. This reason, therefore, utterly fails for dealing with this imposition as a regulatory tax. The appellant further contends that the requirements of uniformity in the exactions of this act, considered as a revenue measure, are met and satisfied by the provisions of the Workmen's Compensation Insurance and Safety Act, which provides for a state compensation insurance fund to which employers, by the payment of a relatively small sum, may have resort for protection against the liabilities imposed by these acts. We are unable to perceive how this permitted recourse for the employer, while it might lessen the amount of his burden, could be effectual to relieve the law of its defect of lack of uniformity, treated as a revenue tax measure. The case of Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398, from the concurring opinion of Mr. Justice Shaw, of which the appellant quotes certain passages, was not dealing with the question of taxation, but solely with the power of the Legislature in enacting a workmen's compensation law to create discriminations based upon certain well-defined classifications of employments. Neither do we regard the case of State v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466, 94 N. J. Law, 357, as having any bearing upon the immediate subject under discussion, since in that case the charge imposed upon employers in extra-hazardous occupations was based upon a well-defined distinction and classification and was supported for that reason. We are unable to perceive any material distinction, either in fact or in principle, between the case at bar and the case of Bryant v. Lind-

say, 110 Atl. 823, where the Supreme Court of New Jersey, in dealing with the statute of that state almost identical with the act of 1919, after holding the imposition of the New Jersey statute to be a tax imposed for the purpose of supporting the expense of a state agency, goes on to say:

> "Such a tax has manifestly no relation to the police power; it is plainly not a property tax, and when we consider that it is restricted not merely to employers generally who have in their employ workmen with no dependents entitled to claim, but employers of that character who are within section 2 of the Compensation Act we reach a tenuity of classification that seems to us to deprive the class of any logical validity and of all substantial basis. Southern Railway Co. v. Green, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247."

[4] The respondent herein urges yet other constitutional grounds against the validity of the act of 1919, treated as a tax measure, which we do not deem it necessary to consider. There is, however, a final reason which impels us to the conclusion that this act, considered as a whole, has been rendered invalid by the decision of this court in the former proceeding which eliminated from its provisions sections 5 and 6 thereof. The act, regarded as a whole, was obviously intended by the lawmakers to be supplementary to the general Workmen's Compensation Act of this state. It refers in its title to said act. It adopts the definitions of said act as to compensable injuries, as to those entitled to death benefits and as to the basis of calculation of the total awards in such cases. It places the administration of the fund to be derived from its enforcement in the hands of the Industrial Accident Commission, and it vests in said Commission complete judicial power over the matter of the making and collection of the award from which it provides, and with full jurisdiction and authority to hear and determine all questions and controversies arising under the act, in accordance with the procedure provided for the exercise of such jurisdiction by that body in the Workmen's Compensation Act. Beyond this it is barren of any suggestion that the courts should have any jurisdiction whatever over the enforcement of its provisions. This being so, we are impelled to the conclusion that the act was intended by its framers to stand or fall as a whole, and, hence, that the elimination of sections 5 and 6 therefrom by our former decision so far interfered with the purposes and operation of the act as to render it void as a whole.

Judgment affirmed.

We concur: WILBUR, C. J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.; WASTE, J.; MYERS, J.

---

62 Cal. App. 91

OLIVIERI v. POLICE COURT OF CITY OF BAKERSFIELD et al. (Civ. 4162.)

(District Court of Appeal, Second District, Division 1, California. May 4, 1923.)

1. Intoxicating liquors 🔑11—City ordinance providing heavier penalty than state law for same act is void.

A city ordinance making it unlawful for any person to keep or store intoxicating liquor in any public or semipublic place, and fixing as a penalty for its violation a fine of not more than $500 or imprisonment not more than 180 days, imposes a heavier penalty than is imposed for the same offense by Wright Act, § 2, which enacts as the law of the state a provision of Volstead Act, tit. 2, § 3, prohibiting unlawful possession but imposing no imprisonment for the first offense, and therefore the ordinance is void under Const. art. 11, § 11, delegating to cities power to enact such regulations that are not in conflict with the general law.

2. Criminal law 🔑252(3)—Complaint held to charge offense under statute notwithstanding reference to ordinance.

A complaint in a police court charging that defendant had kept and stored intoxicating liquor in the city without having a valid permit so to do, contrary to the provisions of a city ordinance and contrary to the statutes of the state, sufficiently charges a violation of Wright Act, § 2, to sustain it under that statute, even though the city ordinance referred to was void.

3. Criminal law 🔑94—Complaint held not to charge maintenance of nuisance, but possession within jurisdiction of police court.

A complaint charging that defendant unlawfully kept and stored intoxicating liquor in a building within designated city did not charge a violation of Volstead Act, tit. 2, § 21, imposing as penalty for maintaining a nuisance a fine and imprisonment which were beyond the police court of the city, but only charged the offense of unlawful possession of intoxicating liquor, a prosecution for which was within the jurisdiction of that court.

Application for writ of prohibition by A. Olivieri, prayed to be directed to the Police Court of City of Bakersfield and C. F. Baughman, Judge thereof, to prevent the Judge from proceeding with the trial of petitioner on the charge of unlawfully possessing intoxicating liquor. Demurrer to petition sustained, and petition denied.

Dorsey & Campbell and Irwin & Laird, all of Bakersfield, for petitioner.

E. F. Brittan and M. G. Brittan, both of Bakersfield, and Tanner, Odell & Taft, of Los Angeles, for respondents.

W. D. McConnell and J. Friedlander, both of Los Angeles, amici curiæ.

CURTIS, J. A complaint was filed in the police court of the city of Bakersfield charging that the defendant on the 24th day of December, 1922, did willfully and unlawfully have, keep, and store intoxicating liquors in a certain building situated in said city of Bakersfield, without having a valid permit so to do, contrary to the provisions of section 6 of Ordinance No. 64 of said city, and contrary to the statutes of the state of California; that pursuant to said complaint and a warrant issued thereunder, petitioner was arraigned in said court and his trial upon said charge set for February 1, 1923. This proceeding is instituted for the purpose of securing a writ of prohibition, directed to the respondent, restraining him from proceeding with the trial of said action, and comes before us on a demurrer to the petition.

Petitioner bases his right to said writ upon the ground that the said Ordinance No. 64 of the city of Bakersfield is in conflict with the general laws of the state of California, that is to say, the Wright Act, passed by the Legislature of the state, and which became effective December 21, 1922, after its approval by the voters of the state (St. 1921, p. 79). In support of his argument against the validity of said ordinance, petitioner contends that the Wright Act covers the same matters and prohibits the same acts as are sought to be covered and prohibited by the ordinance in question; that the penalty prescribed by said ordinance for said offense fixes a greater punishment than is prescribed by the state law for the same offense; and therefore said ordinance is in violation of section 11, art. 11 of the Constitution of the state.

Ordinance No. 64 is set forth in full in the petition, and section 6 thereof reads as follows:

> "It shall be unlawful for any person to have, keep, or store any intoxicating liquor in any public or semipublic place in the said city, except as provided herein."

Said ordinance further provides as a penalty for its violation a fine of not less than $250 nor more than $500, or by imprisonment in the county jail for a period of not more than 180 days, or by both such fine and imprisonment.

Section 2 of the Wright Act provides:

> "All acts or omissions prohibited or declared unlawful by the Eighteenth Amendment to the Constitution of the United States, or by the Volstead Act are hereby prohibited and declared unlawful; and violations thereof are subject to the penalties provided in the Volstead Act."

Section 3 of title 2 of the Volstead Act (41 Stat. 308) reads as follows:

> "No person shall, on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor, except as authorized in this act," etc.

The Volstead Act fixes the punishment for possession of intoxicating liquors contrary to its provisions at a fine of not more than $500 for the first offense.

While the section of the Volstead Act as enacted by the Wright Act is not exactly in the same words as section 6 of the ordinance of the city of Bakersfield, we will assume for the purposes of this appeal that the same subject-matter is covered by both the statute and the ordinance. Petitioner so maintains, and it is not seriously controverted by the respondent.

[1] The question then arises: Is the ordinance in conflict with the state law and therefore rendered void by the provisions of article 11, § 11 of the Constitution, which provides that police power is thereby delegated to cities to enact such regulations as are not in conflict with the general laws?

Much of the discussion by counsel in their briefs is obviated by a late decision of the Supreme Court, reported in 214 Pac. 850, and entitled In the Matter of the Application of Arthur Mingo for a Writ of Habeas Corpus. In that proceeding the Supreme Court had under consideration an ordinance of the county of Kings, adopted prior to the enactment of the Wright Act, making it unlawful to have intoxicating liquors in one's possession and prescribing a greater penalty for such offense than that prescribed by the Wright Act. The court called attention in that case to the difference in the penalty imposed by the act and that imposed by the ordinance. For the first offense under the Wright Act the penalty was a fine not exceeding $500. Under the ordinance the maximum penalty prescribed was a fine of $500 and imprisonment for 90 days. And the court held that an ordinance punishing exactly the same offense as is punishable under the state law, and with a greater penalty is void.

The ordinance considered by the court in the last-named case is in all its essential features, so far as this proceeding is concerned, similar to the ordinance of the city of Bakersfield under consideration. And following the conclusions reached by the Supreme Court in that case we must hold that section 6 of the ordinance of the city of Bakersfield is void.

[2] Were this the only question before us, it would be our plain duty to grant the writ as prayed for by petitioner and restrain the respondent from the trial of said action. But there is another feature of the case which, in our opinion, is worthy of attention and the correct consideration of which leads us to an entirely different action.

The nature of the proceeding in the Mingo Case, supra, differed from that now before us. The Mingo Case, supra, was an application for a writ of habeas corpus after the defendant had been convicted and after sentence of imprisonment had been imposed upon him, and while he was serving imprisonment under said sentence. The present proceeding, as we have already seen, is one in which the petitioner asks for a writ of prohibition against respondent, restraining him from the trial of said action, on the ground that the court has no jurisdiction of the subject-matter of the action. In the Mingo Case, supra, the court says:

> "The mere fact that the complaint alleged a violation of the county ordinance instead of the state law would not render the judgment void in so far as the facts alleged and proved show a violation of the law (Ex parte Murphy [Cal. Sup.] 212 Pac. 30; Matter of Von Perhacs [Cal. Sup.] 212 Pac. 689); but in the case at bar the sentence of imprisonment was not authorized by the state law."

In re Murphy, supra, the petitioner sought to secure his release from custody after conviction for operating an automobile carelessly and recklessly on a public street. He had been charged with the violation of a certain ordinance of the city and county of San Francisco. It was held that the Motor Vehicle Act of the state (St. 1919, p. 191) covered the whole field of traffic regulation, that the ordinance in question sought to prohibit the same act as the Motor Vehicle Act had prohibited, and was in conflict with the statute and void, but that the prisoner was not entitled to his discharge on habeas corpus because of the invalidity of said ordinance, where the complaint in said action recited an act forbidden by the Motor Vehicle Act, and the judgment of conviction was legal under the terms of said act. The complaint recited that the acts complained of were in violation of certain provisions of the ordinance. Nevertheless, the court held that while the complaint "was not in the exact language of the Motor Vehicle Act, it is in substance the same and could not have failed to inform the prisoner of the nature of his offense, and it clearly recited an act forbidden by the Motor Vehicle Act."

That case goes further than it is necessary for us to go in the present proceeding. There, the petitioner had been convicted and was sentenced to imprisonment in the county jail. In our case, no judgment has been rendered. The petitioner has simply been charged with an offense and the respondent was proceeding to try him for the offense charged. Under the authority of In re Murphy, supra, the respondent may proceed to hold said trial, provided the complaint in said action, although purporting to state an offense under the ordinance, does in fact state an offense under the Wright Act, and this is so, even if the ordinance is void. When we compare the complaint with the provisions of the Volstead Act, which the Wright Act has made the law of this state, we are satisfied that it states an offense thereunder. In fact, the main contention of petitioner is that the offense set out in the complaint is prohibited both by the Wright Act and the ordinance. As hereinbefore indicated, we have agreed with him in this contention, and have held the ordinance void for the reason that it attempts to legislate upon the same matter covered by the statutes of the state. The complaint, however, still stands as a perfectly valid complaint under the Wright Act, and therefore the respondent, in whose court said complaint was made, has jurisdiction to proceed with the trial of the defendant for the offense charged.

[3] It is suggested by petitioner that the offense stated in the complaint is in violation of section 21 of title 2 of the Volstead Act, and that section 21 provides for a fine of not more than $1,000 or imprisonment of not more than one year, or both, and therefore the respondent would have no jurisdiction of such a proceeding. Said section 21 provides that any room or building where intoxicating liquor is manufactured or sold in violation of that act is a common nuisance and that any person who maintains the same is guilty of a misdemeanor, etc. In our opinion, by no reasonable construction of the complaint can it be held to state an offense under this section of the Volstead Act. We are therefore unable to agree with this last suggestion of the petitioner.

As stated before, the complaint in this proceeding states an offense under the Wright Act, and one within the jurisdiction of respondent.

The demurrer is sustained and petition denied.

We concur: CONREY, P. J.; HOUSER, J.

62 Cal. App. 6

CHAVEZ et al. v. SCULLY et al. (Civ. 4244.)

(District Court of Appeal, Second District, Division 1, California. April 28, 1923.)

Appeal and error ⚷879—Attorney held not to have sufficient interest in judgment to sustain an appearance by him on his own behalf.

Where a decree in an action in partition adjudged and proportioned among the various counsel the attorneys' fees allowable as part of the costs, *held*, that one of such attorneys, after his dismissal, did not have a sufficient interest in the case to warrant an appearance by him on his own behalf on appeal in a proceeding to have the judgment wherein he was awarded attorneys' fees set aside.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

Action by Federico Chavez and others against Thomas J. Scully and others. On motion to strike out reply to defendant's opening brief on appeal by plaintiffs. Motion granted.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Harry M. Irwin, of Los Angeles, for appellants.

Sarau & Thompson, of Riverside, and J. Wiseman Macdonald, of Los Angeles, for York.

CURTIS, J. The original action was one in partition. A final decree was entered therein and provided, among other things, that a certain amount should be allowed the parties as attorneys' fees, and then proceeded to apportion said amount to the several attorneys in the case, among whom was Waldo M. York, one of the attorneys for the plaintiffs, who was given one-fourth of the aggregate amount allowed as counsel fees. After the entry of said final decree, two of the plaintiffs, discovering that an error had been committed therein, were dissatisfied with the decree and immediately took steps to have the same corrected. Waldo M. York and Harry M. Irwin had acted as their attorneys during the pendency of the action. Following their decision to attempt to have the decree corrected, they substituted the said Harry M. Irwin as their attorney in the place of the said Waldo M. York and Harry M. Irwin. They thereupon gave notice of motion to set aside and vacate the decree. The court denied the motion and they have appealed to this court from said order denying their motion.

On this appeal, a brief was filed by Messrs. Sarau & Thompson, attorneys for the said Waldo M. York, and in his behalf, entitled "Reply to Appellants' Opening Brief," and the appellants now move this court to strike said brief from the files of this court.

It is contended that said Waldo M. York is not a party to said action and does not have any interest therein sufficient to entitle him to appear or to be heard on this appeal.

The decree, as we have already seen, attempts to fix the amount of attorneys' fees to which each of the attorneys in the case would be entitled. It therefore amounts to an order or judgment in favor of the several attorneys for the respective amounts thereby apportioned to them. If the court had authority to make such a decree, then the attorneys would be entitled to enforce the same, and, if the decree were assailed, to defend it against any attacks made thereon, consistent with their duty to their clients.

The authority to allow counsel fees in partition actions is derived from section 796 of the Code of Civil Procedure. This section reads as follows:

> "*Costs of Partition a Lien Upon Shares of Parceners.*—The costs of partition, including reasonable counsel fees, expended by the plaintiff or either of the defendants, for the common benefit, fees of referees, and other disbursements, must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties."

It does not appear that this section of the Code of Civil Procedure has ever been before the appellate courts of this state for construction, relative to the power given therein to the court to fix or allow attorneys' fees. It will be observed, however, that the section provides only that counsel fees may be included in the costs of partition expended by either plaintiff or defendant for the common benefit of all the parties to the action, and that they must be paid by the parties respectively entitled to share in the land divided. The fact that counsel fees are placed in the same category with other costs of suit expended by the parties would indicate that this provision of the Code was made for the protection and reimbursement of the parties, and then only after such costs and attorneys' fees had been paid, or at least incurred. Any decree, therefore, made in accordance with this section should run in favor of the parties to the action and not to those to whom the parties may have became liable for costs, etc.; otherwise, the decree of partition might provide not only for the payment to the attorneys in the case of their attorneys' fees, but also for the payment to the reporter, the referee, the witnesses, and any other persons to whom any of the parties may have become legally liable for services rendered, which could be properly included in the costs of the action. We apprehend that no one will contend that the section will bear any such construction, yet to maintain that the decree could provide for the payment of attorneys' fees to the attorneys in the action would in our opinion tend to just such a result.

Statutes similar to the section of the Code now under consideration have frequently been before the Supreme Court of this state, and that court has invariably held that, where the court is given authority to allow attorneys' fees in certain actions or proceedings, such allowance must be made to the party to the action, and it has annulled and declared void in every instance, as far as our information goes, orders and decrees made directly in favor of the attorneys.

In a divorce action under the authority of section 137 of the Civil Code, the court ordered attorneys' fees paid to the plaintiff's attorneys. The Supreme Court set aside the order and in doing so used the following language:

> "Section 137 regulates the matter in this state, and that section contemplates an order to pay to the wife. * * * When awarded, either by statute or upon general principles, 'suit money' is awarded to her; and by section 137 counsel fees, if ordered to be paid, are ordered as part of her necessary expenses for prosecuting or defending the action for divorce.

> * * * The order here was a direct judgment for money in favor of persons not parties to the suit, and to that extent was irregular and void." Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345.

In Sullivan v. Gage, 145 Cal. 759, 79 Pac. 537, the court directed the attorney fees to be paid to the attorneys for the receiver and the order was held by the Supreme Court to be defective and was set aside on the ground that the order should have run in favor of the receiver and not his attorneys.

In the Estate of Levinson, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479, an allowance of $500 was ordered paid to the attorneys of the administrator. On appeal the Supreme Court struck out this allowance on the ground that it should have been made to the administrator and not to the attorney.

In Briggs v. Breen, 123 Cal. 657, 56 Pac. 633, 886, it was held that the estate is not liable to an attorney, and the allowance for attorney's fees is made to the executor or administrator and not to the attorney.

In the Estate of Kruger, 143 Cal. on page 144, 76 Pac. 891, on page 892, the court states the law to be as follows:

> "It is well settled that whatever allowance is to be made from the estate to the executor or administrator for the services of his attorney must be made to the executor or administrator, and cannot be made to the attorney." (Citing cases.) "The attorney employed by an executor or administrator to assist him in the execution of his trust has no claim that he can enforce against the estate either by action * * * or in any other way. * * * His claim is solely against his client, the executor or administrator. He is not by reason of such employment the attorney of the estate, but is simply the attorney of the executor or administrator who selects and employs him. * * * He is not a 'person interested in the estate' within the meaning of those words as used in the section relative to the presentation of exceptions to the accounts of the executor or administrator and the conclusiveness of decrees of settlement of such accounts. * * * He therefore cannot legally file exceptions to an account, for only parties 'interested in the estate' may do so, * * * and exceptions filed by him are ineffectual for any purpose. (Briggs v. Breen, 123 Cal. 657.)"

The cases of In re Levinson, Briggs v. Breen, and Estate of Kruger, supra, were decided, however, prior to the amendment of section 1619 of the Code of Civil Procedure, providing that attorneys for executors and administrators shall be allowed out of the estate fees for their own services rendered the estate. As the section now stands and has stood since its amendement in 1909, an order of the court directly in favor of an attorney for his fees in the estate might be assumed to be legal, but this would be due to the positive direction of the code section in favor of attorneys in probate proceedings. These authorities would indicate that the decree, in so far as it purports to allow *to the attorneys* certain fees for their services, is to that extent invalid. It would therefore not give the said attorneys any personal interest in the judgment. Having no such interest therein, they would have no right to appear in the case representing simply themselves and not their clients, or to be heard in any proceeding to annul or set aside the decree.

There is another ground set forth in paragraph II of appellants' points and authorities accompanying their motion and advanced by counsel as a reason why the brief filed by Sarau & Thompson should be stricken from the files of this court. We have carefully considered the argument of counsel in support of this additional ground, and have also examined the brief sought to be stricken from the files of the court. We find nothing in said brief that warrants the attack made against it by counsel for appellants, and in granting the motion to dismiss the same, we do not wish to be understood that we concur in any manner with the argument of counsel made in behalf of his motion and contained in said paragraph II of his said points and authorities.

The motion will be granted solely on the ground that the party for whom Sarau & Thompson appear as attorneys has no interest in said action sufficient to entitle him to appear herein, or to be heard on this appeal.

Appellants' motion is hereby granted, and the brief hereinbefore referred to, and entitled "Reply to Appellants' Opening Brief," is hereby stricken from the files of this court.

We concur: CONREY, P. J.; HOUSER, J.

---

62 Cal. App. 47

WARFIELD v. BASSO et al. (Civ. 4151.)

(District Court of Appeal, Second District, Division 1, California. May 1, 1923.)

1. Pleading 🔑193(8)—Mistaken rule by which damages sought will not invalidate pleading.

Where facts stated in a complaint show plaintiff is entitled to damages of some sort, it was not a fatal error that the pleader has mistaken the rule by which such damages should be determined.

2. Courts 🔑122—Jurisdiction determined by amount of judgment in good faith demanded.

Jurisdiction of a court is to be determined by the amount for which judgment in good faith is demanded.

3. Frauds, statute of 🔑148(1) — Allegation that contract which statute required to be in writing was in writing is unnecessary.

In an action on a contract, required by the statute to be in writing, the presumption is that the contract is in writing, and there is no necessity for an allegation in the complaint to that effect, and a complaint alleging "said defendants entered into an agreement and contract with the plaintiff herein," was sufficient, particularly in view of the further allegation that a partial payment had been made which, under Civ. Code, §§ 1624, 1739, would take the transaction without the statute.

4. Sales 🔑202(1)—Transaction held sufficient to constitute sale of automobile, although full payment not made in cash.

Under Civ. Code, § 1721, defining a sale, a transaction looking to the sale of an automobile truck *held* sufficient to constitute a sale, though the seller accepted only a part payment in cash, coupled with an agreement to accept another automobile as additional payment, with the balance to be paid in installments; full payment not being necessary to complete the transaction.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Action by C. F. Warfield against Domenick Basso and Eugene Guasti, copartners doing business as Basso & Guasti. Judgment for defendants, and plaintiff appeals. Reversed.

Hocker & Austin, of Los Angeles, for appellant.

D. M. Potter nad A. J. Getz, both of Los Angeles, for respondents.

HOUSER, J. Plaintiff commenced an action against defendants by filing a complaint, which, after the formal parts thereof, contained the following allegations:

> "That on said 3d day of February, 1922, said defendants were the owners of and in possession of one certain Chevrolet automobile truck, Model No. 490, of the reasonable value of $658.80, and on said day and date, said defendants entered into an agreement and contract with the plaintiff herein, by the terms of which said defendant sold and agreed to deliver unto plaintiff said automobile truck, in consideration of the payment of the sum of $658.80, payable as follows: Eight dollars and eighty cents in cash money, and one certain Overland automobile valued by said defendants at $300, and the further sum of $350, to be paid in 12 equal monthly installments, and said automobile truck to be delivered to plaintiff upon delivery of said Overland automobile and the payment of said sum of $8.80, in money.
>
> "That plaintiff, on said 3d day of February, 1922, paid to said defendants the sum of $8.80, a portion of said price of said Chevrolet automobile truck, and said defendants received said sum of $8.80, a part of the purchase money of said automobile truck; and plaintiff tendered and offered to deliver to defendants, said Overland automobile, and was and is now able, ready, and willing to pay said installment payments, and in all things carry out the conditions of said contract on his part to be performed.
>
> "That on the 6th day of February, 1922, made such tender and offer to deliver said automobile, and then and there made written demand, that said truck be delivered to plaintiff, but said defendants refused to deliver said truck, and shortly afterwards, within 30 days, subsequent to said 3d day of February, 1922, as plaintiff is informed, and has good reason to believe and does believe, the defendants sold and parted with the possession of said automobile truck, and placed it beyond their power to deliver the same to plaintiff, to his damage in the sum of $658.80, the value of said automobile truck.
>
> "That plaintiff purchased said automobile truck, for his own use, in his business, for hauling, and at the time of making said contract with the defendants so informed defendants of such fact, and that such an automobile truck was necessary for use in the business of plaintiff. That the reasonable value of the use of said automobile truck, in plaintiff's business, is $2 per day, and by reason of the failure of defendants to deliver said automobile truck to plaintiff, pursuant to the terms of their said agreement, plaintiff has been damaged in the sum of $2 per day, for the time since said February 3, 1922, or an aggregate sum of $400.
>
> "That said defendants have not, nor has any person on their behalf, paid either said damage of $658.80, nor $400, nor any part thereof.
>
> "Wherefore, plaintiff prays the judgment of the court, and the plaintiff recover of the defendants and each of them the sum of $1,058.80, and costs of suit."

Defendants demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action against defendants. The court made an order sustaining the demurrer, and it was further ordered that the plaintiff be and he was given ten days from the date of the order within which to amend his complaint. More than ten days thereafter having elapsed, and plaintiff not having filed an amended complaint in the action, judgment was ordered that plaintiff take nothing by reason of his complaint and that defendants recover their costs. Plaintiff appeals from the judgment.

[1] In support of the judgment, one of the objections which is urged against the complaint is that the damages claimed therein are not such as are provided by the statutes covering a transaction of the nature outlined in the complaint; but the rule of law is that where the facts stated in the complaint show that the plaintiff is entitled to damages of some sort, it is not a fatal error that the pleader has mistaken the rule by which such damages should be determined.

In Hudson v. Archer, 4 S. D. 128, 55 N. W. 1099, which was an appeal from an order sustaining a demurrer to a complaint, the court said:

> "As we have seen, an erroneous claim for damages or demand for relief is not a ground of demurrer. If the rule by which the damages are to be estimated as stated in the complaint is incorrect or insufficient, the defect cannot be reached by demurrer so long as the complaint states facts entitling the plaintiffs to recover any damages in the action."

Regarding a like question in Kraft v. Rice, 45 App. Div. 596, 61 N. Y. Supp. 368, it is said:

> "We agree with the court below in the statement of the rule relating to the sufficiency of a pleading on contract, that, if it clearly sets forth a contract and its breach, even though the theory of damages predicated thereon may be erroneous, it would be a statement of a good cause of action. * * * If, in addition to the contract, a breach was alleged, then the plaintiff would be entitled to at least nominal damages, and the complaint would not be demurrable."

In Colrick v. Swinburne, 105 N. Y. 503, 12 N. E. 427, the opinion of the court contains the following:

> "It is not material that the plaintiff did not demand the precise damages to which he was entitled, or that he mistook the true rule of damages in his complaint. The complaint averred a legal wrong and a resulting pecuniary injury, and it was competent for the court, under the complaint, to adjust the recovery upon the true basis."

And see the following cases: International & G. N. R. Co. v. Gordon, 72 Tex. 44, 11 S. W. 1033; Harmon v. Callahan (Tex. Civ. App.) 35 S. W. 705.

[2] That the jurisdiction of the court is determined by the amount for which judgment, in good faith, is demanded in the complaint, is so well settled in this state that an enumeration of authorities on that question would not serve any useful purpose.

[3] For the reason that the alleged agreement was not in writing, it is contended that there can be no recovery. The allegation of the complaint with reference thereto is that on a certain date "said defendants entered into an agreement and contract with the plaintiff herein," etc. The authorities of this state are numerous which hold that, in an action on a contract, required by the statute of frauds to be in writing, the presumption is that the contract is in writing, and there is no necessity for an allegation in the complaint to that effect. Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567, 112 Pac. 454; Bradford Investment Co. v. Joost, 117 Cal. 204, 48 Pac. 1083; Curtiss v. Ætna Life Ins. Co., 90 Cal. 245, 27 Pac. 211, 25 Am. St. Rep. 114; Barnard v. Lloyd, 85 Cal. 131, 24 Pac. 658; McMenomy v. Talbot, 84 Cal. 279, 23 Pac. 1099; Broder v. Conklin, 77 Cal. 330, 19 Pac. 513; Nunez v. Morgan, 77 Cal. 427, 19 Pac. 753.

Moreover, it is alleged in the complaint:

> "That plaintiff, on said 3d day of February, 1922, paid to said defendants the sum of $8.80, a portion of said purchase price of said Chevrolet automobile truck, and said defendants received said sum of $8.80, a part of the purchase money of said automobile truck."

It is a general rule that under an oral contract for the sale of personal property part payment of the agreed purchase price will take the contract out of the statute of frauds. Note to the case of Driggs v. Bush (Mich.) 125 Am. St. Rep. 395, where many cases are cited. In addition thereto, we have positive declaration to like effect contained within our statute. Section 1624 of the Civil Code provides, in substance, that such oral contract is invalid "unless the buyer * * * pays at the time some part of the purchase money." And section 1739, Civil Code, contains the following:

> "No sale of personal property, or agreement to buy or sell it for a price of two hundred dollars or more, is valid, unless: * * *
>
> "(3) The buyer, at the time of sale, pays a part of the price."

[4] Assuming the allegations of the complaint to be true, the transaction between the parties amounted to a sale by the defendants to the plaintiff, notwithstanding the fact that there was only a part payment in cash, coupled with an agreement to accept another automobile as additional payment, with the balance to be paid in installments. Lambert v. McCloud, 63 Cal. 162, 164; Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 75 Pac. 564; Mansfield v. District Agricultural Ass'n, 154 Cal. 145, 97 Pac. 150.

Neither delivery to the plaintiff of the automobile in question, nor full payment thereof, was necessary to complete the sale as between the parties to the transaction. Civ. Code, § 1721; Johnson v. Dixon Farms Co., 29 Cal. App. 52, 155 Pac. 134, 136; Hamilton v. Klinke, 42 Cal. App. 426, 183 Pac. 675; Young v. New Pedrara Onyx Co., 48 Cal. App. 1, 192 Pac. 55.

It follows that the complaint states a cause of action.

Judgment reversed.

We concur: CONREY, P. J., CURTIS, J.

(61 Cal. App. 635)

SCHLITZ et al. v. THOMAS et al.
(Civ. 2571.)

(District Court of Appeal, Third District, California. April 11, 1923. Hearing Denied by Supreme Court June 7, 1923.)

1. Guaranty 🔑100, 105—Principal and surety 🔑183, 194(6½)—Subrogation 🔑21—Payment must be under compulsion to entitle guarantor or surety to reimbursement contribution, or subrogation.

To entitle a guarantor or surety to reimbursement, contribution, or subrogation on account of payments made in behalf of his principal, it must appear that such payments were made under compulsion; that is, under a legal obligation and not as a mere volunteer.

2. Subrogation 🔑21—Payment must have been under necessity to entitle payor to "subrogation."

One of the principles lying at the foundation of subrogation in equity is that the person seeking subrogation must have paid the debt under some necessity to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditors.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Subrogation.]

3. Corporations 🔑269(1)—Indorsers of corporate note suing stockholders must show legal liability for payments made.

In an action by indorsers on the note of a corporation to compel the stockholders of such corporation to reimburse plaintiffs for the amount paid, the burden is on plaintiffs to show that they were legally liable to make such payment.

4. Corporations 🔑268(5)—Stockholders sued for corporate note paid by indorsers may show under general denial that note was barred by limitations at time of payment.

In an action by indorsers of a corporate note against stockholders, to recover the amount paid by plaintiffs, the defense that the note was barred by limitations at the time of the alleged payment by indorsers need not be pleaded by defendants, but was available under a general denial; such fact, if true, being merely evidence that the payment by the indorsers was voluntary and not under necessity.

5. Corporations 🔑237—Complaint by indorsers on corporate note against stockholders states no cause of action, where showing note to have been barred by limitations.

Where a complaint by indorsers on a corporate note against stockholders disclosed that at the time the indorsers paid the note it had become barred by limitations, the complaint failed to state a cause of action.

6. Evidence 🔑73—Stockholder not paying assessment, whose name does not appear on subsequent assessment delinquent list, presumed no longer stockholder.

It is presumed that a corporation followed the law with reference to the collection of assessments against stockholders and under Civ. Code, § 333, providing that no assessment must be levied while a previous one remains unpaid, the absence of the name of a shareholder who had not paid a previous assessment from the list of delinquents under a subsequent assessment justifies the inference that the stock of such shareholder had been sold under a former assessment, or at least that the officers of the corporation so believed.

7. Corporations 🔑269(2)—In action to hold stockholders liable to indorsers paying corporate note, evidence tending to show sale of defendants' stock for nonpayment of assessments held admissible.

Where indorsers of the note of a corporation, including managing officers, sued alleged stockholders for the amount they were required to pay, and the evidence showed that many of the records had been lost or destroyed and that plaintiffs had in many respects conducted the business of the corporation in a very loose and irregular manner, a wide latitude should have been permitted in the cross-examination of the principal officers, and the exclusion on cross-examination of testimony sought to be elicited that would have tended to show that defendants' stock had been sold for nonpayment of assessments, and that certain of the plaintiffs had made admissions to that effect *held* erroneous, as was also the refusal of the court to permit defendants to prove that, after the sales of their respective shares, they made no claim and asserted no right in stock of the corporation.

8. Corporations 🔑243(7)—Irregularities in sale of stock for delinquent assessments does not preserve stockholders' liability to creditors.

Under Civ. Code, § 347, providing that no action can be sustained to recover stock sold for delinquent assessments for irregularities in such sale, unless the plaintiff pays or tenders the sum for which the same was sold, together with subsequent assessments paid thereon, and that no such action can be sustained unless commenced within six months after the sale, the fact that there had been mere irregularities in forfeiture and sale of a stockholder's share does not render the forfeiture invalid as against creditors of the corporation, where both the company and the shareholder treated the forfeiture as valid.

9. Corporations 🔑243(2)—Person whose name appears on corporate books as stockholder presumed to be such, but presumption rebuttable.

Under Const. art. 12, § 3, providing for individual liability of corporate stockholders, and Civ. Code, § 343, requiring entry of stock transfers to be made on corporate books, and section 322, making applicable the terms stockholder and member to equitable owners and to members whose names do not appear on the books, a person whose name appears on the books of the corporation is presumed to occupy that relation to the corporation which the books indicate, the entry, however, not being conclusive but presumptive, and while such person, though not the owner, may be required to respond to a creditor of the corporation, such liability is based, not upon ownership, but on grounds of estoppel to deny ownership.

10. Corporations 🔑243(10) — Circumstances stated under which there is and is not an estoppel to deny liability as stockholders.

To entitle indorsers of the note of a corporation, paid by them, to recover on the ground of estoppel, against stockholders whose names appeared as such on the books but whose shares had been sold to the corporation for nonpayment of assessments, it must appear that the indorsers knew of the admission of the relation as stockholders indicated by the books at the time they paid the note, that they did not know of the sale of the shares, and that they relied directly on such admission, and will be injured by allowing its truth to be disproved, but, where it affirmatively appears that some of the indorsers actually knew of the sale of the shares, and that the stockholders were no longer such, they could not have been misled by the stock records, since payment by them was not made in reliance on their liability, so that a necessary element of estoppel is wanting.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by John J. Schlitz and others against Ben Thomas and others. Judgment for plaintiffs, and defendants appeal. Reversed with directions.

J. W. Wiley, of Bakersfield, for appellants.
C. L. Claflin and Claflin & Lambert, all of Bakersfield, for respondents.

FINCH, P. J. The complaint alleges that at all times therein mentioned the defendants were stockholders of the Delano Creamery Company, a corporation; that on November 28, 1914, the corporation executed its promissory note to the First National Bank of Bakersfield for $8,000, due one day after date; that at the same time the plaintiffs duly indorsed such note and guaranteed the payment thereof and any renewal of the same; that on the 21st day of July, 1916, the bank commenced an action against plaintiffs and others to enforce payment of the note, and, on the 13th day of February, 1918, it was given judgment against plaintiffs and the corporation for $10,107.10; and that on the 21st day of April, 1918, the plaintiffs paid the bank $10,541.27 in full satisfaction of the judgment.

For a second cause of action it is alleged that on the 1st day of December, 1912, the corporation executed its promissory note to the First National Bank of Delano for $4,000 due one day after date; that at the same time the plaintiffs duly indorsed the note and guaranteed the payment thereof and any renewal of the same; and that on the 1st day of July, 1918, the plaintiffs, as such indorsers and guarantors, paid the last-named bank $6,189.64. The complaint alleges that this action was commenced June 23, 1919, and contains appropriate allegations as to the number of shares of subscribed capital stock and the number owned by each defendant.

The answer of defendants Thomas, McHarvey, and Clark denies the execution of the notes by the corporation and the alleged payments by plaintiffs, and further denies that defendants were stockholders at any time after February —, 1916.

The evidence shows that the notes were executed and their payment guaranteed as alleged in the complaint; that the plaintiffs paid $10,445.10 in satisfaction of the alleged judgment in April, 1918; and that, in July, 1918, the plaintiffs paid $6,189.60 in satisfaction of a judgment rendered in an action by the First National Bank of Delano against R. J. Martin and others. The complaint does not allege the rendition or the payment of any such judgment, and the evidence does not show on what liability the judgment was based or whether the plaintiffs herein were parties to the action in which the judgment was rendered. Notwithstanding this variance between the allegations of the complaint and the evidence, and the further fact that the uncontradicted evidence shows that the amount paid by plaintiffs in satisfaction of the judgment alleged in the first cause of action was $96 less than alleged, the court found for plaintiffs in accordance with the allegations of the complaint and entered judgment accordingly. Thomas, McHarvey, E. C. Clark, and Mrs. Anna M. Smith, executrix, appeal from the judgment against them.

[1-3] Appellants contend that the liability of the corporation to pay the $4,000 note had been extinguished by the statute of limitations before the alleged payment thereof by plaintiffs and that therefore the payment was voluntary and gave plaintiffs no cause of action against the defendants. This contention must be sustained. To entitle a guarantor or surety to reimbursement, contribution, or subrogation on account of payments made in behalf of his principal, it must appear that such payments were made under compulsion; that is, under a legal obligation, and not as a mere volunteer. Stone v. Hammell, 83 Cal. 547, 23 Pac. 703, 8 L. R. A. 425, 17 Am. St. Rep. 272; Machado v. Fernandez, 74 Cal. 362, 16 Pac. 19; United States Fidelity, etc., Co. v. More, 155 Cal. 415, 101 Pac. 302; Easton v. Boston Investment Co., 51 Cal. App. 246, 196 Pac. 796.

> "One of the principles lying at the foundation of subrogation in equity, in addition to the one already stated, that the person seeking this subrogation must have paid the debt, is that he must have done this under some necessity, to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditor." Ætna Life Ins. Co. v. Middleport, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537.

The burden was on the plaintiffs to show that they were legally liable to make the alleged payment. Easton v. Boston Investment Co., supra.

[4, 5] The defendants did not plead that the note was barred at the time of such payment. Plaintiffs' cause of action, if they have any, was not barred. It accrued at the time of the payment. Ryland v. Commercial, etc., Bank, 127 Cal. 525, 59 Pac. 989; Yule v. Bishop, 133 Cal. 574, 62 Pac. 68, 65 Pac. 1094. The objection here raised is not that plaintiffs' cause of action was barred but that no cause of action ever existed. The issue in this case is not whether the note was barred at the time of payment, but whether the payment was voluntary. The fact that the note was barred when paid by plaintiffs is merely evidence that the payment was voluntary. No reason appears why such evidence should have been pleaded by defendants, any more than that other evidence should have been so pleaded. Plaintiffs' second cause of action not only fails to show that the alleged payment was made under necessity, but affirmatively shows that it was made without any legal necessity. It therefore failed to state a cause of action. In Bailey v. Bussings, 29 Conn. 1, it is said that the form of action for contribution—

> "is usually that of the count in general indebitatus assumpsit for money paid, laid out, and expended, which is, for several reasons, the most advisable form of declaring in such cases; but where a special count is adopted, it in no case states merely the existence of a legal liability on the part of the defendant to contribute to the amount paid by the plaintiff, but invariably alleges the facts on which such liability arose."

In Smith v. Faris-Kesl Const. Co., 27 Idaho, 407, 430, 150 Pac. 25, 32, the court said:

> "That facts must be alleged upon which the claim to the right of subrogation is based is a rule so elementary and universal that no authorities need be cited to support it."

See, also, Ætna Ins. Co. v. Hann, 196 Ala. 234, 72 South. 48; Bond v. Montgomery, 56 Ark. 563, 20 S. W. 525, 35 Am. St. Rep. 119; Michigan City v. Marwick, 67 Ind. App. 294, 116 N. E. 434, 119 N. E. 154; Johnson v. Goldsby, 32 Mo. App. 560; First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 Atl. 333; Sherk v. First Nat. Bank (Tex. Civ. App.) 152 S. W. 832.

Appellants contend that the evidence does not support the finding that they were stockholders at the time of either alleged payment. During the year 1915 the corporation levied three assessments upon the capital stock thereof. Plaintiff John J. Schlitz testified that he had been secretary of the corporation for five or six years; that the minutes of the board of directors' meetings were written on loose sheets and laid away, "and a great many of those records were destroyed at the time my office burned in 1918"; that "none of the directors paid any attention to the creamery business except Frank, Mr. Hawley, and myself. I guess we run the whole thing for awhile." Notices of the three assessments and notices of shareholders who were delinquent in the payment of such assessments, as published in a local newspaper, were admitted in evidence. Each notice of assessment recited that such assessment had been levied at a special meeting of the board of directors, the dates of such meetings being stated as May 10th, August 21st, and December 20th, respectively in the year 1915. The first delinquency notice, after enumerating the delinquent shareholders, the number of shares owned by them respectively, and the amounts of their unpaid assessments, stated that, "in accordance with law, and an order of the board of directors made on the 17th day of June, 1915, so many shares of each parcel of such stock as may be necessary will be sold at public auction at the office of John J. Schlitz, on I street, in the town of Delano, Cal., on the 19th day of July, 1915, at the hour of 2:00 p. m. of said day, to pay said delinquent assessment thereon, together with costs of advertising and expenses of sale." The notice was signed by John J. Schlitz as secretary. The other delinquent notices were in the same form and contained similar recitals. The second notice fixed the time of sale at October 18, 1915, and the third at February 29, 1916. The names of Clark and McHarvey appear as delinquents in the first notice but not in the others. They paid no assessment. Archie Smith's name appears in the second notice but not in the last. He paid the first assessment only. Thomas paid the first two assessments but not the last. He is listed as delinquent in the last notice. Section 333 of the Civil Code provides, in so far as applicable to the facts of this case, that—

> "No assessment must be levied while any portion of a previous one remains unpaid, unless: 1. The power of the corporation has been exercised in accordance with the provisions of this article for the purpose of collecting such previous assessment."

[6, 7] It is to be presumed that the corporation followed the law, and the absence of the name of a shareholder, who had not paid one assessment, from the list of delinquents under a subsequent assessment, justifies the inference that the stock of such shareholder had been sold under the former assessment, or at least that the officers of the corporation so believed. Schlitz testified that no one appeared at any of the delinquent sales to purchase the stock of delinquent shareholders; that he and the president of the corporation were present at the times and places fixed for the sales; and that the same procedure was had in each instance. Relative to the first sale he testified:

"When the time came for the sale, I think the president, my son, was there at my office. Nothing was said about the stock being delinquent. No one was there to bid. Q. Now isn't it a fact when no one was there to bid, you said between yourselves, * * * 'There is nobody here, strike it off to the corporation,' or you let your son bid it in for the corporation at the assessment price? A. Nothing was said about that."

The attention of the witness was directed to the following question and answer in a prior examination:

"Q. You sold their stock, didn't you, and the corporation bid it in for the assessment? A. I don't know if we did or not, we did in a way; it was presumed to be sold; yes."

His examination at the trial then proceeded:

"Q. Did you make that statement or give that testimony? A. I did. This is still correct. * * * I presume there was no stock sold, there was no stock sold as far as I know, not a share to anybody. * * * Q. You as secretary and your son Frank as president took it for granted that the proceedings there amounted to a sale, is that right? A. That is the idea. * * * Q. Do you remember that during the summer of 1918, you had your office in the same room, in the Masonic Temple with Fred Waite? A. Yes, sir. Q. Do you remember a conversation during that time in the presence of yourself and Mr. Fred Waite, discussing these creamery matters generally and the various assessments, and you told him that nobody ever came to these sales, that Frank was there as president and just bought the delinquent stock in for the company?

"Mr. Claflin: Object to that as incompetent, irrelevant, and immaterial, and not proper cross-examination."

The court sustained the objection. The stock book of the corporation had been admitted in evidence on the direct examination of the witness, and he had testified concerning it:

"So far as I know, this book is the complete record of the stock ownership of this corporation."

The names of defendants appeared therein as stockholders. The question to which objection was sustained was certainly proper cross-examination and very material to defendants' case. All the plaintiffs were stockholders and several were directors. The business of the corporation had been conducted in a very loose and irregular manner. Schlitz testified that he handled "all the official conduct of the corporation." He was uncertain whether a quorum of the directors were present when the assessments were levied. Much of his testimony is wholly at variance with the facts stated in the notices which he signed and caused to be published and much more favorable to his present contentions as a plaintiff. Many of his records had been burned prior to the trial. Under all these circumstances, the defendants were entitled to the fullest latitude in cross-examining the witness. The court also refused to permit defendants to prove that after the sales of their respective shares of stock to the corporation they did not make any claim or assert any right or interest therein. This evidence was admissible as tending to show, together with the other facts stated, that both the corporation and the defendants had acquiesced in the sales of the latter's stock and had treated such sales as valid. Section 347 of the Civil Code provides:

"*Action for Recovery of Stock, and Limitation Thereof.* No action must be sustained to recover stock sold for delinquent assessments, upon the ground of irregularity in the assessment, irregularity or defect of the notice of sale, or defect or irregularity in the sale, unless the party seeking to maintain such action first pays or tenders to the corporation, or the party holding the stock sold, the sum for which the same was sold, together with all subsequent assessments which may have been paid thereon and interest on such sums from the time they were paid; and no such action must be sustained unless the same is commenced by the filing of a complaint and the issuing of a summons thereon within six months after such sale was made."

[8] More than two years had elapsed from the last sale of delinquent stock to the first alleged payment by plaintiffs. Under the provisions of section 347 the defendants had waived any rights they may have had to recover the stock. In American Well, etc., Co. v. Blakemore, 184 Cal. 343, 348, 193 Pac. 779, 781 (19 A. L. R. 1087), in discussing a similar question, the court said:

"The following quotation from Crissey v. Cook, 67 Kan. 20, 72 Pac. 541, is also pertinent: 'If the forfeiture is invalid in respect of something which the parties cannot waive, and which cannot be cured by their acquiescence, he remains liable to the company's creditors in the event of its insolvency. On the other hand, where there had been a mere irregularity in making a bona fide forfeiture within the company's powers, as by failing to give him the prescribed notice, or to pass a formal resolution of forfeiture, but only an entry to that effect on the corporate books has been made by the secretary, yet, if both the company and the shareholder treat the forfeiture as valid, it will be held as such against the company's creditors.' "

The secretary, Schlitz, testified that he did not notify the directors of any of the special meetings held by them, though it does not appear whether they were otherwise notified. It also appears that he assumed authority to publish the delinquent notices without having been formally authorized to do so by the directors. A corporation, however, is presumed to have knowledge of the acts of its president and secretary in the conduct of its business. The corporation and the defendants treated the assessments and sales as as valid and any irregularities therein must be deemed to have been waived. Whether or not the evidence was such as to require a finding that defendants were not stockholders at the time of the alleged payments by plaintiffs, the exclusion of the offered testimony was prejudicial error.

[9] Respondents contend that, if it be conceded that the corporation purchased defendants' stock at the delinquent sales, the defendants are still liable by reason of the fact that no entry of the transfer was made on the books of the corporation as required by section 343 of the Civil Code. Section 3, art. 12, of the Constitution, provides:

> "Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, or shares of the corporation or association."

Section 322 of the Civil Code as amended by St. 1917, p. 786, contains similar provisions and provides:

> "The terms 'stockholder' and 'member,' as used in this section, applies not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock or of a membership, although the same appears on the books in the name of another."

Where the name of a person appears as a stockholder on the books of the corporation—

> "the presumption is that he occupies the relation to the corporation which the books indicate. The entry is, however, not conclusive, but presumptive merely." Welch v. Gillelen, 147 Cal. 571, 575, 82 Pac. 248, 249; Nat. Bank, etc., v. Western Pac. Ry. Co., 157 Cal. 573, 108 Pac. 676, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391; Shean v. Cook, 180 Cal. 92, 179 Pac. 185, 5 A. L. R. 1042; Realty & Rebuilding Co. v. Rea, 184 Cal. 565, 194 Pac. 1024.

While such person—

> "though not the owner, may be required to respond to a creditor of the corporation, such liability is based, not upon ownership, but upon grounds of estoppel to deny ownership." Hughes Mfg., etc., Co. v. Wilcox, 13 Cal. App. 22, 28, 108 Pac. 871, 873.

[10] The presence of a person's name on the books of a corporation as a stockholder is in the nature of a declaration or admission that he is such. To entitle plaintiffs to recover on the grounds of estoppel, it must appear that they knew of such admission at the time of payment, otherwise they could not have been misled by it (Shean v. Cook, supra), that they were without knowledge of the sales to the corporation (Boggs v. Merced M. Co., 14 Cal. 279), and that they "relied directly upon such admission, and will be injured by allowing its truth to be disproved" (Boggs v. Merced Min. Co., supra; Bowman v. Cudworth, 31 Cal. 148; Lux v. Haggin, 69 Cal. 255, 266, 4 Pac. 919, 10 Pac. 674; Conway v. Supreme Council, 137 Cal. 384, 70 Pac. 223; Williams v. Williams, 170 Cal. 625, 151 Pac. 10; Frank v. Crescent Wharf & Warehouse Co., 50 Cal. App. 272, 195 Pac. 79). It affirmatively appears that some of the plaintiffs had actual knowledge of the sales and therefore could not have been misled by the stock records. None of the plaintiffs suffered any injury from the failure to enter the transfers on the books. They extended no credit in reliance on the book entries. Any payments made by them, which created a liability against the stockholders, were not made in reliance upon the presumption that the defendants were stockholders, but in the discharge of the obligation they assumed when they became guarantors. Knowledge on their part of the true ownership of the stock would not have enabled them to escape any part of that obligation, and therefore a necessary element of estoppel is wanting.

The judgment appealed from is reversed, with directions to the trial court to permit the plaintiffs to amend their complaint, if so advised.

We concur: BURNETT, J.; HART, J.

62 Cal. App. 11

KERSHAW v. MADSEN. (Civ. 4523.)

(District Court of Appeal, First District, Division 1, California. April 30, 1923.)

1. Witnesses 🔑195—Declarations to plaintiff by his deceased wife during marriage held inadmissible in action to establish trust in real property.

In an action seeking to establish and enforce an implied trust in real property conveyed to defendant by plaintiff's deceased wife, who had previously been defendant's ward, evidence as to declarations made to plaintiff by his deceased wife during the existence of their marriage relation as to her intent in making the conveyance was properly excluded, under Code Civ. Proc. § 1881, subd. 1, forbidding either husband or wife, without consent of the other, to be examined as to any communication made by one to the other during the marriage.

2. Evidence 🔑271(15)—Declarations to third persons by grantor in deed held inadmissible as self-serving.

Where plaintiff's deceased wife, who had previously been a ward of defendant, had, after the guardianship terminated, transferred real property to defendant, declarations by such wife to persons other than her husband or defendant, and not in defendant's presence, as to her intent in making the deed were inadmissible as self-serving in an action to establish a trust in the property conveyed.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by George Kershaw against Martin Madsen, to establish a trust and compel a conveyance. Judgment for defendant, and plaintiff appeals. Affirmed.

Everts, Ewing & Wild, J. R. Fitch, O. O. Collins, and Collins & Collins, all of Fresno, for appellant.

Lindsay & Conley, of Fresno, for respondent.

RICHARDS, J. This appeal is from a judgment in the defendant's favor in an action instituted by said plaintiff to have it adjudged that a certain deed executed and delivered by one Anna Gothea Nielsen to the defendant Martin Madsen on July 3, 1907, was given without consideration and in trust for certain purposes, and while a confidential relationship existed between the parties to such conveyance, from which facts an implied trust is alleged to have arisen which the plaintiff seeks to have enforced by the court in decreeing a conveyance of the premises described in said deed from the defendant to the plaintiff as the sole heir of the grantor in said deed. There are certain admitted facts shown in the record which may be recited in order to clarify the matters in dispute between the parties to this appeal.

In the year 1891 Hans Nielsen, the father of Anna Gothea Nielsen, being about to die, made a will devising to his said daughter, then a child of three years of age, his whole estate, consisting of 40 acres of land in the county of Fresno, together with certain personal property of the value of about $3,000. By the terms of said will he nominated his friend Martin Madsen to be the executor thereof and the guardian of his said child. Upon his death the defendant qualified as such executor and guardian, and proceeded to administer the estate, both as such executor and guardian, until the year 1906, when, his ward, Anna, becoming of age, he rendered his final accounts, which being settled decrees of distribution and of his discharge as such guardian were duly made, and the property, both real and personal, was delivered over to his former ward. In the meantime his said ward, shortly after her father's death, had been taken to Copenhagen, Denmark, where she lived with her grandmother until she was of the age of 16 years, when she returned to California and became an inmate of the home of her said guardian, being treated by himself and his wife as one of their own children. In the year 1907 Anna Gothea Nielsen, being then 19 years of age, and wishing to return to Copenhagen upon a visit to her friends and relatives there, sought to sell and dispose of the 40-acre piece of land which she had inherited from her father, and of which for a year or so she had been in possession under said decree of distribution, in order to cover the expenses of her projected visit. She inquired of a real estate agent as to its value, and consulted with Martin Madsen and his wife as to its sale. The agent informed her that it was of the value of between $4,000 and $5,000. The result of these conferences was a conveyance of the land by her to Madsen by a deed absolute in form, the said conveyance being drawn by F. E. Cook, Esq., an attorney of Fresno, at her request, and being executed in his presence. The consideration expressed in said deed was $10, but the defendant testified that the actual consideration therefor was $4,500, which was paid by him partly at that time and by later remittances. The grantor in said deed shortly thereafter took her departure to Europe, remaining there about three years, when she again returned to California, and a year later, or in 1911, was married to George Kershaw, the plaintiff herein, going to live with him in Oakland temporarily, but in December, 1912, returning to the household of the defendant Madsen, where she remained as a member thereof until the year 1918, during much of which time her husband, the plaintiff herein, also lived with her in said household. In the latter year she went to live with her husband in an apartment in the city of Fresno, where in the year 1920 she died intestate, leaving her husband, the plaintiff herein, as her sole heir. During her lifetime, subsequent to the date of said conveyance, the said Anna Gothea Nielsen instituted no proceeding to set aside the same, and is not shown to have claimed or asserted to the defendant that he held the title to said premises in trust for her benefit, but it is claimed by the plaintiff herein that upon several occasions after the making of said deed she had asserted to the plaintiff and to others that the deed in question was a trust deed, made for the purpose of enabling the defendant to manage the premises described therein as her trustee and for her benefit, which testimony of the plaintiff the trial court, however, declined to admit in evidence upon the trial of the cause. The trial court made its findings of fact and conclusions of law wherein it found that the averments of the plaintiff's complaint, to the effect that, at the time of the execution of said deed, and for a long time prior thereto the said defendant had exercised parental authority or control over the said Anna Gothea Nielsen, or that she was under the control of said defendant in business matters, was untrue and that it was also untrue that the said defendant had proposed to the said Anna Gothea Nielsen that she should convey said property to him so that he could manage it or carry on her business affairs for her benefit. The court further found:

> "That on the 3d day of July, 1907, for a valuable consideration passing from said defendant Martin Madsen to said Anna Gothea Nielsen, the said Anna Gothea Nielsen, freely, and of her own volition, and not acting under duress, menace, fraud, or undue influence, or any influence of any kind, character, or description, either exercised by the defendant Martin Madsen, or by any other person or persons whatever, made, executed, and delivered the said deed and instrument in writing, which said deed is accurately described and set out in full in plaintiff's complaint, to the defendant Martin Madsen, and that thereupon the defendant Martin Madsen became, ever since has been, and now is the owner of the said real property described in said deed, in fee simple absolute."

The court further found that the cause of action was barred by the statute of limitations. Judgment was accordingly entered in the defendant's favor, and it is from said judgment that this appeal has been taken.

[1] The first contention which the plaintiff makes upon this appeal is that the trial court was in error in excluding from the evidence herein the declarations of the grantor in said deed made to her husband and to other persons as to the purpose and effect of said deed, and as to her intention in the execution and delivery of the same to the defendant. As to the declarations which the plaintiff asserted that his deceased wife had made to him during the existence of their marriage relation touching the subject of her understanding and intent in the making and delivery of said deed, it would seem to be a sufficient answer to the plaintiff's offer of these declarations in evidence to refer to that portion of subdivision 1 of section 1881 of the Code of Civil Procedure which reads as follows:

> "A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage."

The authorities fully uphold the respondent's objection to this class of evidence under the foregoing provision of the Code. Humphrey v. Pope, 1 Cal. App. 374, 82 Pac. 223; Falk v. Wittram, 120 Cal. 479, 52 Pac. 707, 65 Am. St. Rep. 184; Emmons v. Barton, 109 Cal. 662, 42 Pac. 303.

[2] As to the declarations of the grantor in said deed, claimed to have been made by Anna Gothea Nielsen to other persons than her husband or the defendant herein, and not in the latter's presence, it would seem equally clear that these self-serving declarations of the deceased grantor in said deed, made a considerable time after the execution and delivery thereof to the defendant, were inadmissible in evidence. The appellant in urging their admissibility relies upon the cases of Williams v. Kidd, 170 Cal. 631, 151 Pac. 1, Ann. Cas. 1916E, 703; Sprague v. Walton, 145 Cal. 228, 78 Pac. 645; Donahue v. Sweeney, 171 Cal. 391, 153 Pac. 708; Fisher v. Oliver, 174 Cal. 781, 164 Pac. 800; Rice v. Carey, 170 Cal. 753, 151 Pac. 135. In each of these cases, however, the question before the trial court related to the execution or nonexecution and delivery or nondelivery of the instrument in question, and the Supreme Court in each case, in deciding that the declarations, acts, and conduct of the grantor subsequent to the alleged execution or delivery of the document were admissible as bearing upon the intent of the grantor to execute or to deliver the instrument was careful to limit such evidence to these purposes, and to declare that the rule thus laid down was not in conflict with the general rule otherwise reaffirmed that the declarations, acts, and conduct of a grantor, made after he has parted with his title and in disparagement of it, are inadmissible. This is particularly emphasized in Fisher v. Oliver, supra, in which the earlier cases are reviewed, and the case of Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186, which lays down the general doctrine is expressly affirmed. Other cases reaffirming the doctrine declared in Bury v. Young are Ord v. Ord, 99 Cal. 523, 34 Pac. 83; Hyde v. Buckner, 108 Cal. 522, 41 Pac. 416; Emmons v. Barton, supra; Smith v. Mason, 122 Cal. 426, 55 Pac. 143; Bollinger v. Bollinger, 154 Cal. 695, 99 Pac. 196. We conclude that the trial court was not in error in refusing to admit in evidence the declarations of the grantor of this conveyance after the date of its admitted execution and delivery to the defendant herein in disparagement of the title therein conveyed by her.

The appellant's next and final contention is that the evidence in the case is insufficient to sustain the findings of the trial court that it was not true that during the period immediately preceding or attending the making and delivery of the deed in question the defendant exercised parental authority and control of Anna Gothea Nielson, or that she was then under the control of said defendant in business matters, and also the further finding of the trial court that the said conveyance from Anna Gothea Nielsen to the defendant made on July 3, 1907, was for a valuable consideration, and was made, executed, and delivered by her freely and of her own volition, and not acting under duress, menace, fraud, or undue influence, and that the defendant thereby became the owner of the property therein conveyed in fee simple absolute. We have carefully examined the entire evidence in the case bearing upon these contentions, and, while it is true, as shown by the practically uncontradicted evidence of all of the parties concerned, that there existed between the defendant and Anna Gothea Nielsen, at all times from her early childhood and up to the time of her death, a most cordial and affectionate relation approaching the relation of parent and child, and that said relation was at times, and especially during the period of the defendant's service as executor of her father's estate and as guardian of her person and estate, confidential in the highest degree, there is no sufficient evidence that this relation was taken advantage of by the defendant, or that the feelings of trust and confidence and deserved affection uniformly held by the said Anna Gothea Nielsen toward the defendant during all her life were violated by him in this or any other transaction between them. As to the particular transaction under review upon this appeal, there is sufficient evidence to fully sustain the latter finding of the trial court above referred to as to the adequacy of the consideration for said conveyance, as to its payment and as to the freedom of the transaction from any unfairness or undue influence practiced by the defendant or any member of his household upon the said Anna Gothea Nielsen, and affecting the making, execution and delivery of her said deed. The trial court committed no error or abuse of discretion in resolving whatever conflicts there were in the evidence touching this subject in the defendant's favor. The evidence sustains the findings. The findings support the judgment, and the judgment therefore should be, and is hereby, affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

61 Cal. App. 478

PEOPLE v. BROWN. (Cr. 958.)

(District Court of Appeal, Second District, Division 1. California. April 24, 1923.)

1. Criminal law 🔑507(7)—Denial of instruction on law of accomplice testimony in prosecution for pandering held not error.

In a prosecution for pandering where conviction was sought to be sustained on testimony of the woman influenced, *held*, that it was not error to deny a charge on the law of accomplice testimony, since such woman could not have been an accomplice in the crime of inducing and persuading herself to become an inmate of a house of prostitution.

2. Prostitution 🔑4—Officers' testimony held to establish defendant's place house of prostitution.

In prosecution for pandering, testimony of police officers *held* sufficient to establish the house under defendant's control a house of prostitution, nor did the fact that such officers' knowledge was obtained in course of official duties rather than by general inquiry render it inadmissible.

3. Criminal law 🔑539(1)—Court's discretion in permitting reading in evidence of absent witnesses' testimony held not abused.

In prosecution for pandering, evidence *held* insufficient to show an abuse of discretion by the court in determining that due diligence has been used in searching for a witness, so as to warrant the reading in evidence of her testimony taken before a committing magistrate as allowed by Pen. Code, § 686.

4. Criminal law 🔑736(1)—Whether diligence exercised to find witness within state question of fact for trial judge.

Whether due diligence has been had in efforts to find witness within state is question of fact for trial court, whose determination will not be interfered with except where discretion abused.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Mason Brown was convicted of pandering, and he appeals. Affirmed.

Stanley A. Visel and W. W. Judd, both of Los Angeles, and C. L. Bogue, of San Pedro, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., and Lorrin Andrews, of Los Angeles, for the People.

CONREY, P. J. The information in this action was in four counts, each charging a separate crime. The defendant was found guilty on the first count alone, wherein he was accused of the crime of pandering in that on or about the 19th day of May, 1922, he did willfully and feloniously procure a female, a certain Mrs. Lundy, and feloniously did induce, persuade, and encourage said Mrs. Lundy to become an inmate of a house of prostitution. The defendant appeals from the judgment and from an order denying his motion for a new trial.

The evidence relied upon by the prosecution consisted principally of the testimony of Mrs. Lundy and of several police officers. The errors claimed and relied upon by appellant are as follows:

(1) That the court erred in refusing to instruct the jury, as requested by the defendant, concerning the manner in which the testimony of an accomplice is to be regarded, and concerning the corroboration required in order to authorize a conviction based upon the testimony of an accomplice.

(2) That if the jury found as a matter of fact that Mrs. Lundy was an accomplice, her testimony was not sufficiently corroborated.

(3) That the proof that the hotel where, according to the testimony, the offense was

committed, was a house of ill fame or prostitution, was not sufficient as a matter of law.

(4) That the court erred in permitting the deposition of Mrs. Lundy to be received in evidence over the objection of the appellant that no proper foundation had been laid.

(5) That the court refused to give a number of proper instructions offered by the defense. (This fifth point will be passed without discussion, because not supported by argument in the brief for appellant.)

The crime of pandering, as defined in the statute, may be committed in several ways. It includes the case where any person shall "induce, persuade or encourage a female person to become an inmate of a house of prostitution, or shall procure for a female person a place as inmate in a house of prostitution, or as an inmate of any place in which prostitution is encouraged or allowed." Stats. 1911, p. 9; Deering's Gen. Laws (1915 Ed.) Act 865.

> "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Pen. Code, § 1111.

The last sentence of this section of the Code was added thereto by amendment in the year 1915 (Laws 1915, p. 760).

In support of his contention that Mrs. Lundy by her testimony placed herself in the position of an accomplice to the alleged crime, appellant sets out in his brief that part of her testimony which he deems pertinent to the question. The evidence shows that the house known as the Rex Hotel, at San Pedro, was under the personal management and conduct of the defendant. Mrs. Lundy testified that on the night of May 17, 1922, she went to this house, where she remained for about three days; that she had arrived in town that day and went to this hotel because she could not get any other room in the town; that she did not go there for the purpose of prostitution. Questioned as to the reason why she thereafter conducted herself as stated in the testimony she said:

> "Well, Mr. Brown's proposition to me that there was good money in the house, and I was not planning on staying here very long, and I just figured that I could get a few new clothes while I was there."

She gave further testimony which, if true, shows that pursuant to the suggestions of defendant, she engaged in the business of prostitution and received the visits of several men who were sent to her room by the defendant. But on the third night of her stay there the supposed customer proved to be a police officer, who was assisted by two other officers who previously had hidden themselves in the room. After he had paid her, and she had accepted, marked money for the stated purpose, Mrs. Lundy was arrested; whereby that episode was closed.

[1] Viewed simply upon the facts, and the nature of the transaction described, it at first seems plain enough that Mrs. Lundy could not be an accomplice in the crime of pandering in a case where the pandering as charged consisted of the inducing, persuading, and encouraging of herself to become an inmate of a house of prostitution. To understand the argument for appellant one must consider the definition of an "accomplice" according to section 1111, together with section 31 of the Penal Code, which states what persons are principals in the commission of a crime. If there appears, among other things, that all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, are principals. So it is argued that, according to the testimony of Mrs. Lundy, she was not a victim, but voluntarily co-operated with the defendant in the very act of inducing or encouraging herself to be and remain in the house for the stated purpose; that thereby she aided and abetted the defendant in his reciprocal act of inducing or encouraging her in the described conduct.

The leading case relied upon by appellant is People v. Coffey, 161 Cal. 446, 119 Pac. 901, 39 L. R. A. (N. S.) 704. That was a case wherein the defendant was charged with the reception of a bribe, and it was contended that his conviction was obtained in violation of law upon the uncorroborated testimony of a self-confessed accomplice in the asserted crime. The judgment was reversed on the ground that the testimony of that person was not corroborated as required by law. The person so considered as an accomplice was one who, according to his testimony, had acted as an intermediary between the giver and the receiver of the bribe. The Supreme Court held that the lower court erred when it instructed the jury that upon the question whether one is an accomplice in the commission of a crime "the final test of the question as applied to a witness in any case is, could such witness lawfully be indicted with the defendant for the offense on trial? If so, he is an accomplice within the meaning of the law. If not, he is not, and the man who gives or offers a bribe is not for that reason an accomplice of the one who receives or agrees to receive a bribe." It is significant that the decision in People v. Coffey, supra, was soon followed by the amendment of section 1111 of the Penal Code, which amendment we have quoted. Manifestly, it was by that amendment, intended to place it beyond doubt that the rule requiring corroboration of the testimony of an accomplice as specified in that section is limited to cases where there is evidence which, if true, classifies the witness as one "liable to prosecution for the identical offense charged against the defendant on trial."

The offense charged against appellant Brown is one which could be committed by one person, without participation of another person in the act by which the crime was perpetrated. In this it differs from bribery, prostitution, and various other crimes. It involves an absurdity, contrary to good sense to say that, under the evidence in this case, Mrs. Lundy "induced, persuaded and encouraged" Mrs. Lundy to become an inmate of defendant's house, and thereby could have been held guilty of pandering, because she cooperated with the defendant when he "induced, persuaded and encouraged" her to become such inmate. In our opinion the court did not err in refusing to give the requested instructions relating to the corroboration required, of the testimony of an accomplice.

[2] The evidence that the Rex Hotel, while under the management and control of the defendant, was a house of prostitution, is sufficient. Several witnesses testified that they knew the reputation of the house and that it was reputed to be a house of that character. People v. De Martini, 25 Cal. App. 9, 142 Pac. 898. The fact that these witnesses were police officers and that their knowledge of the reputation of the house had been obtained by them in the course of their official duties—including conversations with several persons—rather than by more general inquiry, did not make their testimony inadmissible.

[3] The testimony of Mrs. Lundy, taken before the committing magistrate, was read in evidence, as permitted by section 686 of the Penal Code, after preliminary evidence had been received which the court held to be sufficient to establish the fact that the said Mrs. Lundy could not with due diligence be found within this state. It was shown by the testimony of Mrs. Spinner that in June, 1922, Mrs. Lundy resided for a short time at the house of Mrs. Spinner, and then went to San Francisco. From a stated address at that city on the 19th of June, she wrote a letter to Mrs. Spinner. In this case a subpœna was sent to the sheriff at San Francisco, who made return that Mrs. Lundy had left said address "five months ago without paying her rent. Very bad tenant, always in trouble. Her husband is a marine in the navy, now at Mare Island, Vallejo, California." Various other efforts were made to find the witness, but without success.

[4] Under all the facts proved concerning Mrs. Lundy, we cannot say that the court abused its discretion in determining that due diligence had been used in searching for her, notwithstanding that there is no evidence that any inquiry was directed to her husband for the purpose of finding her. The ordinary presumption that a husband will know where his wife is living had become very unsubstantial in this instance. The question as to whether it is satisfactorily shown that a witness cannot with due diligence be found within the state is a question of fact that is addressed to the trial court, to be determined by it from evidence introduced before it, "and with the determination of that question of fact by the trial court, this court will not interfere, unless the evidence thereof is such as to satisfy the court that the trial court abused the discretion confided to it in holding that due diligence had been used, and that the witness could not be found." People v. Lewandowski, 143 Cal. 574, 77 Pac. 467; People v. Trent, 25 Cal. App. 740, 145 Pac. 541.

Finally, we are compelled to say that our examination of the entire record in this case satisfies us that the verdict is well sustained by the evidence and that in the conviction of the defendant there has been no miscarriage of justice.

The judgment and order are affirmed.

We concur: HOUSER, J.; CURTIS, J.

---

62 Cal. App. 56

JACKSON v. SNOW et al. (Civ. 4491.)

(District Court of Appeal, First District, Division 2, California. May 1, 1923.)

1. Appeal and error ⟹883—Objection to introduction of oral testimony concerning written contract held not available after counsel had agreed to its introduction.

Where at the opening of trial counsel have agreed that oral testimony might be received for the purpose of explaining an apparent ambiguity in a written contract, and where testimony has been received without objection, the objection cannot thereafter be made to the introduction of further oral testimony nor prejudice predicated on the overruling of such objection.

2. Vendor and purchaser ⟹62—Clauses of contract for conveying realty relating to restrictions, reservations, easements, and incumbrances held not repugnant to each other; "incumbrances."

Under Civ. Code, §§ 1641, 1645, 1649, and 1651, a provision of a contract for the conveyance of realty "subject to conditions, restrictions, reservations and easements now of record," *held* not repugnant to a subsequent clause stating that the property was "free and clear from all incumbrances whatsoever, except as otherwise herein expressly provided for, to wit, 1921–22 taxes," the term "incumbrances" as used by laymen relating to something that is a lien upon the property which requires the payment of money to discharge, and not generally referring to a restriction, reservation, right of way, or other easement.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Incumbrance (on title).]

3. Specific performance ⚷126(2)—Objection to judgment as requiring assumption of mortgage by purchaser of realty held without merit.

Objection to a judgment requiring specific performance of a contract to purchase realty, on the ground that it required defendant to assume a mortgage on the property, *held* without merit where the contract itself provided that the property was to be conveyed free and clear from all incumbrances whatsoever, except certain taxes and restrictions and reservations then of record.

4. New trial ⚷140(1)—Affidavits in support of motion for new trial held to disclose bad faith and warrant denial.

Affidavits filed in support of a motion for a new trial, after judgment requiring specific performance by the purchaser of a contract to convey realty, *held* to plainly establish bad faith and warrant denial of such motion.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by D. Ripley Jackson against Pearl E. Snow and the Title Insurance & Trust Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Frank Bryant, of Los Angeles, for appellant Snow.

Chas. H. Brock, J. N. Hastings, and Earl E. Johnson, all of Los Angeles, for appellant Title Insurance & Trust Co.

I. Henry Harris, of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued to enforce specific performance of the sale of real property. The plaintiff alleged that on the 13th day of September, 1921, plaintiff and the defendant Snow entered into a written contract, which is attached as an exhibit to the complaint and is designated as a "sales deposit receipt." This receipt recited that plaintiff's agents had received from the defendant Snow the sum of $1,650 as a deposit and part payment on the purchase price of the real property "subject to conditions, restrictions, reservations, and easements now of record." The contract recited that the full purchase price was $11,000, $5,500, including the amount therein receipted for, being payable upon the execution and delivery of deed, together with a guaranteed certificate of title showing title to said property to be in said owner "free and clear of all incumbrances whatsoever, except as otherwise herein expressly provided for, to wit. 1921–1922 taxes." The complaint further alleged that the plaintiff had performed all the terms required of him under the contract, but that the defendant had refused to accept the property, and had repudiated the contract. It was also alleged that the property included in the contract was worth the sum of $11,000, and not less, and that the transfer of said property was an adequate consideration for the payment of the moneys agreed to be paid by the purchaser; that the contract as to the defendant Snow was in all respects just and reasonable, and was not obtained by any misrepresentation, concealment or unfair practices; and that the assent of neither party was obtained under influence of mistake, misapprehension, or surprise. The prayer called for a decree compelling the defendant Snow to carry out the terms of the contract and compelling the defendant Title Insurance & Trust Company to pay over to the plaintiff the sum of $1,650, which had been deposited with it in escrow as part of the first payment under the contract. Each defendant filed a separate answer. That of the defendant Snow admitted all the material allegations of plaintiff's complaint excepting those relating to plaintiffs being ready and able to transfer said property free from defect in title, or that plaintiff otherwise performed or substantially fulfilled the terms of his contract. By way of separate defense it was alleged that certain restrictions, conditions, and reservations stood of record against said property contained in the deeds of conveyance through which the plaintiff deraigned title as follows: A restriction prohibiting the sale of intoxicating liquor upon the property, one prohibiting the erection of a building within less than 30 feet from the front line thereof, and one prohibiting the erection of a building thereon less than $1,000 in value except on the rear of the lot. By way of cross-complaint the same defendant set forth these restrictions as constituting a material defect against the title to the property, and alleged that without said restrictions said property would be reasonably worth the sum of $16,000; that the purchase price thereof fixed in said contract was $11,000; and that by reason of plaintiff's failure to convey the property free from such restrictions said defendant had been damaged in the sum of $5,000. A demurrer to this cross-complaint was sustained and the amended answer of the defendant Snow was filed, omitting all reference to the cross-complaint and claim for damages and praying merely for the return of the sum of $1,650 which had been deposited in escrow as part of the first payment. At the same time an amended cross-complaint was filed which contained the same allegations relating to the value of the property which appeared in the original answer and cross-complaint and prayed for damages in the sum of $5,000 in addition to the return of the original deposit.

The case was tried upon these pleadings, and findings were made that by virtue of the contract of the parties it was understood and agreed that the defendant Snow purchased said property subject to the condition, restrictions, and easements then of record, and subject to 1921–1922 taxes; that the plaintiff was always ready, willing, and able to perform his part of the contract, but that the defendant had violated her contract and declined and refused to accept the property subject to the conditions and restrictions of record as agreed in said contract; that the allegations of the cross-complaint were not true; and that there were no defects in the title of said property other than such defects as the defendant Snow agreed to accept. Judgment was rendered in favor of the plaintiff, commanding the defendant Snow to perform the terms of her contract, and commanding the defendant Title Insurance & Trust Company to pay to the plaintiff the sum of $1,650 less any sum due it from the plaintiff under the escrow agreement. Both defendants have appealed from the judgment.

The appeal of the appellant Title Insurance & Trust Company does not require separate consideration. Its appeal was taken under the provisions of section 953a of the Code of Civil Procedure and is presented to this court with nothing more than a recital of the findings of fact and conclusions of law made by the trial court and a statement by the appellant that it has no interest in the litigation other than as an escrow agent and in maintaining the status quo of the escrow until a final judgment is obtained defining the rights of the respective parties. It could have reached this same result by depositing the money in court at the time of the trial of the action, and thus saved the parties some unnecessary expense.

The appeal of the appellant Snow presents three grounds for consideration: (1) That the admission of oral testimony to explain the written contract was error; (2) that the judgment entered was for an excessive amount in that there was an outstanding mortgage upon the property for $2,500 which this appellant will be required to assume in addition to the payment of $11,000 which was the agreed price for the property; (3) that this appellant was entitled to a new trial on the showing made on the hearing of her motion in the trial court.

[1] 1. Upon the first point the argument is that, where part of a contract is written and part printed and the written and printed parts are inconsistent, the words in writing will control the construction, and oral evidence to explain the intention of the parties is not admissible. At the opening of the trial, counsel for respondent made an oral statement of the case in which it was said that the only issue before the court was whether the language of the written contract, "showing title to said property to be in the said owner free and clear of all incumbrances whatsoever, except as otherwise herein expressly provided for, to wit, 1921–1922 taxes" ("1921–1922 taxes" of the portion quoted being written in the contract and the remainder thereof being printed), controlled the other printed portion of the contract which read "subject to conditions, restrictions, reservations and easements now of record." As to what then occurred, we quote from the reporter's transcript:

> "The Court: Well, that is an ambiguity that will call for oral testimony to explain. Mr. Harris: Yes, sir. The Court: You concur, gentlemen for the defense, in that statement as being substantially the issue involved? Mr. Landreth: I am representing the real defendant [Snow], and that is substantially the case, the ambiguity which will be explained by oral testimony, or, after the actual receipt is before the court, by the examination of the actual written instrument and the rules of construction."

Thereafter respondent produced a witness who testified that before the property was offered for sale the auctioneer announced in the presence of all the prospective bidders that the property would be sold subject to the restrictions and reservations of record and the taxes for 1921–1922. This testimony was all received without objection. Other witnesses were called and testified to the same effect, and then for the first time counsel for appellant interposed the objection that the written contract embodied all the terms of the agreement and that the oral testimony was improper. Having agreed at the opening of the trial that oral testimony might be received for that purpose, and having permitted the testimony of the witness O'Connor to be given without objection, this appellant cannot claim prejudice in the overruling of his objection to the introduction of the testimony of other witnesses which was merely cumulative.

[2] We find no error in the trial court's construction of the contract. The language "subject to conditions, restrictions, reservations, and easements now of record" is in no wise repugnant to the language "free and clear of all incumbrances whatsoever except as otherwise herein expressly provided for, to wit, 1921–1922 taxes." Though it is true that, in the legal sense, restrictions, reservations, and easements are treated as incumbrances upon realty, it is likewise true that such is not the common or ordinary use of the term by the layman. The common use of the term "incumbrances" by the layman relates to something that is a lien upon the property which requires the payment of money to discharge. It is scarcely, if ever, used in reference to a restriction, reservation, right of way, or other easement. It is a cardinal rule of construction of all contracts that the court

should ascertain the intention of the parties where this is possible. For this purpose the whole contract is taken together so as to give effect to every part (section 1641, Civ. Code), and technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense. Section 1645, Civ. Code. If the terms of a promise are in any respect ambiguous or uncertain, then the contract must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it. Section 1649, Civ. Code. It is only in a case where the written portion of a contract is "absolutely repugnant" to the printed portion that the latter must be disregarded. Section 1651, Civ. Code.

All the evidence received in this case shows beyond a doubt that when the contract was executed the parties intended that the sale was made subject to all conditions, restrictions, reservations, and easements then of record. The contract was executed in the office of this appellant's husband, who was then employed in the trust department of the Title Company and was a man experienced in the examination and preparation of contracts of this nature. According to his own testimony, he conceived the idea that the writing "1921–1922 taxes" would support the contention that the printed portion of the contract relating to restrictions, reservations, and easements might be disregarded. He so advised his wife, and, acting upon his advice, she repudiated the contract, though at the time of the trial she failed to appear, and offered no evidence to aid the court in arriving at the intention of the parties at the time of the execution of the contract. In accordance with the sections of the Code above cited the trial court properly construed the contract to mean that the property was taken subject to the conditions, restrictions, reservations, and easements then of record, and that such was the intention of the parties at the time of its execution.

[3] 2. The second point raised by this appellant is wholly without merit. In the first place, there is no evidence in the record that a mortgage of $2,500, or in any other sum, was outstanding at the time of the trial; but if such be the case, this appellant is fully protected by the judgment, which provides that the payments required of this appellant are to be made only upon the tender to her by the respondent of a guaranteed certificate of title showing title to said property to be in respondent free and clear of all incumbrances whatsoever except 1921–1922 taxes, and conditions, restrictions, reservations, and easements then of record. This plainly requires the respondent to clear the title of any mortgages outstanding against the property.

[4] 3. The affidavits filed by this appellant on her motion for a new trial disclose a state of facts which plainly indicates that her entire action in this proceeding was taken in bad faith. Her own affidavit alleged that she was sick at the time of the trial and was unable to be present in court, but it appears from the record that no request for a continuance of the trial had been made. She also alleged that she was present at all times and within reasonable distance from the auctioneer and heard his statements, but that at no time did the auctioneer state or announce that the property would be taken subject to any conditions, restrictions, reservations, or easements whatsoever. This, of course, was merely contradictory of the testimony of the four witnesses who testified at the request of the respondent that such announcement had been made by the auctioneer. The other affidavits presented upon this motion merely set before the court matters of questionable legal advice which had been given to the appellant. She was, however, represented in court on the day of the trial by her counsel who was not prevented from protecting her interests, and it does not appear that she was in any way prejudiced by any advice which she had received from others. In her cross-complaint she alleged that the restrictions relating to the use and occupation of the property materially affected the value thereof, that without said restrictions such property would be reasonably worth the sum of $16,000, while with said restrictions it was not reasonably worth more than $11,000. Upon this allegation she prayed for damages in the sum of $5,000 for the failure of respondent to convey the property to her without said restrictions. This in itself was sufficient to satisfy the trial court that this appellant was not defending the action in good faith; that her claim relating to the construction of the contract was purely technical, because, if the property was worth $11,000 with the restrictions, she was getting just what she bargained for, whereas if she had knowledge of the restrictions and executed the contract with the intention that the respondent should be required to remove them, she was taking an undue and unfair advantage of the respondent, because she must have known either that they could not be removed or that, if removed, the value of the property would be enhanced to her profit to the extent of $5,000. All these circumstances so plainly disclosed the bad faith on the part of this appellant that the trial court was fully justified in denying her motion for a new trial.

The judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

61 Cal. App. 791

ROCKRIDGE PLACE CO. v. CITY OF OAKLAND. (Civ. 4465.)

(District Court of Appeal, First District, Division 1, California. April 27, 1923. Hearing Denied by Supreme Court June 25, 1923.)

1. Eminent domain 🔑280—Property owner by petitioning for grading of street does not thereby waive or estop himself from asserting right to damages.

A property owner, by joining in a written petition to a city council requesting it to grade a public street abutting on his property to the official grade, does not thereby waive his rights or estop himself from asserting his rights to demand compensation for the damages caused by such grading.

2. Eminent domain 🔑266—Failure of property owner to pursue particular remedy for injuries from grading of street does not preclude pursuit of other remedy.

A property owner suffering damages by reason of the grading of a street has a right either to enjoin or to sue for damages, and his failure to avail himself of one of these rights has no effect upon his pursuit of the other.

3. Eminent domain 🔑280—Does not exist where property owner seeks enforcement of constitutional right to recover damages to property.

Estoppel does not exist where a property owner seeks enforcement of his constitutional right to recover damages to his property.

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by the Rockridge Place Company against the City of Oakland. Judgment for plaintiff, and defendant appeals. Affirmed.

Leon E. Gray, City Atty., and Markell C. Baer, Deputy City Atty., both of Oakland, for appellant.

F. E. Boland, C. Irving Wright, and John Douglas Short, all of San Francisco, for respondent.

ST. SURE, J. In 1913 the city council of Oakland changed and re-established the official grade and width of the sidewalks on Broadway under the Change of Grade Act of 1909 (Stats. 1909, p. 1018). The council, pursuant to proper legal proceedings, officially changed and re-established the grade to a depth of nearly 30 feet lower than it had formerly been opposite the plaintiff's property at the crest of the Broadway hill. On June 13, 1914, the plaintiff, along with a majority of other owners of property fronting on Broadway street, between Ocean View drive on the south and Temescal creek on the north, signed and presented a petition to the council requesting the improvement of Broadway by grading it to the official grade, preparatory to later curbing and guttering the street and paving it with oil macadam and constructing a culvert in Temescal creek. Following the filing of this petition and on November 30, 1914, the city of Oakland adopted an ordinance lowering further the grade on Broadway and naming a street called Patton street and establishing grades on Patton street. Thereafter, the city council, in accordance with the Improvement Act of 1911 (Stats. 1911, p. 730), adopted the plans of the city engineer, passed its resolution of intention to grade Broadway, from Ocean View drive to Patton street, which lies close by Temescal creek. Said resolution was published and posted in the manner provided by law. No protests were filed. On January 11, 1915, the city council passed its resolution ordering the work. The notice of award was published, but again no protests. The contractors entered upon their work and lowered the grade of Broadway and paved the street to conform to the official grade. During this time the plaintiff, the court found, was cognizant of the performance of the work but at no time acquiesced in or consented to the doing thereof. The facts above set forth are taken from the findings of the trial court. No contention is made that the proceedings before the city council looking to the change of grade in Broadway had not in all respects been properly complied with. The prayer of plaintiff's complaint was for damages generally caused by the depreciation in value of the abutting property and the interference with its use and the ingress from and egress into Broadway. For such depreciation in value plaintiff was awarded the sum of $750. The appeal is upon the judgment roll.

[1] The appeal is concerned with the consequential damages claimed to have been caused the property by the physical or actual change of the grade, and the widening of the road to the outer edges of the sidewalk, which improvements were made in 1914. The question presented is, as stated by counsel for defendant: "Is a property owner who joins in a written petition to the city council requesting it to grade a public street abutting on his property to the official grade, entitled to demand compensation for the damages caused by such grading?" or, as stated by counsel for plaintiff: "Whether the plaintiff waived its rights, or is estopped to assert them, by signing the petition above mentioned."

Counsel for defendant says that "the problem of law involved has never been squarely decided in California," and that "defendant relies upon the doctrine of waiver rather than a strict estoppel." We have been unable to find a case in this state which can be said to be "upon all fours" with the one before us, but somewhat similar questions have been presented to and passed upon by our Supreme Court. The fundamental principle involved is to be found in the organic law of the state which prescribes as a paramount rule that—

"Private property shall not be taken *or damaged* for public use without just compensation having been first made to, or paid into court for, the owner." Const. Cal. art. 1, § 14; Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 317, 56 Am. Rep. 109; Eachus v. Los Angeles Railway Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; Eachus v. City of Los Angeles, 130 Cal. 492, 62 Pac. 829, 80 Am. St. Rep. 147; Partridge v. City of Richmond, 36 Cal. App. 389, 172 Pac. 166.

The change of grade from which damage resulted was accomplished under the provisions of the Improvement Act of 1911. The act nowhere requires the filing of a petition signed by property owners to set in motion the provisions thereof relative to street grading. Under what circumstances, or in what form, the petition was presented, the record does not disclose. The municipality was petitioned to exercise its undoubted right to grade the street, and the petition must be taken as a request for the making of that improvement with due regard to the rights of the property owners. Assuming that the petition was the moving cause of the doing of the work, it was the duty of the municipality to proceed in accordance with the law. We fail to see how any greater effect than this could be given to the petition.

There are a number of decisions in other jurisdictions which are directly in point, and while there is a conflict of authority we are of the opinion that the better view is expressed in those cases which hold that where the right of an abutting owner to be compensated for damage to his property by a change in the grade of the street is rested upon constitutional guaranties, such waiver of a constitutional right ought not to be lightly inferred, and cannot clearly be derived from the request to grade the street. New Decatur v. Scharfenberg, 147 Ala. 367, 371, 41 South. 1025, 119 Am. St. Rep. 81.

In Barker v. Taunton, 119 Mass. 392, the court said:

> "It is no bar to the claim for damages made by the petitioner, that he was one of the original petitioners for the improvements. That alone is not evidence of an assent that his property shall be taken for public use without compensation."

And the Pennsylvania court said in Jones v. Bangor, 144 Pa. 638, at page 648, 23 Atl. 252, at page 253:

> "We cannot assent to the proposition that a lot owner, who joins in a request to the borough authorities to grade a street, is estopped thereby from claiming compensation for an injury to his property by the grading."

And as was said in the case of Robinson v. City of Vicksburg, 99 Miss. 439, 54 South. 858:

> "Or may a waiver be implied by his signing a petition with the knowledge that in paving the street the city might find it necessary to change its grade? We think not. In our judgment such conduct ought not to operate as an estoppel. A constitutional right may not be so lightly waived. There is nothing whatever in the petition, nor in the conduct of the appellant, as disclosed by the record, which evidenced a purpose on his part to waive his constitutional right to claim damages to his property, caused by raising the grade of the street."

Defendant further contends that under the authority of Butters v. City of Oakland, 53 Cal. App. 294, 299, 200 Pac. 354, 356, decided by this court June 22, 1921, the plaintiff should have first brought action to enjoin the performance of the work until its damages were in a proper proceeding, determined and paid, speciously selecting and quoting from the opinion of the Supreme Court in bank denying hearing the following:

> "* * * The remedy of the property owners in such a case (referring to the acts of the city in changing the grade) is not to enjoin the collection of the assessment levied to pay the cost of the work, but to enjoin the performance of the contract prior to the work having been done until damages are paid, in case the result of such work would cause damage to the abutting property."

The remainder of the expression of the Supreme Court upon the subject reads:

> "It constitutes no defense against the collection of the assessment. That the city is liable for damages caused to the abutting property by excavation or fills in a street in front thereof, see Eachus v. Los Angeles, 130 Cal. 493; Eachus v. Los Angeles, etc., Co., 103 Cal. 614; Reardon v. San Francisco, 66 Cal. 492, 506."

While the appeal in the Butters Case concerned the same property involved herein, it was directed toward certain defects in the proceedings incident to assessment, and had no reference whatever to the question presented in the instant case, which is wholly concerned with a claim for damages resulting from the grading work.

[2] A party has a right either to enjoin or to sue for damages in a case such as this, and his failure to avail himself of one of the rights has no effect upon his pursuit of the other. Wilcox v. Engebretsen, 160 Cal. 288, 116 Pac. 750.

[3] Counsel for defendant has said that he relies upon the doctrine of waiver rather than a strict estoppel. From this statement and the argument presented in the briefs in support thereof, we gather that it is the thought of defendant's counsel that waiver rests fundamentally upon the doctrine of estoppel; that the question as here presented rests upon the facts from which it is to be ascertained whether or not plaintiff is estopped to deny that it has waived its rights to damages. Knarston v. Manhattan Life Ins. Co., 140 Cal. 57, 73 Pac. 740. The trial court upon the facts has, we think, correctly concluded that plaintiff is not barred nor estopped from claiming damages. Furthermore, an estoppel does not exist where the

property owner seeks enforcement of the constitutional right to recover damages to his property. Sala v. Pasadena, 162 Cal. 714, 124 Pac. 539; Partridge v. City of Richmond, 36 Cal. App. 389, 172 Pac. 166.

The judgment is affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

---

62 Cal. App. 1

WRIGHT v. CITY OF OAKLAND.
(Civ. 4465.)

(District Court of Appeal, First District, Division 1, California. April 27, 1923. Hearing Denied by Supreme Court June 25, 1923.)

Municipal corporations ⟹280(1) — Property owner by entering agreement with grading contractors to fill an adjacent lot held not to have lost right to damages resulting to her from such grading.

In an action by a property owner to recover damages to her property from the grading of a street, where it was shown that she had no knowledge of the commencement of the work, but after learning of it had entered into an agreement with the grading contractors to place some of the earth so removed on an adjacent lot belonging to her, and also to remove a certain bank of earth from her property, *held*, that by such agreement she had not waived her right to enjoin the contractors or the municipality from proceeding or completing the work or estop herself from asserting her right to damages.

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by Edith F. Wright against the City of Oakland. Judgment for plaintiff, and defendant appeals. Affirmed.

Leon E. Gray, City Atty., and Markell C. Baer, Deputy City Atty., both of Oakland, for appellant.

F. E. Boland, C. Irving Wright and John Douglas Short, all of San Francisco, for respondent.

ST. SURE, J. This case is almost identical with that of Rockridge Place Co. v. City of Oakland (Cal. App.) 216 Pac. 64 decided this day. The cases were tried together upon substantially the same facts, and both involve the same points of law.

The court gave plaintiff judgment against defendant in the sum of $2,000. As in the companion case the appeal comes up on the judgment roll alone.

In this case, however, the trial court found facts additional to those narrated in the Rockridge Place Co. Case. It found that plaintiff did not in fact know of the actual performance of the work until it was practically completed; that at the time plaintiff first saw the work there remained only a small portion of the grading and surfacing to be performed; that plaintiff did at no time acquiesce or consent to the doing of the work at all; that subsequent to this time plaintiff entered into a contract with the contractors who were engaged in lowering the grade adjacent to her property whereby the contractors agreed to place the earth so removed on an adjacent lot belonging to plaintiff, and also to remove a certain bank of earth from her property; that in consideration of this agreement plaintiff waived all right that she might have to enjoin either the said contractors or the city of Oakland from proceeding or completing the work; that in pursuance of said contract said earth, both that excavated from Broadway and that excavated from plaintiff's lot, was removed to the adjacent lot and there used to fill and raise its level; that said contract was entered into at the suggestion and for the convenience of the contractors, as well as for the convenience of plaintiff in leveling her adjacent property.

Defendant urges that the agreement between plaintiff and the contractors regarding the removal of the earth from her property shows acquiescence and is an additional reason why the doctrine of estoppel should apply against her. We think that these last-mentioned additional facts would seem rather to strengthen than to weaken plaintiff's case. A discussion of them would be mere reiteration.

Upon the authority of Rockridge Place Co. v. City of Oakland, this day decided, the judgment is affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

---

61 Cal. App. 737

STERNES et ux. v. SUTTER BUTTE CANAL CO. et al. (Civ. 2598.)

(District Court of Appeal, Third District, California. April 23, 1923. Rehearing Denied May 23, 1923. Hearing Denied by Supreme Court June 21, 1923.)

1. Eminent domain ⟹271—Remedy by way of recoupment in damages rather than by injunction may be had against public utility.

Remedy by way of recoupment in damages rather than by injunction may be had from a public utility for injuries sustained.

2. Waters and water courses ⟹156(2)—Contract to convey right of way for canal at "reasonable price" construed.

Where a contract with a canal company for the construction of a ditch provided "the necessary rights of way therefor through said lands will be granted without unnecessary delay to the first party at such reasonable price as may be acceptable, * * *" *held*, that the reasonable price referred to must be such as would reasonably compensate property owners for whatever pecuniary injury they suffered.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reasonable Price.]

3. Eminent domain 🔑280—Grant of right of way of property owner estops subsequent action for damages.

A grant of a right of way by a landowner estops him from thereafter prosecuting any action for past, present, or future damages that may have occurred, or reasonably be expected to occur, by reason of the necessary, natural, or ordinary use of the utility for which the right of way is granted.

4. Waters and water courses 🔑156(2)—In determining reasonable price for grant of right of way for canal, grantors held entitled to same consideration as in condemnation proceedings.

Where a grant of a right of way to a canal company provided that the compensation should be such "reasonable price" as was acceptable to the grantee, *held*, that the grantors in an action to determine such reasonable price were entitled to present to the jury every item of damage or injury to their property for which they would have been entitled to recover in condemnation proceedings, including damages for seepage.

On Rehearing.

5. Waters and water courses 🔑158(2)—Agreement with canal company for construction of ditch held not to require adjoining landowners to furnish rights of way.

Agreements with a canal company for the construction of a ditch *held* not intend that the adjoining landowners should furnish the rights of way, but only that the cost of construction and right of ways should be borne by them in the first instance with an agreement for subsequent reimbursement by the canal company.

6. Eminent domain 🔑280—Contract for construction of ditch held not to contain waiver of rights to compensation for rights of way.

A waiver in an agreement with a canal company for the construction of a ditch of any right to claim a refund of money paid the canal company under the contract *held* not a waiver of right to compensation for the taking of rights of way.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Floyd G. Sternes and wife against the Sutter Butte Canal Company and another. Judgment for defendants, and plaintiffs appeal. Reversed.

Arthur Coats, of Yuba City, for appellants.
W. H. Carlin, of Marysville, Henry Ingram, of Gridley, and A. H. Hewett, of Yuba City, for respondents.

PLUMMER, Justice pro tem. It appears from the complaint in this action that the appellants (husband and wife) are the owners of two tracts of land comprising about 200 acres situate in Sutter county, held and possessed by them as community property; that during the years 1919 and 1920 the respondent canal company entered upon both the said tracts of land and proceeded to excavate a canal, or ditch, of approximately 50 feet in width across parcel No. 1 of the tracts of land owned by the appellants, and constructed levees along the side lines of said ditch approximately 3 feet in height above the natural ground, leaving the bed of the canal about 2½ feet below the natural level of the surrounding country; that across parcel No. 2 the width of the canal was about 46 feet, with levees along the side lines, and the depth of the canal about the same as across parcel No. 1; that the lands belonging to the plaintiffs are adapted to the growing of grains, alfalfa, and practically all kinds of fruit trees; that the height of the water carried through the canal is above the level of the surrounding country; that during the irrigating season the water has seeped, and will continue to seep out of said canals, and flood, injure, and damage plaintiffs' land, and render it unfit for any use but the raising of rice; and that by reason of the construction of said canal the drainage of a considerable portion of the lands belonging to the plaintiffs is obstructed, and will continue to be obstructed, rendering the said lands unfit for farming purposes, all to the damage of plaintiffs in the total sum, including the land taken, of somewhat in excess of $31,000. A cross-complaint was filed by the canal company, based upon an indebtedness of the plaintiffs to the defendant company, but upon such issues there is no controversy, and consideration thereof need not be given.

The trial court confined the testimony to the value of the land taken, to wit, 5.18 acres, and excluded all testimony as to past, present, and prospective damages to the land not taken, and instructed the jury that only the value of the land actually taken could be considered, which value was fixed at the sum of $530. The correctness of this ruling is the issue tendered upon appeal.

[1] No deed to any right of way was executed by either of the plaintiffs to the defendant company, proceedings in eminent domain were not had, and this action is prosecuted as its antithesis, or opposite remedy, to which the plaintiffs are relegated where damages are sought from a public utility. The remedy of the plaintiffs by way of recoupment in damages, rather than by an injunction, is so well settled that citation of authorities is unnecessary.

It appears from the transcript that on or about the 15th day of September, 1919, the plaintiff Floyd G. Sternes and a number of other landowners entered into a contract,

---

which contract contains the following reference to rights of way:

> "The cost of construction of said ditch, or ditches, and other necessary facilities, and the cost of necessary grants of rights of way therefor to the first party, shall be borne and paid by the second parties, each of the said second parties paying such pro rata of such costs as the area of his land set opposite his name bears to the total area of lands of all of the second parties; but said ditch or ditches, and facilities, and said rights of way shall be the property of the first party, and the second party shall be entitled to reimbursement of said costs from the first party without interest thereon, upon the conditions and to the extent hereinafter specified."

The manner of repayment was to be by way of giving credit by the canal company to the owner of the land from whom the right of way was received. The project not being carried forward as rapidly as had been anticipated, and also owing to increase in prices, costing more than had been anticipated, another agreement was entered into, dated the 30th day of August, 1920, between the canal company and certain landowners, including the appellant Floyd G. Sternes. In so far as this agreement relates to the right of way and compensation therefor, it reads as follows:

> "The second parties, severally agree that whenever any of the ditches shown on said map cross their lands * * * including the ditch or ditches constructed and to be constructed by the first party, the necessary rights of way therefor through said lands will be granted without unnecessary delay to the first party, at such reasonable price as may be acceptable to the first party; the amount of money payable therefor by the first party to each respective grantor, less whatever may be required to be paid to discharge encumbrances on the land to be granted, to be credited to the party making said grant as part of the cost to be borne and paid by said party for the construction of all of said ditches and other irrigating facilities as herein provided."

It was elsewhere provided in said contract that the landowners were to pay to the canal company the sum of $20 for each acre of land owned by them, and described and referred to in the aforementioned agreements. The wife of the plaintiff Floyd G. Sternes did not sign either of the agreements mentioned.

The appellants insist that under the provisions of section 172a of the Civil Code, as added by St. 1917, p. 829, § 2, the want of the wife's signature thereto renders the contracts just mentioned void. This being an action for damages for the taking of community property, and not an action to compel a conveyance, it would seem that whatever recovery is had would still be community property. However, by reason of the views hereinafter expressed, it seems unnecessary to determine such question, as the result arrived at would be identical with the conclusions which we have reached as to the right and amount of recovery. With this in view, let us consider the language of the contracts. The first makes no mention of the measure of compensation. The latter is as follows:

> "The necessary rights of way therefor through said lands will be granted without unnecessary delay to the first party, at such reasonable price as may be acceptable to the first party."

[2] It will be observed that this language refers to the compensation for the right of way, and is no different from the language ordinarily used, and which would ordinarily be used by any grantor in conveying a right of way for a specific purpose. There are no limiting clauses, and no words whatever which limit the reasonable price to be paid therefor to the land actually taken, even if the agreements to make this grant had been executed by both husband and wife. As before stated, no right of way was granted; entry was made and the land taken without payment. The reasonable price referred to in the contract must be held to be such as would reasonably compensate the appellants for whatever pecuniary injury they suffered, and whatever is included in a grant of a right of way is included within the terms of the contract executed by Floyd G. Sternes alone, as well as though it had been executed also by his wife. To ascertain this we have but to examine the cases prosecuted to collect damages after rights of way have been granted. These cases all show that a grant of a right of way, in general terms, is the exact counterpart of whatever damages would be considered and determined by the court and allowed in condemnation proceedings.

In Nunnamaker v. Columbia Water Power Company, 47 S. C. 485, 25 S. E. 751, 34 L. R. A. 222, 58 Am. St. Rep. 905, the Supreme Court of South Carolina declares the law as follows:

> "There is a well-settled rule to the effect that where property is purchased when it might have been condemned, the consideration is conclusively presumed to cover all damages to the remainder of the tract for which the owner could have obtained compensation in condemnation proceedings." And, quoting from an Illinois case with approval, "it is held that where a person conveys a right of way over his land, it will be conclusively 'presumed that all the damages to the balance of the land, past, present, and future, were included in the consideration paid him for his conveyance, the same as an assessment of damages on a condemnation would be presumed to embrace,'" and then says: "There are many other cases to this effect. It would be unreasonable to hold that a voluntary grant of a right of way is not as effectual to protect the grantee from suit for damages arising from its proper use, as a right of way taken under compulsory proceedings."

In Lewis on Eminent Domain, § 474 (3d Ed.), it is stated that—

> "The conveyance of land for a public purpose will ordinarily vest in the grantee the same rights as though the land had been acquired by condemnation (citing a long list of authorities). The conveyance will be held to be a release of all damages which would be presumed to be included in the award of damages if the property had been condemned. The grantor therefore cannot recover for any damages to the remainder of his land which result from the proper construction, use and operation of the works upon the property conveyed (citing innumerable authorities)."

That damages inflicted upon land not taken by seepage may be considered in condemnation proceedings seems clearly allowable. In Denver City Irrigation Co. v. Middaugh, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 243, the court thus expresses its view:

> "In assessing damages in condemnation proceedings for lands taken for the purpose of constructing a ditch or reservoir thereon, injuries likely to result from seepage and leakage from such canal or reservoir would naturally be among the first items to occur to a jury."

Further:

> "An examination of the reported cases shows that there is no substantial difference in the general rules applicable to the assessment of damages in condemnation proceedings, as announced by the courts of last resort, but in the application of such rules to particular cases the same uniformity has not been observed; still no case has been called to our attention which by any fair construction can be held to be in conflict with the conclusion that damages for seepage and leakage should have been determined in the first proceeding."

In the more recent case of Farmers' Reservoir & Irrigation Co. v. Cooper, 54 Colo. 402, 130 Pac. 1004, the Supreme Court of Colorado uses the following language:

> "In condemnation proceedings all damages, present and prospective, that are the natural, necessary, or reasonable incident of taking the property sought to be condemned, must be assessed."

It was there held that seepage, and damages resulting from seepage, constituted an incident to be considered by the court or jury whenever land was taken for a right of way to construct a canal.

[3] It thus appears by an unbroken line of authorities, and also as well as by good reasoning, that whenever a grant of a right of way is executed by a landowner he thereby estops himself from afterwards prosecuting any action for the past, present, or future damages that may have occurred, or reasonably be expected to occur, by reason of the necessary, natural, and ordinary use of the utility or public service for which the right of way is granted. And this includes the natural, reasonably to be anticipated, and ordinary injury resulting to adjacent land from seepage, if the land is of a character that admits of or may be reasonably expected to admit of such action of the waters taking place.

[4] If the appellants in this case had executed a grant of a right of way, they would be barred from prosecuting an action for damages, because the law would presume that such item of damage had been considered, determined and paid for. Now, if this is true, what items of damage would the appellant be entitled to have considered by the jury in a case where they had only agreed—assuming that the contract in this case is valid—to grant a right of way after a reasonable price had been paid therefor? It seems to us that the question answers itself, and that the appellants were entitled to present to the jury and have the jury consider every item of damage or injury to their property for which they would have been entitled had condemnation proceedings been had, and which they would lawfully be authorized to consider before executing a grant of a right of way, and which the law would presume they had considered if a grant to a right of way had been executed. This evidence the appellants were precluded from introducing by reason of the construction given to the language of the contract, in which it was held that the words found therein by which the appellant Floyd G. Sternes contracted to grant the necessary rights of way at such reasonable price, etc., limited recovery to the value of the land actually taken, which holding is contrary to what the appellant would have been presumed to have considered if a right of way had actually been granted. Another way of ascertaining the meaning of the contract, assuming that the contract referred to is valid, is to inquire as to what should have been the holding of the court if an action for specific performance had been instituted by the defendant. It can hardly be doubted that the words "reasonable price" for the right of way could only be construed as reasonable compensation for the detriment caused the owners of the land. In other words, specific performance would not be granted without adequate compensation, and that adequate compensation would include just the items to which we have referred in this opinion. If such is not the correct construction of the contract, then it would be void for uncertainty or for want of consideration. Any other construction given to the contract herein would violate the constitutional provision against taking private property, etc., without compensation.

It follows, therefore, that the appellants were deprived of the opportunity of showing what reasonable compensation should be allowed for the taking of the land necessary for the actual construction of the ditch and the natural and necessary damages incident thereto, and reasonably to be anticipated as flowing therefrom; hence a new trial must be had herein, irrespective of whether section 172a of the Civil Code, as added by St. 1917, p. 829, § 2, has any application to the facts of this case, and which in any event are really immaterial, because if the appellants are entitled to full compensation, the necessity of the wife's signature to the contract becomes wholly immaterial.

For the reasons herein given, it is hereby ordered that the judgment of the trial court be, and the same is, hereby reversed.

We concur: FINCH, P. J.; BURNETT, J.

On Rehearing.

PLUMMER, Justice pro tem. It is earnestly contended by the petitioner herein that the court did not fully consider or perhaps did not give full weight to the fact that there were two agreements executed between Floyd G. Sternes, one of the plaintiffs in this action, and the Sutter Butte Canal Company, one of the defendants, and a large number of landowners.

[5] It is further contended that the agreement executed on the 15th day of September, 1919, provided that the landowners should pay for the rights of way. The petition states:

> "Let it be borne in mind that the agreement of September 16, 1919, provided that the landowner should furnish the rights of way," etc.

If this interpretation of the contract were correct, the petitioner would be entitled to a rehearing, but is such an interpretation of the contract admissible? There are three references to the rights of way in the contract of September 15, 1919. They are, first:

> "And said second parties are willing and have agreed to advance to first party the cost of all such rights of way, construction, enlargements, ditches and works to be acquired and constructed as aforesaid."

The second reference is:

> "The cost of construction of said ditch or ditches * * * and the cost of necessary rights of way * * * shall be borne and paid by the second parties, each of the second parties paying such pro rata of said cost as the area of his land set opposite his name bears to the total area, etc.; but said ditch or ditches * * * and said rights of way shall be the property of the first party, *and the second parties shall be entitled to reimbursement of said costs from the first party, without interest thereon, upon the conditions and to the extent hereinafter specified.*"

The third reference to the right of way in said agreement reads:

> "The amounts deposited with the first party by the second parties to cover the cost of construction of said ditches and facilities and acquisition of rights of way above referred to *shall be returned by the first party to said second parties* in accordance with its rules and regulations."

The agreement dated August 30, 1920, between the parties, does not alter the provisions of the original agreement as to who should pay for the rights of way, as will be seen by the opinion of the court filed herein, which quotes in full every word of the agreement of 1920 in reference to the rights of way, and as to the manner of payment therefor, which shows that the burden is squarely fixed upon the canal company.

[6] It is further contended by the petitioner that the plaintiffs herein have waived reimbursement, but the agreement of 1920 upon which such claim is based does not bear out the contention. After having provided for the rights of way as herein stated, the agreement next sets forth that the landowner shall pay the sum of $20 per acre, *after crediting said party with such amount as he or she may be entitled to for the right of way granted by him or her to the first party.* And then as to the payments made by the landowner, after such credits are allowed, the contract does contain a waiver in the following language:

> "Said parties making said payments shall not be entitled to reimbursement or return by the first party of any part of said payments, or of any part of said advance heretofore made by the second parties, any right of reimbursement or return thereof being hereby expressly waived and relinquished. Said parties also hereby waive and relinquish any right to claim any part of any sums of money which may be hereafter received by the first party from any other person for or on account of the construction of said ditches or other irrigation facilities, or of the costs of rights of way therefor."

This is not a waiver of any credit which it is previously expressly provided in the contract shall be given to the landowner as compensation for any right of way granted by him. It is only a waiver of any right to demand a return of any money which he may have paid after receiving the credits to which he may be found entitled. It is true that there is nothing said about consequential damages, or what shall be considered in determining the reasonable price to be paid by the canal company to the landowner by way of credits, and for that very reason the court must look to the authorities to ascertain what is included within such language, and this we have fully set forth in our previous opinion herein.

Since the writing of our first opinion herein the Appellate Court of the First District, in the case of Rockridge Place Co. v. City of Oakland, 216 Pac. 64, opinion filed April 27, 1923, has thoroughly considered the question of waiver or estoppel when applied to one's constitutional right to compensation when property is taken for a public use. It is there held that it is no bar to a claim for damages that the petitioner was one of the original petitioners for the improvement; that a waiver is not to be implied from the fact that the petitioner asked the improvement. The language of the court there used, and which is pertinent here, is:

> "A constitutional right may not be so lightly waived. There is nothing whatever in the petition, nor in the conduct of the appellant as disclosed by the record, which evidenced a purpose on his part to waive his constitutional right to claim damages to his property, caused by raising a grade of the street."

This is the language of the case of Robinson v. City of Vicksburg, 99 Miss. 439, 54 South. 858, quoted with approval by the Appellate Court.

With the amount of damages claimed, this court has nothing to do; hence the argument of petitioner based upon such figures as to what other property owners might claim need not be considered. The question at issue is not the amount—it is the right to make proof of the compensation to which the plaintiffs are entitled for and on account of the right of way taken by the canal company, and the incidental damages to their property alleged to have been caused thereby.

Another reason why a rehearing should not be granted herein, and why the appellants are entitled to a new trial, and which was not touched upon in our previous opinion, is to be found in paragraph V of the plaintiffs' complaint. It is there alleged that said defendant (canal company), in constructing said canals and ditches, willfully, unlawfully, needlessly, and wantonly damaged, injured, and destroyed plaintiffs' land, and cut the same up into small parcels against the protests of the plaintiffs, when defendants could have at all times herein mentioned before the construction of said canals and, as said defendant well knew, built said canals and ditches in such a manner and in such a location as to have caused the plaintiffs far less damage and injury; and that plaintiffs did not, and have never consented to the construction of said canals and ditches at the places and in the manner herein described; and that said defendant, acting as such public utility and as such public service corporation, took more of said land of plaintiffs than was reasonably necessary for public use, and that said canals were not located and built by said company in a manner most compatible with the public good and the least private injury. And then followed by the allegations of the complaint referred to in our previous opinion, which state a cause of action and present issues upon which the plaintiffs were entitled to introduce evidence.

The language of the agreements is not ambiguous; as we have shown by quoting therefrom, they are very clear and explicit, and we have omitted no part which would in any way change the construction which has been given upon the questions involved herein. Upon the question of rights of way and compensation therefor, both agreements are practically the same and have been considered together.

For the reasons stated in our first opinion herein, and the additional ones above stated, the petition of the defendant Sutter Butte Canal Company for a rehearing in this cause is hereby denied.

We concur: FINCH, P. J.; BURNETT, J.

---

61 Cal. App. 765

RESETAR et al. v. LEONARDI et al.
(Civ. 2597.)

(District Court of Appeal, Third District, California. April 25, 1923.)

1. Appeal and error 🔑232(2)—General objection to evidence insufficient to raise objection that it tends to establish agency by estoppel which was not pleaded.

An objection to evidence as being incompetent, irrelevant, and immaterial is insufficient to raise the objection that it tends to establish an ostensible agency based on estoppel which should have been and was not pleaded.

2. Appeal and error 🔑197(3)—Objection to pleading because it relied upon an ostensible agency not pleaded held not available when first raised on appeal.

An objection to a pleading in that it relied upon an ostensible agency which because it was based on the principle of estoppel should have been pleaded *held* not available unless raised below.

3. Principal and agent 🔑189(1)—In action based on contract made by agent, it is proper to allege contract made by principal.

In an action on a contract made by an agent, it is proper to allege that the contract was made by the principal, nor would the fact that an ostensible agency based on estoppel was sought to be established change the rule.

4. Appeal and error 🔑931(1) — All intendments and conflicting rational inferences must be resolved in favor of judgment of trial court.

On appeal all the intendments and conflicting rational inferences must be resolved in favor of the judgment of the trial court.

5. Estoppel 🔑107 — Only where party has knowledge at time of filing complaint that cause rests on estoppel is he required to plead it.

It is only where a party has knowledge at the time his complaint is filed that his cause of action must rest upon estoppel that he is required to plead it.

6. Sales 🔑52(6)—Evidence held sufficient to establish purchaser of apples was agent for defendant produce company.

In an action to recover the purchase price of two carloads of apples bought by an alleged agent of defendants and billed to defendants, evidence *held* sufficient to establish that the apples were sold to defendants, not to the alleged agent.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by Mike Resetar and others against J. Leonardi and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

John R. Cronin and Ben Berry, both of Stockton, for appellants.

Scott Rex, of Stockton, and Wyckoff & Gardner, of Watsonville, for respondents.

BURNETT, J. Plaintiffs were wholesale apple merchants at Watsonville, Cal., and defendants were partners engaged in the produce and commission business under the name of "Valley Fruit & Produce Company" in the city of Stockton. Plaintiffs claim to have sold and shipped to defendants three carloads of apples in October and November, 1920. The first of these cars, consigned by respondents to themselves, with a draft on appellants attached to the bill of lading, was paid for and is not involved in this controversy, except as the facts connected therewith may have some bearing upon the question of the liability of appellants for the other two carloads, which were shipped on open account, and were never paid for. The complaint was to recover the purchase price of these, being in two counts in consequence of the two separate shipments. The two counts are similar in form, and it was alleged in the first:

> "That heretofore, and on November 5, 1920, at the special instance and request of defendants, plaintiffs sold and delivered to defendants at Watsonville, Cal., certain goods, wares, and merchandise, to wit, a carload of apples, which was of the fair and reasonable worth and value, and for which defendants promised and agreed to pay the sum of $1,750.95."

The answer of defendants denied:

> "That heretofore, and on November 5, 1920, or at any other time or at all, at the special instance and request of defendants, plaintiffs sold and delivered to defendants at Watsonville, Cal., * * * a carload of apples," or "that these defendants, or either of them, or any person acting for and on behalf of these defendants or either of them, or acting for and on behalf of the partnership known as Valley Fruit & Produce Company, ever purchased from the plaintiffs herein * * * a carload of apples or any other goods, wares, and merchandise."

There was also a specific denial that they or any one acting for them ever promised or agreed to pay to plaintiffs any sum of money whatever. The corresponding allegation of the second count of the complaint was denied in a similar manner. The trial was had without a jury, and the findings and judgment were in favor of plaintiffs for the full amount claimed, to wit, the sum of $2,892.90, from which judgment the appeal has been taken.

It may be stated at the outset that the apples were ordered from plaintiff by one Thomas Vossos, and the important and vital question in the case is whether there was sufficient evidence to support the view that he was either the actual or ostensible agent of defendants in the purchase of the apples. The main argument of both parties, presented skillfully and elaborately, is addressed to this consideration, and we have given it careful attention. Before noticing it specifically we observe the apparent failure of appellants to attach adequate significance to the authority and responsibility of the trial judge in determining the weight of the evidence and the credibility of the witnesses, and to the established limitation upon the power of an appellate court to overthrow the findings of the trial court. The rule itself, of course, is so elementary and familiar as to need no restatement.

[1, 2] Preliminarily to the main discussion we may also advert to the contention of appellants that their objection to evidence of ostensible agency should have been sustained upon the ground that, such agency being founded upon the principle of estoppel, it was necessary for plaintiffs to allege it. We see no merit in the claim. In the first place, appellants should have made this specific objection, if they intended to urge it subsequently. They contented themselves with the general objection that the evidence is "incompetent, irrelevant, and immaterial" and simply repeated it in response to the question of the trial judge: "Is there anything other than your general objection, can you direct my attention to anything of the reason why you object?" It is true that to one or two of the questions the specific objection that the complaint did not allege "agency" was made, but nothing said about estoppel or ostensible agency. It is quite apparent that this criticism is of that class which cannot avail a party unless timely attention is called to the supposed defect in the court below. In view of the record it may be regarded as a case tried upon the theory that both the actual and the ostensible agency of Vossos were in issue, and the situation is one for the application of the principle enunciated in Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 Pac. 90; Cushing v. Pires, 124 Cal. 663, 57 Pac. 572; Busch v. Los Angeles Ry., 178 Cal. 536, 174 Pac. 665, 2 A. L. R. 1607, and many other decisions.

[3-5] Moreover, in an action based upon a contract made by an agent, it is proper to allege that it was made by the principal. McGibbon v. Schmidt, 172 Cal. 70, 155 Pac. 460; Montgomery v. Dorn, 25 Cal. App. 666, 145 Pac. 148. If made through an ostensible agent, the effect in law is the same as though

made by an authorized agent, and there seems to be no good reason why the rule of pleading should not be the same. Indeed, this view is in harmony with the authorities cited by respondents, of which we may mention Robinson v. American Fish, etc., Co., 17 Cal. App. 212, 119 Pac. 388; Meister & Sons Co. v. Wood-Tatum Co., 26 Cal. App. 584, 147 Pac. 981; Armstrong v. Barceloux, 34 Cal. App. 433, 167 Pac. 895; Leavens v. Pinkham & McKevitt, 164 Cal. 242, 128 Pac. 399. Statements apparently to the contrary are found in some of the decisions, among which is Fritz v. Mills, 12 Cal. App. 113, 106 Pac. 725, but they should not be regarded as consistent with the principles of our modern liberal system of pleading and practice. It may be added that the cases cited by appellants in this connection are distinguishable from the situation herein, but we forbear specific notice of them other than to say that in the Fritz Case, supra, it was not alleged that the contract was executed by defendant, but that she, "through her duly authorized agent, executed her agreement in writing, wherein the said defendant agreed to sell and the plaintiff agreed to buy" the premises in controversy. Plaintiff having elected to allege that the act was performed by her duly authorized agent, and thus specifically confining her cause of action to a certain condition could not complain if the court limited the proof to that peculiar situation. The case is different, however, where the ultimate fact is alleged that the contract was made by the defendant. In such instance the allegation may be supported by proof that it was executed directly by the defendant or through her authorized or ostensible agent, as that term is defined in sections 2300, 2317 and 2334 of the Civil Code. Moreover, there is room for the claim that respondents had no reason to believe, until the trial was well under way, that the question of ostensible agency would arise. As to this there may be ground for the opposing contention, but we cannot ignore the rule that all intendments and conflicting rational inferences must be resolved in favor of the judgment of the trial court. Hence it is fair to apply the well-settled doctrine that it is only where a party has knowledge at the time his complaint is filed that his cause of action must rest upon estoppel that he is required to plead it. Donnelly v. San Francisco Bridge Co., 117 Cal. 417, 49 Pac. 559; Llewellyn Iron Works v. Kinney Co., 172 Cal. 210, 155 Pac. 986. In the former it is said:

> "Although the doctrine of ostensible agency rests upon estoppel, the plaintiff is not required to plead such estoppel, or to aver the facts constituting ostensible agency, where he believed and had come to believe that the negligent person was in fact the agent of the defendant; and a party is not bound to plead an estoppel where he is without knowledge that his claim must ultimately rest upon it."

The discussion of this point is already too greatly prolonged, and we may dismiss it with the additional reflection that most of the evidence along this line, to which objection was made, was admissible as tending to show actual as well as ostensible agency, and, even if the complaint was defective in said particular, manifestly it resulted in no prejudice to defendants.

[6] But the vital question in the case is obviously whether the evidence was sufficient to support the conclusion of the trial court as to the agency of Vossos. In the effort to maintain their position respondents have recited many circumstances relating to the various shipments, which they claim, in their cumulative force, furnish the requisite support for the finding, and we shall set them forth substantially as thus exhibited. In doing so we naturally favor respondents where there is any conflict in the evidence.

Vossos was admittedly an employee of defendants until the first week in October. He did the purchasing for the firm, and was the only person connected with them who bought and sold apples and like produce. In his work for appellants he used a Ford automobile belonging to them, and on which car was painted the name of the firm, "Valley Fruit & Produce Co., Stockton." This car was sold to Vossos in the early part of October. Prior to August 30, 1920, respondents had heard that appellants were a reliable firm, and on that date the former wrote to the latter, quoting prices on apples and soliciting an order. No answer to the letter, however, was received. On October 22 Vossos came to respondents' place of business at Watsonville, driving said car with said firm name still painted upon it, handed out the printed business card of appellants with his own name rubber-stamped thereon and negotiated for and purchased from Mike Resetar a carload of apples for the Valley Fruit & Produce Company, stating at the same time that he was "of the Valley Fruit and Produce Company." This carload was shipped out on October 25, and the next day respondents wrote and mailed a letter to appellants in which they stated:

> "You will find inclosed invoice to cover shipment of apples to you yesterday in car D., L. & W. 35810. We have drawn a draft against you for the total amount of the invoice. We hope that the fruit will give you entire satisfaction.
>
> "Thanking you for the order, and hoping that we may have the pleasure of filling more orders for you this season, we remain," etc.

A draft for $1,317.50 on the Valley Fruit & Produce Company was attached to the bill of lading and forwarded through the Bank of Watsonville for collection. The bill of lading showed that the car was consigned by respondents to themselves with directions to "advise Valley Fruit & Produce Company, Stockton, Cal." The draft and bill of lading were received by the First National Bank of Stockton on October 27, and the collection clerk of the bank on that day sent the Valley Fruit & Produce Company a written notice by mail, advising them of the receipt by the bank of said instruments. Defendants were also notified by telephone, and on the following day one Cochello, a groceryman of Stockton, paid the draft, he testifying at the trial that he purchased the apples from Vossos. When the car arrived at Stockton on October 28 the notice and disposition clerk of the Southern Pacific Company, Miss Eberhart, phoned the information to the Valley Fruit & Produce Company, and talked with a man who gave his name as Tom, and at the same time she made out and mailed a postal card notice, addressed to appellants, stating that the car had arrived, and the same would be delivered to them on payment of the freight and surrender of the bill of lading. On the same day this carload of apples was delivered to Cochello on payment of the freight and surrender of the bill of lading. She testified that she had no recollection of giving any notice to any one other than defendants of the arrival of this car. It thus appears that appellants were notified four different times of the arrival of the draft and bill of lading and the carload of apples —by written notice and phone from the First National Bank of Stockton, and by postal card notice and phone from the Southern Pacific office.

As to the second carload, early in November Vossos again appeared at respondents' place of business, traveling in the same automobile. He again ordered a carload of apples, requesting that it be billed on open account to appellants. They were shipped November 5, and on the next day plaintiffs wrote and mailed to defendants a letter in reference to the shipment, inclosing an invoice or bill showing the purchase price to be $1,750.95 and the bill of lading indicating that the car was consigned by respondents directly to appellants. This car arrived at Stockton November 8, and Miss Eberhart notified defendants, both by phone and by postal card, of its arrival. After the second car arrived Mr. Leonardi, who seems to have been the moving spirit and the active manager of the defendant firm, came into the Southern Pacific office and complained about the delay in the delivery of the car, such delay having been caused by the fact that the bill of lading was not presented when the first effort was made to secure the delivery of the apples. We may pause here to state that this is one of the strong and decisive facts in the case, and we have given particular attention to the claim of appellants that it was not sufficiently shown, but the testimony of two witnesses is amply sufficient, having been fully credited, as it undoubtedly was, by the trial judge, to justify the conclusion that Leonardi made such visit and such complaint. We quote from Miss Eberhart's testimony as follows:

"Q. Well, prior to the arrival of these three cars, had you seen Mr. Leonardi to know him by sight? A. Yes, sir. Q. By Mr. Leonardi I refer to the Mr. Leonardi whom the testimony in this case shows to be a member of the partnership doing business as the Valley Fruit & Produce Company? A. Yes, sir. Q. The same man, did you see him in connection with any one of these three shipments? A. As I remember, I did. Q. What do you remember? A. As near as I can remember, Mr. Leonardi came in * * * after the second car arrived and complained about the delay on the car—delay in delivery of the car."

She further described the appearance of said person, and the record further shows:

"Mr. Rex: Q. One more question: Can you identify Mr. Leonardi in court here? A. Yes, sir. Q. Who is he? A. That gentleman sitting over there next to Mr. Cronin. Q. That is all? A. I know him by sight. Mr. Rex: It will be admitted that the person pointed out by the witness is the defendant Leonardi in this case. Mr. Cronin: Yes, sir."

W. J. Fannon, who was employed in the freight office of the Southern Pacific Company, after being asked if he had seen Mr. Leonardi before, testified that he had, and that "on the delivery of the second car of apples that is the man that surrendered the bill of lading to me." Furthermore, the record of his testimony shows:

"Q. Had there been a previous effort to get those apples out without surrender of the bill of lading? A. Yes, sir. Q. And that you declined to permit? A. Yes. sir. Q. And subsequently was it on the same day that they reappeared with the bill of lading? A. Yes, sir. Q. And when the bill of lading was surrendered you say that it was Mr. Leonardi who was there? A. Yes, sir."

It is true that he appears to have been a cautious and conscientious witness, and stated that when he first came into the courtroom he was not sure that Mr. Leonardi was the man, but he added:

"This gentleman here is evidently the man that surrendered the bill of lading. Of course, he was dressed different then—in his working clothes. He did not have his glasses on."

He further stated that he had a "recollection of him coming in there, and the reason that I remember is that because he tried to raise a row with some of the S. P. employees there because they refused to deliver this car of apples to the other man without the surrender of the bill of lading; otherwise I would not have probably ever been able to recognize the man."

Thus was the identification sufficiently positive to warrant a finding that Leonardi was the man. It is also rather significant that Leonardi, when on the witness stand, did not contradict this testimony of Miss Eberhart and Mr. Fannon. In reference to the matter he was asked only this question, "Did you call at the Southern Pacific Company to pay for a carload of apples—pay the freight on a carload of apples that arrived on or about the 8th of November, 1920?" and he answered, "No, sir," but neither of these witnesses had testified that he paid the freight on the car. It may have been an inadvertence of counsel, as suggested by him, that the witness was not called upon categorically to deny the testimony of said witnesses for plaintiffs, but we are guided, of course, by the record as it is, and that record justifies the assertion that the testimony of said witnesses was not even challenged by defendants. The freight on this car was paid to the witness Fannon on November 8 by one Sourbis of the Zante Grocery Company, a relative of the Vossos brothers, who testified that he paid the freight at the request of Tom Vossos.

As to the third and last car, Vossos again visited the place of business of respondents about November 20, and the course of procedure was about the same as before except that Mike Resetar, with whom he dealt, was unable to state whether Vossos came by automobile or not. He bought another carload for the defendants, which was shipped by respondents November 22, consigned to appellants. Substantially the same course was pursued as before in sending letters and notices to defendants as to the shipment, but they made no reply. When Vossos negotiated for this purchase Mike Resetar told him that they could not sell unless he would pay for the other car, as they needed the money, but on his assurance that upon his return to Stockton he would mail a check for the amount the third carload was shipped and billed open. Miss Eberhart called Vossos by phone at the Valley Fruit & Produce Company's place of business, notified him of the arrival of the car, and, at his instruction, placed the notation on the waybill to put the car on the team track for immediate delivery. On November 26 Vossos gave a receipt for this car.

We are not unmindful of the fact that agency cannot be established by the declarations of an agent; indeed, they are not admissible for that purpose. This rule was recognized by the trial court, and the conversations between Vossos and plaintiffs were admitted only to show that respondents actually sold the apples, not to Vossos, but to defendants. It is not doubted that this was entirely proper. It may be granted also that some of the circumstances upon which respondents rely, considered separately, are of little significance; but in the aggregate they create a strong probability that Vossos was authorized to represent defendants in the purchase of the apples. Indeed, from a reading of the record it is difficult to reach any other conclusion, notwithstanding the asseverated denials of the defendants.

A few facts stand out prominently which we may recall with some particularity. Leonardi admitted that he received a telephone notice from said First National Bank of the fact that the carload of apples of October 26 had arrived. If he did not know that the shipment was upon the order of Vossos it is almost unbelievable that he would not have inquired why such freight should be intended for his firm. Appellants say that they were under no legal obligation to do so; but, be that as it may, applying the ordinary standards of human conduct, the trial court could hardly resist the conclusion that his failure to make inquiry carried with it the implication that he knew of the supposed agency of Vossos. Having this knowledge it was, of course, his duty to repudiate such agency if it did not exist, and to notify the consignor in order that he might not be thereafter imposed upon. But the more rational inference would be that Vossos was really the agent of the firm.

Another fact of equal persuasive force is the inquiry of Leonardi as to the delay in the delivery of the second carload. This is entirely inconsistent with the view that he had no knowledge of the part of Vossos in the transaction. The significance of this circumstance is indeed recognized by appellants, and they question the sufficiency of the identification of him by the witnesses, but they said he was the man, and we cannot hold that they were mistaken.

Another circumstance of monumental potency is the silence of defendants after the receipt of the numerous letters and notices which were sent to their address. It is true that defendants denied that they received them, but their story as to the delivery of the mail naturally excites incredulity, and doubtless was rejected by the trial court as improbable. Subdivision 24 of section 1963 of the Code of Civil Procedure places among the disputable presumptions the following:

> "That a letter duly directed and mailed was received in the regular course of the mail."

This presumption is evidence, and under the peculiar circumstances of the case the court was entirely warranted in following the presumption rather than the testimony of the defendants. Manifestly, if they received these letters and notices, they would be put upon inquiry, and as honest men they would notify the consignor, if, as a matter of fact, Vossos was not their agent.

The last circumstance which we emphasize is disclosed by the testimony of Miss Eberhart that when the last carload arrived on November 26 she called up the defendants at their place of business, and Mr. Vossos responded. Why should he be there to answer messages and to attend to business transactions of that kind unless it were with the knowledge, acquiescence, and authority of the defendants? This was nearly two months after appellants declared that the connection of Vossos with the firm had ceased, but this circumstance might justly be regarded by the trial court as casting discredit upon their testimony.

We have not overlooked the discussion of the legal propositions involved, but they are simple and fundamental, and demand no specific notice. It may be that Vossos was a consummate rascal, as claimed by appellants, and that they are the unfortunate victims of his evil machinations; but, having reached the conclusion that the material findings of the trial court are supported, that is the end of the matter as far as we are concerned. The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

---

62 Cal. App. 17

PEOPLE v. McHUGH. (Cr. 1019.)

(District Court of Appeal, First District, Division 2, California. April 30, 1923.)

1. Highways 🔑186—In prosecution for driving while intoxicated, exclusion of conversation of accused held not error.

In a prosecution for driving an automobile while intoxicated, where defendant's companion had testified that defendant was sick and not intoxicated, and had stated that defendant had conversed intelligibly concerning their trip previous to the accident resulting in their arrest, *held*, that it was not error to exclude testimony as to the particular subjects of the conversation had.

2. Witnesses 🔑245—Exclusion of statements made by one accused of driving automobile while intoxicated relating to his physical condition held not error.

In a prosecution for driving an automobile while intoxicated, defended on the ground that accused was sick and not intoxicated, the exclusion of testimony by accused's companion as to statements by accused concerning his physical condition, *held* not error, where the witness had already testified that accused had complained of being faint and ill, and that he appeared extremely nervous.

3. Highways 🔑186—In prosecution for driving while intoxicated, evidence held immaterial and properly excluded.

In a prosecution for driving an automobile while intoxicated, where it appeared that accused's companion, just after a collision which resulted in their arrest, had given a name other than his own, *held*, that it was not error to exclude testimony as to his reasons for so doing, they being immaterial on the question of accused's guilt.

4. Criminal law 🔑485(1)—Exclusion of expert testimony in answer to hypothetical question, which did not state all facts and circumstances in evidence, held not error.

In a prosecution for driving an automobile while intoxicated, *held*, that it was not error to exclude testimony of a physician in answer to a hypothetical question which did not contain a statement of all the facts and circumstances which had been put in evidence by the prosecution.

5. Criminal law 🔑1170(2)—In prosecution for driving automobile while intoxicated, exclusion of testimony of physician relating to allegation of whether accused was intoxicated held not prejudicial error.

In a prosecution for driving an automobile while drunk, the exclusion of a physician's testimony in answer to the question, "Doctor, could one accurately determine whether or not a person were intoxicated without knowing the history of the case?" *held* not prejudicial error, where facts, relied on to show other testimony unreliable as to defendant's condition, were already clearly before the jury.

Appeal from Superior Court, Alameda County; George Samuels, Judge.

Joseph J. McHugh was convicted of driving an automobile while intoxicated, and he appeals. Affirmed.

Alexander O'Grady, of San Francisco, and William R. Geary, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment convicting him of driving an automobile in the county of Alameda while intoxicated. The defendant was sentenced to imprisonment for six months in the county jail.

The evidence overwhelmingly sustains the charge against the defendant, and the matters urged upon the appeal are all in relation to rulings made by the trial judge upon the admission of testimony at the trial.

While driving in Alameda county the defendant collided with an automobile which was at a standstill at the side of the road. Several persons who were in the automobile which was struck testified to the intoxicated condition of the defendant, as did also passers-by and the police officers who arrested the defendant and who drove him away from the scene of the accident. Several bottles of whisky were found in the defendant's automobile, some of them filled and others partially emptied, and it appears that the defendant was unable to leave his vehicle unaided and had to be assisted by the police officers, and that, upon being removed from his car, and before he could be placed in the patrol wagon, he fell to the sidewalk when the officers released their hold of him for a moment. There are also numerous other matters appearing in the record which tend to sustain the charge made against the defendant.

[1] The defendant had with him in his automobile at the time of the accident a friend, Thomas Stallard, and two women. Stallard was called as a witness in aid of the defense, which was that defendant was ill and not intoxicated upon the occasion in question. Appellant complains because of a ruling of the trial court in relation to the testimony of Stallard. He testified in detail as to the defendant's activities from the time the party started upon the ride which ended so disastrously until the time of his arrest. Stallard was asked if he had been conversing with the defendant during the drive. He replied that he had. He was asked what had been the subject of the conversation. He replied that the conversation had been about their trip. He also testified that he had observed the condition of the defendant, and that he was not intoxicated; that he was not under the influence of liquor. He was asked if the remarks of the defendant during the ride were intelligent and understandable, to which he replied: "Oh, yes; I could understand him, yes." He was then asked, again, what the defendant and he had been speaking of prior to the collision. Objection was made to this question and sustained. The appellant now contends that this ruling was error, and maintains that, as he was seeking to refute the statements of the witnesses for the prosecution to the effect that he was intoxicated, the jury should have been informed as to the nature of his conversation immediately prior to the accident, so as to be able to determine whether or not such conversation indicated intoxication. The contention of appellant is that the witness Stallard, had he been permitted to answer the question to which objection was made, would have outlined a conversation had between himself and defendant which would have indicated that the defendant was entirely rational and normal at that time. However, the jury was told by Stallard that the defendant was entirely rational, that his conversation was intelligible and that he was not intoxicated. If they believed this testimony, it could not have been strengthened by a narration of the particular subjects of conversation. As the trial court remarked in ruling on the testimony sought to be elicited by counsel, the witness had testified that the conversation of the defendant was intelligent and that he was sober, and nothing more could be added to strengthen the defense relied upon by going into the details of the conversation.

[2] Objection is next made to the ruling of the court sustaining objection to a question asked Mr. Stallard as to whether or not, just prior to the accident, the defendant had complained to Stallard concerning his physical condition. It is contended that such testimony was admissible under the exception to the hearsay rule which admits declarations of one whose sanity is in question, not as evidence of the truth of the facts recited, but as evidence of the state of mind of the person making the declaration. Be that as it may, the testimony sought to be introduced was already before the jury, as this same witness testified that the defendant had complained to him of being faint; that he complained of being ill; that he appeared to be extremely nervous.

[3] Upon cross-examination of the witness Stallard, the prosecution brought out the fact that immediately after the accident Stallard had given his name as Kelly and had stated that he and not the defendant was driving the automobile. This was admitted without objection, and upon redirect examination the attorney for the defendant asked him why he had given the name of Kelly. Objection was made and sustained to the question. He was also asked why he had stated to those present at the scene of the accident that he and not the defendant was driving the automobile. Objection was made and sustained to this question. The conduct of Stallard was not relevant upon the question of the defendant's guilt, and we do not think his reasons for what he did were material.

[4] The remaining objections of the appellant are made to the rulings of the court excluding testimony of defendant's physician, in reply to a hypothetical question and in reply to the following question: "Doctor, could one accurately determine whether or not a person were intoxicated without knowing the history of the case?"

We think the objection to the hypothetical question was properly sustained. The question narrated a number of facts which had been testified to by the witnesses for the defendant, but omitted many of the facts and circumstances which had been put in evidence by the prosecution, and then asked whether, in the light of the facts narrated, the doctor would say that a person was under the influence of liquor or that the manifestations and conditions narrated were due to something besides intoxication. An opinion given by an expert upon a partial statement of the facts is inadmissible and of no value. Encyclopedia of Evidence, vol. 5, pp. 627, 628.

[5] As to the other question addressed to the doctor and set out herein, to which an objection was sustained, it is urged by the appellant that it was competent for him to prove that intoxication is a medical disease and cannot be diagnosed without a knowledge of the history of the case. It is argued that, upon proving this fact, it would follow that the opinions of the witnesses produced by the prosecution to the effect that the defendant was intoxicated were of no value because based merely upon external symptoms

and not upon a history of the case. The defendant's contention upon this matter was clearly before the jury, as appears from a reading of the entire transcript. Upon cross-examination of the witnesses for the prosecution, the attorney for the defendant brought out clearly the fact that such witnesses were not experts upon intoxication; that they judged merely from objective symptoms, which they narrated. They admitted that such symptoms, individually and in combination, were consistent with a condition other than intoxication, as well as with a condition of intoxication, but they, nevertheless, stated as their opinions, based upon their general information and observation, that the defendant was intoxicated. The jury was at liberty to accept or reject these opinions of the witnesses for the prosecution. In the testimony of the defendant's physician the jury had before it other facts which, conceivably, might have explained the defendant's conduct, and which made up the so-called history of the case. But these latter facts did not explain the defendant's conduct to the satisfaction of the jury and its view of the matter is amply justified by the entire record. We find no miscarriage of justice in the verdict.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

---

62 Cal. App. 22

PEOPLE v. COCKRILL et al. (Cr. 655.)

(District Court of Appeal, Third District, California. April 30, 1923. Hearing Denied by Supreme Court June 28, 1923.)

1. Indictment and information 🔑159(2)—Conviction under indictment so amended as to state an offense absolutely void.

Where an indictment in the first instance states no offense, but is amended so that it does state an offense, a conviction under the indictment so amended is coram non judice, and absolutely void, under Pen. Code, § 1008.

2. Indictment and information 🔑110(2)—Departure from language of statute in defining crime immaterial if crime charged with clearness equal to language of statute.

In those cases in which the crime may properly be stated in a criminal pleading in the exact language of the statute defining it, a departure from the precise language of the statute in setting forth the crime in an indictment or information will not have the effect of vitiating the pleading if the language employed in such pleading describes the offense sought to be charged with clearness equal to that of the language of the statute itself.

3. Conspiracy 🔑43(1)—Indictment under Alien Land Law charging conspiracy to "purchase" real property in violation thereof held to state an offense.

An indictment for violating the Alien Land Law, forbidding conspiracy "to effect a transfer of real property" in violation of its provisions, alleging that defendants, one of whom was an alien ineligible to citizenship of this country, conspired to "purchase" certain real property, *held* to state an offense; the word "purchase" meaning "to acquire; to buy for a price," and in law including every mode of coming to an estate except by inheritance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Purchase.]

4. Conspiracy 🔑43(1)—Indictment for violating Alien Land Law held not invalid for failing to allege that land acquired was agricultural or farming land.

An indictment for conspiring to violate the Alien Land Law, escheating agricultural or farming land acquired by aliens ineligible to citizenship, *held* not void for failing expressly to allege that the property purchased by defendants was agricultural or farming land, or not land which such alien might acquire for residential or commercial purposes.

5. Indictment and information 🔑111(1)—Indictment under Alien Land Law not invalid for failing to negative acquisition of lands to satisfy liens.

An indictment for conspiring to violate the Alien Land Law, escheating to the state lands of a certain class acquired by aliens ineligible to citizenship, was not invalid because it failed to allege that the acquisition of the land was not to be consummated for the purpose of enforcing or satisfying any lien existing upon real property at the time of the enactment of the law.

6. Indictment and information 🔑159(2)—Amendment of indictment for conspiring to violate Alien Land Law held not to prejudice rights of defendants.

In a prosecution for conspiring to violate the Alien Land Law, the substantial rights of the defendants were not prejudiced under Pen. Code, § 1008, by permitting the indictment to be amended so as to state the offense or the transaction from which it arose in greater detail; the substance of the crime charged not being affected.

7. Conspiracy 🔑44½—Instruction in prosecution for conspiring to violate Alien Land Law incorporating provisions of act as to prima facie presumption of intent held not error.

In a prosecution for conspiring to violate the Alien Land Law, it was proper for the court to incorporate in its charge a portion of the law providing that a prima facie presumption that the conveyance is made with intent to avoid escheat shall arise upon proof of the taking of the property in the name of a person other than certain persons mentioned in the act if the consideration is paid or agreed to be paid by an alien, since, under Pen. Code, § 1102, rules of evidence in civil actions are applicable also to criminal actions, and it not appearing that it was the legislative intent that such presumption should have application only under civil cases in escheat.

8. Aliens 🔑10—Constitutional law 🔑250—Alien Land Law as to presumption of intent to evade escheat held not to deny equal protection of the law.

That provision of the Alien Land Law raising a prima facie presumption that a conveyance under the act is made with intent to evade escheat where the property is taken in the name of one person and the consideration to be paid by an alien does not deny to any person or class of persons within the state the equal protection of the law guaranteed by Const. U. S. art. 14, § 1.

9. Treaties 🔑13—Alien Land Law held not to infringe rights guaranteed to alien Japanese denizens.

Alien Land Law, § 9, providing that a prima facie presumption of intent to evade escheat shall arise when the property is taken in the name of one and the consideration is to be paid by an alien, *held* not to infringe any rights guaranteed to alien Japanese denizens within the state of California by article 1, par. 3, of the Treaty of 1911 between the United States and Japan.

10. Constitutional law 🔑250—Legislature may change any rule of evidence, and place upon defendant in a criminal case a heavier burden.

It is within the constitutional right of the Legislature or of the people in the exercise of the powers of initiative which they have reserved to themselves to change any rule of evidence now existing, and to place upon defendant in a criminal case of whatsoever character a heavier burden in the trial of the charge against him than he is under the existing system required to bear.

11. Conspiracy 🔑47—Provision as to presumptions in Alien Land Law held not to change burden of proving guilt beyond reasonable doubt.

Alien Land Law, § 9, providing that a prima facie presumption that a conveyance under the act is made with intent to evade escheat shall arise upon proof of the taking of the property in the name of one person, the consideration to be paid by an alien, does not relieve the people of the burden of proving the guilt of persons prosecuted under section 10 of such act beyond every reasonable doubt.

12. Conspiracy 🔑48—Instructions advisable in prosecutions under Alien Land Law stated.

In conspiracy prosecutions for violating Alien Land Law, where an instruction declaring the prima facie presumption provided by section 9 of the act is given, such instruction should always be accompanied by an instruction that the burden thus placed upon defendants charged under section 10 of the act was only such as required defendants to introduce evidence sufficient to create a reasonable doubt of their guilt.

13. Criminal law 🔑822(11)—Instruction as to prima facie presumption in prosecution for conspiring to violate Alien Land Law held not to place undue burden of proof upon defendants.

In a prosecution for conspiring to violate the Alien Land Law by the purchase of agricultural land to be owned by an alien Japanese, where the court had charged the prima facie presumption of intent to evade escheat as stated in the act, such instruction did not have the effect of attaching to defendants any further burden than that of creating by the introduction of testimony in rebuttal of the presumption a reasonable doubt of their guilt, in view of other instructions given.

14. Criminal law 🔑1169(1)—Introduction in evidence of discussion by defendant before grand jury of meaning of Alien Land Law held harmless error.

In a prosecution for conspiring to violate Alien Land Law it was not prejudicial error to admit in evidence certain statements made by one of the defendants before the grand jury relating to the transaction involved, and which consisted entirely of a discussion between the district attorney, his assistant, defendant, and some of the grand jurors, as to the meaning of the several provisions of the law.

15. Conspiracy 🔑45—Discussion by defendant and grand jurors as to meaning of law charged to have been violated held admissible to show defendant's intent.

In a prosecution for conspiring to violate the Alien Land Law, brought against an alien Japanese and his attorney, a discussion between such attorney and others before the grand jury as to the meaning of certain provisions of the law was admissible in evidence at the trial against the attorney as tending to reveal such attorney's real intentions with regard to the transaction upon which the charge was based.

16. Conspiracy 🔑47—Evidence held to sustain conviction for conspiring to violate Alien Land Law.

In a prosecution of an alien Japanese and his attorney for conspiring to violate the Alien Land Law in procuring the execution of a contract, whereby the alien was to purchase agricultural land in violation of the act, evidence *held* to sustain a conviction.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

W. A. Cockrill and Y. Akada, also known as S. Akada, were convicted of conspiracy to violate the Alien Land Law, and they appeal. Affirmed.

Hearing denied by Supreme Court; Seawell, J., having been trial judge, does not participate herein.

Chas. A. Wetmore, Jr., of Marysville, Gillogley, Crofton & Payne, of San Francisco, and Frank A. Duryea, of Marysville, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendants, Cockrill, a lawyer by profession, and Akada, a native of Japan, were indicted by the grand jury of Sonoma county for the crime of conspiring to cause or effect the transfer of real property to an alien ineligible to citizenship under the laws of the United States, in violation of the provisions of an initiative act adopted by the people at the general election held on November 2, 1920 (St. 1921, p. lxxxiii), and designated and known as the "Alien Land Law." The defendants demurred to the indictment on general and special grounds, and also moved to set it aside for alleged statutory reasons. The motion was disallowed, but the district attorney, conceding the force of the demurrer in a certain particular, was, upon motion, allowed to amend the indictment. Like proceedings were had as to the amended indictment, and, by leave of the court, the district attorney again amended the indictment, and it was upon the second amended indictment that the defendants were finally arraigned, tried, and convicted of the crime above stated.

At the time fixed for the arraignment of the defendants for sentence, the latter, through their counsel, interposed a motion in arrest of judgment and also a motion for a new trial, both of which were denied. The appeal is by the defendants from the judgment and the order denying their application for a new trial.

The transaction out of which this prosecution developed took place on the 26th day of August, 1921, negotiations for its consummation having previously been carried on for several weeks by the defendants with B. C. Souza and Mae C. Souza, his wife, the parties owning the land involved in the transaction. The Souzas were the owners of approximately 30 acres of agricultural land situated near Petaluma, in Sonoma county. When the defendants proposed to purchase the land the Souzas stated to them that, if the purchase of the land was to be made for Akada himself, and the property to be for his own possession, occupation, and use, they did not think that the sale could be made under the law, referring, of course, to the Alien Land Law. Akada and his wife (also a native of Japan) had, prior to the transaction here involved, lived on a farm in Sonoma county for a number of years, and during that time several children were born to them, and both Akada and Cockrill declared to the Souzas that the land was to be purchased for the American-born children of said Akada. After considerable discussion of the matter Cockrill, so the Souzas testified, stated that he had consulted the district attorney of Sonoma county about the transaction, and had been advised by that official that, if the land was to be purchased for the American-born children of Akada, the transaction would be perfectly legal. This statement was positively denied by the district attorney. He testified that no such advice was given by him to Cockrill; that the latter had never consulted him about the matter.

Finally a written agreement for the purchase of the land, dated the 26th day of August, 1921, was entered into between the Souzas and the defendant Cockrill whereby the land was sold to the latter for the sum of $2,250. Upon the execution of this agreement Cockrill paid the vendors the sum of $150. The agreement provided that on the execution of a deed and certificate of title to the property the sum of $1,100 was to be paid, and that the balance of the purchase price, $1,000, was "to be covered by a mortgage on said property, said mortgage to be held by parties of the first part (the Souzas) or their assigns." The Souzas, as we have stated, testified that the defendants represented to them at all times that the land was to be purchased for and to be owned by the American-born children of the defendant Akada. Akada furnished the money with which the payments on the land were made.

It appears that the abstract of title disclosed some defects in the title, and on September 24, 1921, Cockrill, representing the Souzas as their attorney, commenced a suit to quiet title in the superior court of Sonoma county. There is no question raised here as to the fact that four of the children of Akada, for whom it was claimed by Cockrill and Akada the land was purchased, were of American birth.

After the action to quiet title was commenced Cockrill was subpœnaed to appear before the grand jury to give testimony as to the transaction. Before the inquisitorial body he testified that Akada purchased the property for his American-born children; that the contract of sale was taken in Cockrill's name, as trustee for said children, and that the intention was to complete the transaction by taking a deed in the name of said children and then having a guardian of their estates appointed for them.

It appears that at the time of the several transactions herein referred to, while believing that Akada's native-born children could take title to agricultural lands in this state, and that it was not unlawful for him (Akada) to furnish the money for the purchase of such lands for such purpose, Cockrill was of the opinion that an alien Japanese father could not act as guardian of his children's estate, and hence "arrangements were made to have an American citizen appointed as such guardian as soon as the title should be found good and the actual transfer made." Parenthetically, we may say that the Supreme Court, in the case of Estate and Guardianship of Yano, 206 Pac. 995, decided subsequently to the transactions above referred to, held that an alien incapable of becoming a citizen of this country may not only furnish the money for the purchase of agricultural lands for his American-born children, but may also act as guardian of the persons and estate of such children.

There was testimony to the effect that, upon the execution of the agreement of purchase and sale, the defendant Akada commenced to improve the land by erecting thereon a number of buildings which, aside from the one in which he and his family were to reside, were to be used as "chicken houses." All this testimony was by the court limited in its application to the defendant Akada. There were also admitted in evidence certain statements made by Cockrill and Akada when testifying before the grand jury regarding the transaction involved herein, as was also an extrajudicial statement by Akada relative to said transaction, in which, however, he declared that the property was bought for his children, but in which he gave what appears to be an inconsistent explanation as to the source from which the money used in purchasing the property came.

The above statement embraces substantially all evidence of material importance introduced by the people in support of the charge. As to the defense, Cockrill's testimony was all that was received in rebuttal of the showing made by the people, Akada not having been called to testify. Cockrill's testimony consisted of an effort on his part to explain that the transaction involving the purchase of the land was carried on in good faith, and according to a conscientious interpretation by him of the provisions of the Alien Land Law, and that the intention was to purchase the land for Akada's American-born children.

The defendants advance a number of points on which they claim to be entitled to a reversal of the judgment and the order. Most of these points, while involving challenges of the legal soundness of certain given instructions and the action of the court in disallowing others proposed by defendants, and rulings of the court as to the admissibility of certain evidence, in reality involve an assault upon certain portions of the Alien Land Law upon the ground of their alleged invalidity. These points we will now proceed to consider.

1. The defendants vigorously contend that, in allowing the purported indictment to be amended, the court committed error in this: That the indictment, as originally filed, did not state an offense under the act in question, and hence no amendment thereof, even if thus an offense under said law was stated, could make it an indictment, since the situation in such case would be as if the grand jury had not found and presented an indictment against the accused.

The authority for the allowance of amendments of indictments and informations is in section 1008 of the Penal Code, so much of which as is apposite to the present consideration reads as follows:

> "An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads. Such amendment may be made at any time thereafter, in the discretion of the court where it can be done without prejudice to the substantial rights of the defendant. An indictment cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination."

The particulars in which it is claimed that the indictment as originally filed was insufficient because of the want of facts or in the statement of the offense thereby sought to be charged are as follows:

> "First, the indictment did not charge that the land involved was agricultural land, or that it was not land which an alien Japanese might acquire for residence or commercial purposes in accordance with the treaty between the United States and Japan.
>
> "Second, the grand jury did not find or charge that the transaction was for the use or benefit in any way of the defendant Akada.
>
> "Third, the grand jury did not find or charge that the land was not to be acquired for the use and benefit of defendant Cockrill, in whose name the contract was taken.
>
> "Fourth, the grand jury did not find or charge that the contract was not taken, or that the land was not to be finally transferred, in satisfaction of any lien thereof."

[1] Clearly, if the document filed as an indictment in the first instance stated no offense under the Alien Land Law, and the purported second amended indictment, upon which the accused were tried, does state such an offense, then it must be held that the purported trial and the conviction of the defendants were coram non judice, and absolutely void, inasmuch as the document purporting to be the second amended indictment would be no indictment at all, it not having been found and presented by the grand jury. Nor could the document stand as an information, since the prerequisites of the filing of an information are wanting. Sections 809, 872, Pen. Code.

The primary question, then, is whether the "original indictment" stated an offense under the Alien Land Law; and this question must be determined upon a consideration of certain provisions of said law and certain provisions of the Treaty between this government and the Empire of Japan. 37 St. 1504.

The first section of the act in question reads as follows:

> "All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state."

Section 2 provides:

> "All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation

or country of which such alien is a citizen or subject, and not otherwise."

Section 7 reads in part as follows:

> "Any real property hereafter acquired in fee in violation of the provisions of this act by any alien mentioned in section 2 of this act, or by any company, association or corporation mentioned in section 3 of this act, shall escheat to, and become and remain the property of the state of California. * * * The provisions of this section and of sections 2 and 3 of this act shall not apply to any real property hereafter acquired in the enforcement or in satisfaction of any lien now existing upon, or interest in such property, so long as such real property so acquired shall remain the property of the alien, company, association or corporation acquiring the same in such manner. No alien, company, association or corporation mentioned in section 2 or section 3 hereof shall hold for a longer period than two years the possession of any agricultural land acquired in the enforcement of or in satisfaction of a mortgage or other lien hereafter made or acquired in good faith to secure a debt."

The first part of section 8 contains a similar provision as to escheat in relation to any leasehold or other interest in real property less than the fee acquired in violation of the provisions of the act by an alien mentioned in section 2 of said act, or by any alien, company, association or corporation mentioned in section 3. There are other provisions in said section which are not material to this inquiry.

Section 10, upon which the indictment herein is predicated, reads as follows:

> "If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both."

The initial clause of article 1 of the Treaty between the United States and Japan reads as follows:

> "The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

It will be noted that sections 1 and 2 of the Alien Land Law describe and designate the classes of aliens competent to acquire and possess real property in this state, the first including all that class of aliens that are eligible to acquire the rights of citizenship in the United States, and the second embracing all aliens, whether they are or are not eligible to citizenship of this country, that are entitled to acquire and possess real property by virtue of the provisions of any treaty between this government and the country of which such aliens are natives guaranteeing such right.

While section 3 is not particularly important to the discussion of the points herein made, it may be explained that it guarantees the right to own real property by such aliens as are not mentioned in sections 1 and 2 as may constitute a majority of the members of any company, association, or corporation, organized under the laws of this state or any other state or nation, or who hold a majority of the issued capital stock of said company, etc., and which corporation is authorized to acquire, possess, enjoy, and convey real property or any interest therein in this state, in the manner and to the extent and for the purposes prescribed by any treaty existing at the time of the enactment of said law between the government of the United States and the nation or country of which such members or stockholders are citizens or subjects. Obviously no other class of aliens ineligible to become citizens of the United States than those classes mentioned in the above sections of the Alien Land Law are entitled to acquire agricultural or farming land in this state.

With this understanding of the provisions of the Alien Land Law and the provisions of the treaty between this government and the government of Japan which are pertinent to the present investigation, we will proceed to an examination of the indictment as it was found and presented by the grand jury to the superior court. That pleading is in the following language:

> "W. A. Cockrill and Y. Akado are accused by the grand jury of the county of Sonoma, state of California, by this indictment, found this 15th day of November one thousand nine hundred and twenty-one, of the crime of conspiracy to effect a transfer of real property in violation of the Alien Land Law of the state of California, committed as follows:
>
> "The said W. A. Cockrill and Y. Akado, on or about the 19th day of September, nineteen hundred and twenty-one, at and in said county of Sonoma, state of California, that the said defendants W. A. Cockrill and Y. Akado did then and there willfully, unlawfully and feloniously conspire together to effect a transfer of real property in the county of Sonoma, state of California, and an interest therein, and did so willfully, unlawfully and feloniously take and enter into an agreement to purchase certain real property from Bartholomeu C. Souza and Mary C. Souza in the name of said defendant W. A. Cockrill, and paid thereon on the purchase price thereof the sum of one hundred and fifty dollars, lawful money of the United States, which said money so paid on said purchase price was paid by said defendant Y. Akado, said Y. Akado being an alien and a subject of the Empire of Japan, and not being then and there an alien eligible to citizenship

under the laws of the United States, and there not being then and there any treaty existing between the government of the United States and the government of the Empire of Japan providing for the acquiring, possessing, enjoying and transferring real property or any interest therein, contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California."

[2, 3] It will be observed that the indictment, as it was originally framed, is substantially in the language of section 10, upon which it was founded. It is true that the pleader in preparing the indictment used the word "purchase," which is not employed in section 10, in the place of the word "transfer," which is used in said section in defining the offense. In other words, the indictment, in the place of alleging in that portion thereof directly charging the offense that the defendants unlawfully, etc., did "conspire to effect a transfer," etc., as is the language of section 10, alleges that the defendants did willfully, unlawfully, and feloniously take and enter into an agreement "to purchase certain real property," etc. But, even in those cases in which the crime may properly be stated in a criminal pleading in the exact language of the statute defining it, a departure from the precise language of the statute in setting forth the crime in an indictment or information will not have the effect of vitiating the pleading if the language employed in such pleading describes the offense sought to be so charged with clearness equal to that of the language of the statute itself. Indeed, the word "purchase," taken alone, and as it is used in the present case, is much more scopeful than would be the word "transfer," taken alone, if it were likewise used. To say that one had effected the transfer of real property without further explanation or amplification of the proposition would be ambiguous as to the persons by whom and to whom the transfer is made. In the present case, for instance, if there was nothing more in the indictment than the allegation that the defendants had formed a conspiracy to effect a transfer of real property contrary to the provisions of the Alien Land Law, the indictment would be obnoxious to the objection of uncertainty and ambiguity. In fact, it would probably be held not to state an offense under the law. The word "purchase" has a definite and well-understood juridical meaning. Indeed, its meaning in a juridical sense is quite synonymous with its signification as it is colloquially used and understood, and, when used for the purpose of characterizing a transaction involving property of any kind, it is readily to be understood therefrom that there has been an acquisition by one or more parties of the title to such property. "Purchase," states Webster in his dictionary, means "to acquire; to buy for a price." This is undoubtedly the popular meaning. In law it "includes every mode of coming to an estate except by inheritance." Greer v. Blanchar, 40 Cal. 194, 197. In Marsh v. Lott, 8 Cal. App. 384, 391, 97 Pac. 163, which was a suit for the specific performance of a contract of option to buy real property, and in which agreement it was covenanted that the proposed vendee was thereby given "an option to purchase" certain real property, the appellate court had occasion to interpret the word "purchase" as used in such agreement, and in explaining the meaning of said word said:

> "By reference to said agreement, we find that she gave plaintiff an option to purchase her property. The word 'purchase' implies the acquisition of; so that he (proposed vendee) was given the right to acquire the property of defendant, which in this case could not be otherwise than by a deed of conveyance."

Thus must it readily be seen that, in alleging that the defendants, one of whom was an alien ineligible to citizenship of this country, conspired to purchase certain real property, the indictment stated an offense against which the statute inveighs. In other words, the sum and substance of the charge as laid in the indictment before its amendment was that the defendants, one an alien legally incapable of becoming a citizen of the United States, and the other, as we may assume from his name, a citizen of this country or, if not already one, a person who is eligible to become such, entered into a conspiracy to effect a transfer to themselves of certain real property, contrary to the terms of the Alien Land Law of the state of California and that, in pursuance of the execution of such conspiracy, they committed two distinct overt acts, to wit: (1) That they entered into a written agreement with the owners of said real property for the acquisition thereof; (2) that, on the execution of said agreement, they paid to the vendors, with money furnished by the alleged alien defendant, the sum of $150 on the purchase price. Section 1104, Pen. Code. Of course, the indictment necessarily means that the intent of the defendants was to prevent, evade, or avoid an escheat as provided in the act.

[4] But, as we have seen, it is urged that, to state an offense under the law in question, it was necessary that there should have been an allegation in the indictment that the real property which it is alleged was purchased by the defendants was agricultural or farming land, or not land which such alien may acquire for residential or commercial purposes. It is to be conceded that, as it was originally framed, the indictment is by no means a model criminal pleading. It is further to be conceded that, since under their treaty rights Japanese aliens may own certain houses, manufactories, shops, etc., and which possibly might be susceptible of the construction that thus they are guaranteed the right to own the land upon which such houses, etc.,

were erected and are maintained, it would have been the result only of the exercise of wisdom if the pleader, in drafting the indictment, had also alleged that the real property which it is charged that the defendants acquired or entered into an agreement to acquire was agricultural or farming land; still, as is to be understood from what we have said above, we do not think that allegation was indispensably essential to the statement of the offense denounced by section 10 of the act. In construing the indictment we must consider section 10, on which it is based, together with the other provisions of the Alien Land Law and the provision of the treaty between this government and the empire of Japan guaranteeing to alien Japanese certain rights as to real property. Thus viewing the indictment, it seems to us that but one conclusion can follow, and that is that the "real property" which that pleading charges the defendants with having conspired to acquire is the "real property" which the act in question declares that an alien ineligible to citizenship of the United States has no right to acquire or own in this state. The defendants could not have misunderstood the indictment to mean anything else, and it must therefore be held as true, as we have hitherto declared, that the indictment as it was presented to the superior court by the grand jury, while inartificially phrased, was, in all other respects, sufficient to notify the defendants of the particular offense with which they were charged, so that they could not be misled as to its real meaning, or placed in such a position as not to be able to meet by any defense they may have the charge of conspiring to effect the transfer of agricultural land to an alien not competent under our laws to become a citizen or acquire the rights of citizenship of the United States. This is all that is required of any criminal pleading. It may be added that the evidence without conflict shows that the "real property" referred to in the indictment was farming land, and that the defendants, from the character of the cross-examination of the witnesses for the prosecution, appeared to have understood that the indictment so charged.

[5] It was not necessary, in the statement of the offense denounced by section 10 of the act in question, to allege that the acquisition of said land was not to be consummated for the purpose of enforcing or satisfying any lien existing upon real property at the time of the enactment of the Alien Land Law. Indeed, the very allegation that the defendants conspired to purchase certain real property itself plainly negatives the existence of the exception relating to the acquisition of real property through the enforcement or satisfaction of any lien or mortgage, provided in section 7 of the Alien Land Law.

The amended indictment added the allegation that the real property concerned herein was agricultural and farming land; that the contract was taken in the name of the defendant Cockrill for the "use, benefit, enjoyment, possession, occupation, and control of defendant Akada"; that there was no provision in the treaty between the United States and Japan guaranteeing to Japanese aliens the right to acquire agricultural land. The second amended indictment, in addition to the matters set out in the amended indictment, supplied the omission in the amended indictment to state the time at which the alleged crime was committed; that the said land "was and is not acquired in the enforcement or satisfaction of any lien," etc.; that the land was taken in the name of the defendent Cockrill, for the use and benefit of the defendant Akada, "with the intent and for the purpose of preventing, evading, and avoiding the escheating of said land and property to the state"; that defendant Cockrill had no interest in the fee of said land or otherwise.

The only material change made by either amendment was that involved in the allegation that the real property which the defendants conspired to have transferred to themselves was "agricultural or farming land." The other changes were not essential to the statement of the offense. We have already disposed of the proposition that the indictment should have alleged that the land was not acquired in the enforcement or satisfaction of any lien, etc. The allegation that Cockrill had no interest in the fee is immaterial, since the indictment, as originally presented, alleged that the land was purchased by him and the defendant Akada, thus showing that Akada himself had acquired an interest in the land, and that the purpose of the conspiracy or combination between him and Cockrill was to effect that result with respect to said real property.

[6] It is clear that it cannot be held that the change effected in the indictment by the amendment thereof, as above indicated, affected the substance of the crime charged, but merely resulted in stating the offense or the transaction from which it arose in greater detail. Precisely the same offense as was stated in the indictment as it was originally framed is merely set forth with more particularity in the indictment as amended. The substantial rights of the defendants could not, therefore, have been prejudiced by the amendment. Section 1008, Pen. Code. We may add that, since the indictment, both as originally filed and as amended, stated the offense designed to be therein charged, and the original indictment appearing to have been found, indorsed, returned, and presented according to the requirements of the law, the motions to set aside the amended and second amended indictment were properly denied. And for the reasons stated above in holding that the indictment, as orig-

inally framed, was exempt from the claims of the demurrer thereto, the motion in arrest of judgment was properly denied.

2. The next assignment which is to be considered is that the court committed error resulting in serious prejudice to the substantial rights of the defendants by incorporating into its charge and thus reading to the jury certain provisions of the Alien Land Law. The provisions made a part of the court's charge to the jury comprehend all of sections 1, 2, and 10 and a portion of section 9 of said act. Sections 1, 2, and 10 are hereinabove reproduced. As to these, as parts of the court's charge, there is no objection suggested. It is, however, objected that it was error from which the defendants sustained serious damage to their substantial rights for the court to have embraced within its charge that portion of section 9 of the act establishing a disputable presumption of the guilt of persons charged under section 10 upon the proof of certain facts. So much of said section as was included within the charge to the jury reads as follows:

> "Every transfer of real property, or of any interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed or sought to be conveyed shall escheat to the state if the property interest involved is of such a character that an alien mentioned in section two hereof is inhibited from acquiring, possessing, enjoying or transferring it, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein.
>
> "A prima facie presumption that the conveyance is made with such intent shall arise upon proof of any of the following groups of facts:
>
> "(a) The taking of the property in the name of a person other than the persons mentioned in section two hereof if the consideration is paid or agreed or understood to be paid by an alien mentioned in section two hereof."

There are three other distinct acts the doing of which, or any one of which, will raise the presumption mentioned. The specific grounds upon which objection is urged against said instruction is: (a) That the said presumption was intended by the Legislature to be invoked and applied exclusively in civil actions authorized by sections 7 and 8 of said act to be brought for the purpose of securing a decree escheating to the state any real property or leasehold interest in such property which has been acquired in violation of the terms of the act; (b) that said portion of section 9 is violative of that part of section 1 of article 14 of the Constitution of the United States which provides that "no state shall * * * deny to any person within its jurisdiction the equal protection of the laws;" (c) that it is in direct contravention of the terms of article 1, par. 3, of the American-Japanese treaty of 1911; (d) that the provision as to said presumption is invalid because, when given as an instruction to a jury in a case arising under section 10 of the act, it contradicts and destroys the effect of the presumption that all persons accused of public crime are innocent until their guilt is established beyond a reasonable doubt.

(a) The statute does not expressly limit the application of the presumption to any particular action or proceeding which may, by virtue of certain of its provisions, be instituted in the superior court. Nor, as we read the statute, is there any reason arising from the statute itself or from a reasonable construction thereof which inclines us to the belief that it was the legislative intent that the presumption should have application only to civil cases or proceedings in escheat, as authorized by the act.

Section 1102 of the Penal Code provides that:

> "The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code."

[7] We know of no other section or provision of the Penal Code whose language is such as to require the conclusion that the application of the presumption in question should not as well be applied to a criminal as a civil action authorized by the act. Hence we hold that the presumption was properly stated to the jury in the charge of the court in this case.

[8, 9] (b and c) The two propositions thus designated hereinabove may be considered together, since both involve the general contention that the presumption in question is discriminatory in its operation, in that it is applicable alone to cases in which a particular or single class or race of people is proceeded against in this state in an action in the courts of this state. But we think it will require but little reflection and no argument to satisfy any mind unfettered by prejudice against the Alien Land Law or unembarrassed by partisanship in favor of those accused under section 10 in a particular case that, in so far as it applies to criminal cases arising under the act in question, the provision of section 9 as to the conditions upon which the presumption will arise is neither amenable to the objection that it denies to any person or class of persons within this state the equal protection of the law nor subject to the criticism that it infringes any rights guaranteed to alien Japanese denizens within the state of California by article 1, par. 3, of the Treaty of 1911 between our government and Japan. The only criminal proceeding authorized by the act is that which may arise under section 10 thereof, and that section is, it will be observed, sweeping in its scope. It excepts no one from its operative effect, but by its very language is made to apply to all persons, regardless of their race, nativity, or color. If

two or more American-born citizens were to conspire to do the act or acts inhibited by said section their conduct in that regard would clearly fall within the condemnation of the section. Indeed, no better illustration of the legal soundness of this proposition can be found than in the instant case, in which, as we have reason to know, one of the accused is a native of the United States. In its application to the criminal cases arising under section 10 of the act, the prima facie presumption which may arise under the conditions indicated by section 9 is, in its scope and effect, coextensive only with the scope of section 10. The presumption, therefore, as a rule of evidence, necessarily applies alike to all persons, irrespective of nativity, race, or color, who by their conduct come within the ban of section 10. It follows, then, that the rule as to the presumption is not in any wise or in any sense discriminatory as against any class or race of people or violative of any treaty rights of alien Japanese residing in this state.

The proposition decided in Re Terui, 187 Cal. 20, 200 Pac. 954, 17 A. L. R. 630, cited by the appellants, bears no relationship in a legal sense to the points here under consideration. In that case, the Supreme Court had before it the question of the constitutionality of an act of the Legislature of 1921 (St. 1921, p. 613) imposing upon and exacting from "every alien male inhabitant of this state over twenty-one years of age and under sixty years of age," except certain enumerated incompetents, the payment of an annual poll or head tax of ten dollars. Former Chief Justice Angellotti, voicing the views of the court, held, as quite obviously no other conclusion could justly be announced under such circumstances, that (quoting from the syllabi):

> "In view of the provisions of the existing treaty between the United States and Japan, providing, among other things, that the citizens or subjects of neither shall be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects, the alien poll tax law of California is ineffective for any purpose with relation to any citizen of Japan."

This is all that was decided in the Terui Case, and thus readily is it to be perceived that, as stated, it has no application to or bearing upon the points here under discussion.

(d) Finally it is said, as we have seen, that the effect of embracing the presumption in an instruction addressed to a jury in a criminal action based on section 10 is to shift the burden of proof to the accused, and so nullify the effect of the rule that the presumption of innocence abides with the defendant in a criminal case until the jury, from the evidence, has been convinced of his guilt beyond all reasonable doubt.

[10] It will not be denied that, if it be within the competence of the Legislature, in the exercise of its powers under the Constitution, to establish such a rule of evidence as is involved in the prima facie presumption under consideration, a trial court may, if by so doing it does not enter upon the domain of fact, instruct the jury as a matter of law that such presumption will arise upon the proof of a certain fact or group of facts in any criminal case to which it is applicable. And we know of no constitutional restriction upon the Legislature to create or establish any rule of evidence whose effect, when applied, is not to deny to any person accused of crime a trial by due process of law. Indeed, it is in our opinion within the constitutional right of the Legislature, or of the people, in the exercise of the powers of initiative which they have reserved to themselves, to change any rule of evidence now existing, and place upon a defendant in a criminal case, of whatsoever character, a heavier burden in the trial of the charge against him than he is under the existing system required to bear.

[11] But we do not understand that the presumption referred to was intended to relieve the people of the burden of proving the guilt of persons prosecuted under section 10 of the act beyond every reasonable doubt; nor do we think when properly applied, the presumption will have that effect. It is a mere disputable presumption, the effect of which is to be overcome by such evidence only presented by the defendants as will be sufficient to create a reasonable doubt of their guilt. Its meaning is simply this: That, after the people have shown by sufficient evidence, either direct or circumstantial, that the persons charged have by their joint acts effected a transfer of farming or agricultural land to an alien ineligible to become a citizen of the United States, then it rests with those persons to explain the transaction consistently with good faith and honest intentions, or that the combination was formed with no intention to effect the wrongful result which their acts may appear upon their face to have brought about. The "burden" is neither in principle nor degree different from that imposed by the law on a person charged with the crime of murder. Section 1105 of the Penal Code provides:

> "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

[12] The above section, which obviously casts upon a defendant in a murder case the burden of a certain degree, after the homicide has been shown by the people to have

been committed by him, has in innumerable cases been held to represent a perfectly valid exercise of legislative power. But by it there was no intention in the Legislature to say that the burden of proving the defendant's guilt beyond a reasonable doubt was not still upon the people, the quantum of evidence which he was required to present to support that burden being such only as would or will raise a reasonable doubt of his guilt of the crime of murder. People v. Bushton, 80 Cal. 160. 164, 22 Pac. 127, 549; People v. Boling, 83 Cal. 380, 382, 23 Pac. 421; People v. Ah Gee Yung, 86 Cal. 144, 146, 24 Pac. 860; People v. Newcomer, 118 Cal. 263, 271, 50 Pac. 405; People v. Rodriguez, 182 Cal. 197, 187 Pac. 423. It should be suggested in this connection that an instruction to a jury declaring the prima facie presumption provided by section 9 of the act should always be accompanied by an instruction that the burden thus placed upon the defendants charged under section 10 of the act was only such as required the defendants to introduce evidence sufficient to create a reasonable doubt of their guilt.

[13] It is, however, clear from its charge to the jury in the instant case that the trial court did not regard the burden cast upon the defendants by the presumption in question as amounting to more than a demand upon them, in sustaining the burden, to introduce such evidence only as would create a reasonable doubt of their guilt of the offense charged. The court explicitly instructed the jury:

> That the burden of proving the guilt of the defendants was upon the people, and that "every essential fact, or every essential to a conviction, must be established beyond a reasonable doubt and to a moral certainty"; that, upon the plea entered by the defendants of not guilty to the indictment, the presumption of innocence arose, and that said presumption "accompanies the defendants throughout the trial, and goes with you in your retirement to the jury room to deliberate upon your verdict. It will avail to acquit the defendants unless it be overcome by sufficient proof of guilt. You must examine the evidence by the light of that presumption, and, unless, upon examining it, you find it sufficiently strong to overcome the presumption of innocence, to remove it, and, moreover, to satisfy you of the defendants' guilt beyond all reasonable doubt and to a moral certainty, they would be entitled to an acquittal at your hands."

Again, in another part of the charge, the court further instructed the jury that—

> "The law presumes every man to be innocent until his guilt is established beyond a reasonable doubt, and this presumption attaches at every stage of the case, and to every fact essential to a conviction."

These instructions certainly were sufficient to convey to the mind of any intelligent man or woman that the prima facie presumption arising upon a proof of certain facts in connection with the transaction culminating in the execution of the alleged conspiracy does not have the effect of attaching to the defendants any further burden than that of creating by the introduction of testimony in rebuttal of the presumption a reasonable doubt of their guilt.

The court's action in giving and refusing to give other instructions is criticized. It is not necessary to give these assignments special attention herein, for the reason that the court's charge covered every important principle pertinent to the case. Every principle embraced in the instructions proposed by the defendants, but rejected by the court, was covered by the court's charge. The criticism of certain other given instructions than the one embracing a statement of certain provisions of the Alien Land Law, and above considered, we find, upon a careful examination thereof, is without merit.

3. The court allowed the district attorney to introduce before the trial jury certain alleged statements made by the defendant Cockrill before the grand jury relating to the transaction herein involved. This testimony was limited in its effect to the defendant Cockrill. Counsel for the defendants stated that they had no objection to offer to the introduction of any portions of the statement made by Cockrill before the grand jury which involved the facts of said transaction. It transpired, however, that the alleged "statement" consisted entirely of a discussion between the district attorney, his assistant, Cockrill, and some of the grand jurors as to the meaning of the several provisions of the Alien Land Law. To these matters counsel for the defendants vigorously objected. But the court, while stating that they involved mere matters of argument as to the meaning of the law, permitted them to go into the record and before the jury, saying that they were only argumentative, and so were innocuous in their effect upon the rights of the defendants, and were so intermingled with certain facts testified to by Cockrill before the grand jury which the people were entitled to introduce before the trial jury that they could not be segregated from the facts without much waste of time and great inconvenience.

[14, 15] We have given this assignment serious consideration, and thus have not been able to persuade ourselves that the introduction of those matters before the jury exercised any baleful effect upon the rights of the accused. Of course those matters should not have been permitted to be introduced into the case, and should have been stricken from the record; but the opinions expressed by Cockrill, the district attorney, his assistant, and some of the jurors as to the meaning of the provisions of the Alien Land Law corresponded in a measure with the statement of the law by the court in its charge to the jury. Besides, the record shows that

counsel on both sides, in their arguments before the jury, read and gave their respective interpretations of the provisions of said law applicable to the case. There was no expression by either the district attorney, his assistant, or any of the grand jurors contained in the alleged statement of Cockrill before the grand jury upon the question of the guilt or innocence of the defendants. Moreover, Cockrill, when asked by the district attorney or his assistant or any grand juror a question calling for his opinion as to the meaning of certain provisions of the law, invariably answered, and gave his conception of the meaning of said provisions. While these are our views with respect to the admission of the matters referred to in evidence, we are not prepared to deny that there is some force in a suggestion made by the court, when ruling upon the question of the admissibility of Cockrill's testimony before the grand jury, that the discussion of the provisions of the Alien Land Law by the parties named before the grand jury, and thus securing the opinion of Cockrill regarding certain provisions thereof, might have been construed to disclose his real state of mind with regard to the transaction—that is to say, it may well be regarded as tending to reveal in a measure his real intentions relative to that matter. In that view the discussion between Cockrill and others before the grand jury as to the meaning of certain provisions of the law would be admissible in evidence at the trial as against him.

It is lastly contended that the evidence is wholly insufficient to support the verdict, particularly as to the defendant Cockrill. We have above given herein the substance of the evidence introduced by the people and directly addressed to the proof of the charge. Laying aside, for the moment, the instruction containing the provision of the act as to the prima facie presumption arising upon the proof of certain facts or the doing of certain acts, it is clear to our minds that the evidence directly presented by the people was such that it would be an unwarranted interference with the province of the jury for a reviewing court to declare that the conclusion arrived at by the jury was not fortified by sufficient proof. In addition to the admitted facts (above referred to) that Akada furnished the money which was paid on the purchase price, and that Cockrill took the contract of sale in his name, is the testimony of the Souzas that, prior to the time at which Cockrill appeared in the transaction, Akada undertook to negotiate the purchase of the property for himself. Explicitly did B. C. Souza so testify, and further testified that he (Souza) told Akada at that time that he could not sell the land to an alien Japanese, and advised Akada to consult an attorney. It further appears from the testimony of said Souza (and this is not contradicted) that, immediately upon the execution of the contract of sale and the payments required thereby being made, Akada himself took possession of the property, although the contract was still in Cockrill's name. And here we may pause to suggest that the jury were well justified in viewing (and we may assume in support of the verdict that they did so view it) the fact of the taking possession of the land by Akada immediately upon the execution of the contract of sale as reflecting the purpose or intent of the defendants while prosecuting the negotiations for the purchase of the land; that the real intention of the defendants was to purchase the land for Akada and to take it in Cockrill's name as a mere camouflage of such intent. It also appears that no steps had been taken by Cockrill or Akada after the execution of the agreement and Akada took possession of the property to secure the appointment of a guardian for the latter's children. As stated above, Akada, in a conversation with certain parties, after the contract was executed, but prior to the execution of the conveyance of the land according to the terms of the agreement, declared that the money with which certain payments were made on the purchase price belonged to his children, the eldest of whom was about seven years of age, but could not, or at least did not, make a satisfactory explanation as to where or how they kept the money. He also stated that he was going to live on the land with the boy and "run it." Then there was the testimony of the Souzas that, prior to the execution of the agreement of sale, Cockrill said to them that he had consulted the district attorney of Sonoma county about that particular case, and that that official told him (Cockrill) that it was a valid transaction, and, as seen, the denial of the district attorney that he ever gave any such advice to Cockrill or that the latter ever consulted him about said transaction.

[16] Thus it is clear that there was sufficient evidence introduced by the people, if credited or believed by the jury, as the verdict shows that it was, to warrant a verdict of guilty as to both defendants. It is true that Cockrill's testimony tended to contradict the bad faith or any wrongful motive at the botton of the transaction which is to be implied from the testimony presented by the people. It is also true that Cockrill explained, as to the statement of the Souzas, that he said to them that he had consulted the district attorney about this particular case; that, when speaking to the Souzas of his interview with said official, he had reference, and so explained to the Souzas, to another and entirely different case. But it was obviously with the jury to accept the stories of the Souzas on all the matters as to which they testified, and reject the testimony of Cockrill as to any matters to which he testified. This they evidently did.

But, as we have seen, a prima facie presumption of guilt arose upon the uncontra dicted fact that Akada, being an alien, ineligible to become a citizen of the United States, furnished the money with which payments upon the purchase price of the land were made. If there had been no other testimony introduced after the proof or the admission of this fact—if, in other words, the defense had introduced no proof whatever or made no attempt to make a showing in rebuttal of the presumption referred to—it would have been the duty of the jury under the law to return a verdict of guilty. As we have shown, however, there is plenty of testimony in the record which strengthens and supports the presumption.

We have now given painstaking consideration to the points advanced against the validity of the judgment and the order appealed from, and, as must be apparent from the foregoing discussion, have found no just legal reason for disturbing either.

The judgment and the order are accordingly affirmed.

We concur: FINCH, P. J.; BURNETT, J.

(62 Cal. App. 190)

PEOPLE v. KNIGHT. (Cr. 968.)

(District Court of Appeal, Second District, Division 1, California. May 10, 1923.)

Appeal and error ⚷654—Though transcript failed to contain application stating grounds of appeal as required by statute, a certified original application would be permitted.

Where the transcript on appeal did not contain the application for a complete record stating the grounds of appeal as required by Pen. Code, § 1247, but affidavits filed indicated that an application was made as required by the statute within the prescribed time and left with the deputy clerk to be filed, but subsequently lost, *held*, that applicant, having complied with the requirements of statute, should not be required to suffer because of the loss by the clerk, and that he might be permitted to file a certified copy of his original application.

Proceeding by the People against G. H. Knight. On motion to dismiss appeal by defendant. Motion denied.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

J. W. Wright, of Tulare, and D. M. Edwards and J. C. Thomas, both of Visalia, for defendant.

HOUSER, J. This is a motion to dismiss an appeal for the reason that the transcript on appeal fails to show that an application stating the grounds of the appeal was filed by the defendant as required by section 1247 of the Penal Code. That the transcript is thus defective is conceded by appellant; but after the notice to dismiss the appeal was served on the attorneys representing appellant they procured from the judge of the superior court of Tulare county, before whom the action was tried, an order nunc pro tunc permitting appellant to file with the county clerk a copy of an original application by defendant for a complete record as specified by section 1247 of the Penal Code, which application contained a specification of the grounds of appeal. Under rule 14 of the Supreme Court (176 Pac. xi) appellant has suggested a diminution of the record for the purpose of correcting the error, and has also asked for an order directing the clerk of this court to file herein a copy of his original application setting forth the various matters to the omission of which in the transcript on appeal objection is here made.

It is shown by the affidavits on file that the original application for a complete record containing a specification of the grounds of appeal was prepared within the time prescribed by the statute and left with a deputy clerk in the office of the county clerk of Tulare county, with the request that the application be filed, to which the deputy clerk responded, "'Very well,' or something of that kind;" that thereafter in pursuance of said application and on an order by the judge of the superior court of Tulare county, a complete record (with the exception of the application) was made up; that the said application has been lost or mislaid; and that diligent search in the county clerk's office and elsewhere has been made for the said application, but that it has not been found. Appellant apparently complied with the requirements of the statute, and he should not be made to suffer because of the loss by the deputy clerk of the document in question.

It is ordered that the motion to dismiss the appeal be and it is denied; and it is further ordered that the clerk of this court file with the records herein a certified copy of appellant's "application for a complete record" as the same appears on file in the office of the county clerk of Tulare county under the nunc pro tunc order of the judge of the superior court.

We concur: CONREY, P. J.; CURTIS, J.

62 Cal. App. 134

WORTH v. WITT et al. (Civ. 2572.)

(District Court of Appeal, Third District, California. May 7, 1923.)

1. Appeal and error ⚷70(2), 870(5)—Order sustaining demurrer without leave to amend is not appealable.

An order sustaining a demurrer to the complaint without leave to amend is not appealable, but can be reviewed only on appeal from the final judgment entered in the action.

2. Appeal and error ⚷337(2) — Subsequent judgment of dismissal held not to validate appeal from order sustaining demurrer.

An order dismissing an action entered six months after demurrer to the complaint was sustained without leave to amend, and appeal taken therefrom, does not give the appellate court jurisdiction over the appeal previously taken from the order sustaining the demurrer, especially where the notice of appeal was not from any supposed judgment of dismissal, but was from the order sustaining the demurrer.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by C. Worth against Birdie V. Witt and others, to recover rent. From an order sustaining a demurrer to the complaint, plaintiff appeals. Appeal dismissed.

J. G. Rossiter and B. M. Marble, both of Los Angeles, for appellant.

Edward R. Milliken, of Pasadena, for respondents.

BURNETT, J. Plaintiff brought the action to recover $2,750, which he claimed to be due for rent. Defendants owned an adjoining lot upon which were growing certain trees, the roots of which had intruded into the soil of the lot belonging to plaintiff. The latter gave notice to the former that he would demand a rent of $50 a month for the said use of his land. No attention was paid by respondents to said notice, and thereafter another notice was given that the rent would be $100 a month from a certain date. This was also ignored, and the complaint followed, based upon the theory that, by reason of said notice, and the implied acquiescence of the defendants, the relation of landlord and tenant was created. The question thus suggested is novel and interesting, but, as we read the record, we have no jurisdiction to determine it in this proceeding.

A demurrer, both general and special in its nature, was interposed, and the record shows the court sustained the demurrer without leave to amend. No other order or judgment appears in the transcript, and it is from this order that the appeal was attempted to be taken as shown by the following notice:

"Please take notice: That plaintiff above named hereby appeals to the District Court of Appeals * * * from the whole of that certain order and judgment made and entered in this action by said court on the 21st day of October, 1921, wherein and whereby said court sustained defendants' demurrer to plaintiff's complaint without leave to plaintiff to amend, and from the whole thereof."

In the written request to the clerk for the preparation of the transcript plaintiff recited also that he "desires to appeal and has appealed from ruling of this court on defendant's demurrer to plaintiff's amended complaint, wherein and whereby said demurrer was sustained without leave to plaintiff to amend."

[1] That such order is not appealable is settled beyond controversy. The action of the court upon the demurrer can only be reviewed upon an appeal from the final judgment entered in the action. Wood, Curtis & Co. v. Missouri, etc., Ry. Co., 152 Cal. 344, 92 Pac. 868; Litch v. Kerns, 8 Cal. App. 747, 97 Pac. 897; Hanke v. McLaughlin, 20 Cal. App. 204, 128 Pac. 772; Pacific S. Home v. Protection Dist., 49 Cal. App. 326, 93 Pac. 169.

[2] This point was not made by respondents in their brief or on the oral argument, and hence it was deemed advisable to call the attention of the parties to the question that they might submit their views thereon. In response to the suggestion appellant has moved for a diminution of the record to show that a judgment of dismissal was actually entered. His motion has been granted, and the appropriate addition made to the record. But it is apparent that the change does not aid him in any manner. In fact, it shows clearly that his appeal was entirely premature. The clerk's certificate shows that the order of dismissal was made and entered on April 10, 1922, whereas the notice of appeal was given October 21, 1921. Of course, an appeal of October 21, 1921, could not be from a judgment of April 10, 1922. It is the claim of appellant that the clerk should have entered the order of dismissal on October 21, 1921, but, be that as it may, the fact is that he did not do so, and the statutory privilege of taking an appeal is based upon what has been done, and not upon what should have been done. It is manifestly of no moment that appellant believed that said action had been dismissed. The dismissal involved a vital fact which he must ascertain at his peril. Moreover, as we have seen, the notice of appeal was not from any supposed judgment of dismissal, but from the order sustaining the demurrer.

Having attempted to appeal from an order from which the statute gives no right of appeal, appellant's proceeding is abortive, and this court has no jurisdiction.

The appeal is dismissed.

We concur: FINCH, P. J.; HART, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

62 Cal. App. 153

WHITING v. WHITING. (Civ. 4166.)

(District Court of Appeal, Second District, Division 1, California. May 9, 1923. Hearing Denied by Supreme Court July 5, 1923. Rehearing Denied June 5, 1923.)

Divorce ⚿133(1)—Finding of lower court against claim of desertion held sustained by evidence.

In view of Civ. Code, § 99, as to separation by consent, evidence presenting a substantial conflict as to wife's desertion *held* to sustain denial of divorce.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Action for divorce by Lillie L. Whiting against Perry Whiting, wherein defendant filed a cross-complaint also seeking divorce. From a decree denying relief to either party, defendant appeals. Affirmed.

R. L. Horton, of Los Angeles, for appellant.

G. P. Adams and W. W. Orme, both of Los Angeles, for respondent.

CURTIS, J. Plaintiff instituted this action against the defendant to obtain a decree of divorce on the ground of cruelty. Defendant in his answer denied the charge, and filed a cross-complaint against the plaintiff, charging both cruelty and desertion. The court denied relief to either party. The defendant appeals from the judgment, and maintains that the charge of desertion set forth in his cross-complaint was fully established by the evidence in the case, and that the decree should have been in his favor on this issue. He makes no complaint as to the decree denying him a divorce on the ground of cruelty. The sole question, therefore, on this appeal, is whether, on the evidence in the case, defendant was entitled to a decree of divorce on the ground of desertion.

In support of his contention that the decree should have been in his favor defendant's counsel, in his brief, makes copious quotations from the testimony of the defendant. In fact, by far the greater portion of his brief is taken up with such quotations of testimony. He then argues that this evidence constitutes a complete case under the law of this state relative to desertion. We might agree with the defendant in this contention, and, were this the only testimony in the case, we might go farther and hold that the judgment in this case be reversed, and that the defendant be awarded a decree. But the defendant directs us only to the testimony favorable to himself, and leaves out of consideration the testimony in the case on behalf of the plaintiff. If this testimony, favorable to plaintiff, taken in connection with that on behalf of defendant, presents a substantial conflict in the evidence on the issue of desertion, then the finding of the lower court must be sustained.

Defendant alleges that plaintiff deserted him on the 6th day of December, 1918. Plaintiff admits leaving her home on the morning of that day in company with the defendant. When they arrived in the business district of the city of defendant took his grip, said good-bye, and went to his club. She was asked whether she left her husband or he left her; she replied that he left her. She further testified that she remained away three or four days, when she returned to her home, but the defendant was not there. She remained there until the day before Christmas, and during this time the defendant lived at his club, and was only at their home on one or two occasions, and then only for a short period of time. She states that it had been her custom for years to spend Christmas with her friends, the Cheneys, and that on the day before Christmas, with her daughter, Madlyn, she left her home and visted the Cheneys. She remained there a few days, when her daughter was taken with the "flu," and was sent to the hospital. The next day the plaintiff was taken with the same ailment, and also went to the hospital. On January 21, 1919, after recovering from her illness, she returned to her home. She found the house in great disorder; the defendant was not there, and evidently had not been living there during her absence. On this day she took her personal belongings with her, left the home, and has never returned there to live. On the day before, January 20, 1919, at the request of Mr. Adams, the attorney for plaintiff, the defendant called at the office of the latter, when the following conversation took place, as told by the defendant while on the stand as a witness in this case:

> "I went up there. He says, 'Is there any chance—has this gone so far that there is no chance for reconciliation?' 'Well,' I says, 'Mr. Adams, I don't believe that there is any use.' I said, 'This is the second time we have separated now.' And I says, 'She has promised, when she came back the other time, that she would never refer to the past, and it was only a week or so she got mad about something and twitted me about everything that ever happened before. She has done it half a dozen times. She has packed up her stuff partly, and I had to coax her, to coax her up, coax her up; I don't believe if she came back it would last a month or two months at the most.' I says, 'I don't believe that there is any use.'"

The testimony in the case was voluminous, and we have only referred to brief portions of it, but sufficient, we believe, to show that there is a substantial conflict therein upon the issue of desertion as presented by the allegations of defendant's cross-complaint and the plaintiff's answer thereto. The plaintiff stated positively that she did not desert the defendant, and detailed facts and circumstances which lend support to her statement. There was also introduced testimony of other witnesses which tended to corroborate the testimony of plaintiff. In the face of this record we cannot say that there was no evidence to support the finding of the court that plaintiff did not desert the defendant.

We would also call attention to the conversation set forth above between the defendant and the attorney of the plaintiff in the latter's office on January 20, 1919. This was some six weeks after the defendant claims he was deserted by the plaintiff, and while the parties were living separate and apart. He was asked by Mr. Adams, the attorney, if there was any chance for a reconciliation between himself and his wife, and he replied that there was not. He then stated that his wife had left him half a dozen times before, and he had been compelled to coax her back each time; that he did not believe if she came back it would last a month or two months at the most, and that he did not believe there was any use for them to try it again. When we remember that this testimony was given by the defendant himself, and therefore it must reveal clearly his feelings in the matter at the time of the interview, we are forced to the conclusion that the separation then existing between himself and wife was with his consent and approval. Conceding, for the present, that the wife had left the defendant, as he claimed, here was ample evidence that her leaving was with his consent. Separation by consent is not desertion. Section 99, Civ. Code. It is true in other portions of the defendant's evidence he testified that he was unwilling his wife should leave the family home, and that after she left he had repeatedly requested her to return, but such a frame of mind is absolutely inconsistent with that manifested by the defendant at the time of the interview with Mr. Adams, when he positively refused all overtures for a reconciliation, declaring substantially that he did not believe there was any use for them to try and live together again. This testimony, therefore, of the defendant himself presents a substantial conflict in the evidence on one of the essential and material elements in the case, and it alone is sufficient to support the finding of the court that plaintiff did not desert the defendant.

The judgment is affirmed.

I concur: CONREY, P. J.

HOUSER, J., deeming himself disqualified, takes no part in this decision.

(62 Cal. App. 157)

WHITING v. WHITING. (Civ. 4168.)

(District Court of Appeal, Second District, Division 1, California. May 9, 1923. Rehearing Denied June 5, 1923. Hearing Denied by Supreme Court July 5, 1923.)

1. Divorce 🔑216, 228—Allowance of attorneys' fees and alimony to wife pending appeal held not precluded by decree denying her right to costs in action below.

In an action for divorce, where defendant filed a cross-complaint also seeking a divorce, and relief was denied to either party, and each party required to pay his own costs, from which decree defendant appealed, *held*, that the court, notwithstanding its previous decree denying plaintiff alimony or attorney's fees, was not precluded from making an allowance for her use in defending the appeal taken by defendant.

2. Divorce 🔑182 — Allowance of attorneys' fees and alimony held not abuse of discretion notwithstanding wife's separate estate.

In an action for divorce by a wife, who was shown to possess property valued at $4,300, and to be earning $16.50 a week, where defendant was shown to have been worth at least $200,000, *held*, that the court did not err in making an allowance of alimony and attorneys' fees on appeal to the wife notwithstanding her personal estate.

3. Divorce 🔑182—Allowance of attorneys' fees for use on appeal held not invalid.

An allowance of alimony and attorneys' fees to a wife for use in defending an appeal taken by the husband cannot be *held* invalid because of the wife's desertion where such desertion was the sole issue in the trial below which was determined adversely to the husband, and remains unreversed.

4. Contracts 🔑111—Antenuptial contract providing for payment to wife in lieu of all other claims in case of separation or divorce held void as against public policy, and not to preclude allowance of attorneys' fees in divorce action.

An antenuptial contract which provided that, in case of separation or divorce, the wife would accept a stated sum in full payment and settlement for each and every claim of any nature against the husband, including separate maintenance, allowance, alimony, or property claims, *held* void as against public policy, and not to preclude the court from making an allowance of alimony and attorneys' fees in an action for divorce between the parties.

Appeal from Superior Court, Los Angeles County; John W. Summerfield, Judge.

Action for divorce by Lillie L. Whiting against Perry Whiting. From an order allowing plaintiff alimony pending an appeal and attorney's fees, defendant appeals. Order affirmed.

R. L. Horton, of Los Angeles, for appellant.

G. P. Adams and W. W. Orme, both of Los Angeles, for respondent.

CURTIS, J. This is an appeal from an order requiring the defendant to pay plaintiff alimony, costs, and attorneys' fees on appeal in an action for divorce. The original action was instituted by the plaintiff to secure a decree of divorce against the defendant on the ground of cruelty. The defendant, in addition to his answer denying the charge of cruelty, filed a cross-complaint against the plaintiff asking for a decree in his favor on the ground of cruelty and desertion. The action was tried, and the court denied relief to either party. It also decreed that each party pay its own costs, and denied the motion of plaintiff for alimony and attorneys' fees. The decree was entered in June, 1920, and the defendant appealed therefrom. The judgment in said action (being action No. 4166) was affirmed by opinion this day filed. 216 Pac. 91. On May 23, 1921, plaintiff moved said superior court for an order requiring defendant to pay plaintiff a reasonable sum as costs and attorneys' fees on appeal, and for alimony pending the appeal of said action by said defendant. The motion was heard by the court, and the defendant ordered to pay plaintiff the sum of $200 costs and $1,000 attorneys' fees, and the further sum of $150 per month alimony during the pendency of said appeal. It is from this last-named order that defendant has taken the present appeal.

Defendant strenuously insists that the order appealed from cannot be sustained, and enumerates the following grounds why the same should be set aside:

First, the court, at the conclusion of the trial of the action, having entered its decree that each party pay its own costs, and denying plaintiff's application for attorneys' fees and alimony, this decree was res adjudicata, and the court had no jurisdiction to grant a subsequent application for either alimony, costs, or attorneys' fees.

Second, the plaintiff had ample means of her own for her support and the costs of the action.

Third, that plaintiff had, without good cause or reason, deserted and abandoned the defendant prior to the commencement of the action, and was, without sufficient cause or reason, living separate and apart from him.

Fourth, that the antenuptial contract entered into between the parties precluded the court from making the order appealed from.

We will consider these objections in the order in which they are made.

[1] First. Was the court precluded from making the allowance for alimony, costs, and attorney's fees on account of its previous decree denying plaintiff alimony and attorneys' fees? This question must be answered in the negative. Our attention has been called to no authority supporting defendant's position. On the other hand, the exact question has been before our Supreme Court and decided adversely to defendant's contention. Gay v. Gay, 146 Cal. 237, 79 Pac. 885.

[2] Second. It is next insisted by defendant that the court erred in making said order for the reason that plaintiff had ample means of her own, both for her support and to meet the costs of said action. The recital in the order upon this phase of the controversy was as follows:

> "It further appeared to the court * * * that the defendant is a man of independent means and able to pay a sufficient sum for her support and maintenance, and her reasonable costs and attorneys' fees, and that plaintiff owns no property except an orange grove of about four (4) acres of land which has been greatly neglected, and of a value of about $8,000, but the same is incumbered by a mortgage of $3,700, and that the income from said grove is insufficient to pay the operating expenses of the same, and that she has no business or occupation, and is working in a real estate office at a salary of $16.50 per week."

While the order sets forth that the defendant is a man of independent means it does not purport to fix the value of his property, as it does the property of the plaintiff. However, in the affidavits of the parties filed on the hearing of the motion, the plaintiff gives the value of defendant's property in excess of $500,000, while defendant fixes the value at not to exceed the sum of $200,000. We think we are safe in assuming, therefore, that the defendant was possessed of property of the value of this latter figure at least, and that plaintiff's property was of the net value of approximately $4,300, without any net income therefrom, and that her only source of income was her salary of $16.50 per week. As we have heretofore seen, at the time the order was made, the defendant had already appealed to the Supreme Court from the judgment denying his divorce, and it was pending this appeal that alimony was decreed, and it was to enable plaintiff to defend herself against this appeal that the costs and attorneys' fees were ordered. Was it, under such a state of facts, within the power of the court to make the order complained of? The denial of the wife's application would have resulted in one of two situations. The defendant's appeal would have gone uncontested, or the wife would have been compelled to exhaust the small amount of property owned by her in defending herself against the proceeding instituted by defendant. It would have been unfair in the extreme to pit the wife in her penury against the husband in his affluence, in a proceeding commenced by him, and which, if successful, will not only sever the marital relation of the parties, in which the public, as well as they, have an interest, but it will cast a stigma upon the wife, against the infliction of which it was her right and duty to defend. Undoubtedly the lower court in its discretion took these facts into its consideration, and made the order accordingly. In our opinion we do not believe that this was any abuse of discretion.

In the case of Kowalsky v. Kowalsky, 145 Cal. 394, 78 Pac. 877, the Supreme Court, sustained an order of the lower court awarding temporary alimony and counsel fees where it appeared that the wife had some means, probably sufficient to have maintained her during the pendency of the action, and to have enabled her to pay her costs and attorneys' fees. In that case the court says:

> "It was within the discretion of the court to award the plaintiff temporary alimony and counsel fees, notwithstanding the fact that it appeared that the wife was the owner of some corporation stocks of the value of $700 or thereabout. The plaintiff alleged in her affidavit that the defendant owned property worth $100,000 and was in the receipt of an income of $650 per month. The defendant made no denial of this allegation further than to say that his property was not worth $100,000, and that his monthly income was not $600. This was equivalent to an admission that the value of his property and the amount of his income, respectively, were one dollar less than these sums. The court might well conclude that, with such abilities on the part of the husband, it would not be fair to the wife to compel her to sell all that she had in order to raise money wherewith to live and prosecute her action."

In our opinion the Supreme Court in this case satisfactorily answers defendant's contention that the lower court should not have made the order, for the reason that the plaintiff had ample means of her own for her support and costs.

[3] Third. The third ground upon which defendant appeals from the order is that the plaintiff deserted and abandoned him, and was at the date of the order living separate and apart from him. As stated before, defendant in his cross-complaint set up desertion as one of his grounds of divorce. The lower court found against him, and he has appealed from this judgment. The question as to whether the plaintiff deserted the defendant or not is the one question involved in that appeal. To hold in this proceeding that the plaintiff is not entitled to alimony and attorneys' fees because she deserted the defendant would be deciding that appeal in this proceeding. As the record stood at the time the order for alimony was made, the finding of the court was that the plaintiff had not deserted the defendant. Until that finding is set aside by the proper tribunal, it stands, and controls not only the parties to said action, but this court as well.

[4] Fourth. Lastly, defendant contends that the antenuptial contract, entered into between the parties precluded the court from making any order for alimony, costs, and attorneys' fees. We will not discuss the fairness or unfairness of this agreement, nor will we pass upon the question as to whether the plaintiff, prior to executing the same, sought and received proper and sufficient independent legal advice as to her rights thereunder. In view, however, of what has been said in the briefs of counsel, we are led to observe that, if there is any defect in the contract, it is the fault of defendant, and not that of the plaintiff. If the contract is cold and harsh, mercenary in spirit, and lacking in any terms of love and affection which we would expect to find in an agreement of this nature, these shortcomings must not be attributed to the plaintiff. While she had undoubtedly been consulted in a general way as to its terms, the real preparation of the document was intrusted to the defendant. He, or some one in his behalf, dictated its phraseology and selected its words from beginning to end. If any criticism, therefore, is to be indulged in relative to its contents, such criticism comes with ill grace from the lips of the defendant.

The contract in its preamble, recites that the parties thereto contemplate marriage; that they each have separate property, which they consider for the best interests of each should be defined and protected by an agreement prior to marriage, and that the consummation of the contemplated marriage is declared to be sufficient and valuable consideration for all the conditions and requirements of the agreement. The first paragraph of the contract refers wholly to the property of the parties; then follow the second, third, and fifth paragraphs (there is no fourth) in these words:

> "Second: It is further agreed by the said party of the first part hereto that in case of the separation or divorce of the parties hereto or the death of the party of the second part that in either or any of said events that the said party of the first part shall and will accept the sum of five thousand ($5,000.00) dollars in full payment and settlement for any, each and every claim of any nature or character whatsoever against the said party of the second part, his property or estate, and it is further agreed that said sum of $5,000.00 shall include in that event each and all claims for attorney's fees, separate maintenance, allowance, alimony, property claims, or any claim of any kind or character that the said party of the first part may or shall have by reason of being or having become the wife of the said party of the second part, including each and all rights of inheritance, homestead rights and widow's allowance, and upon payment or tender of said sum of $5,000.00 by the said party of the second part, his agents, heirs or legal representatives, within a reasonable time after said event or either of said events shall occur, said first party hereby agrees to and does waive each and all claims of any nature or character whatsoever against the said party of the second part or his property or estate except what he may provide for said party of the first part in his last will and testament, it being however understood and agreed that this does not and shall not constitute an agreement to leave any sum whatso-

ever to the said party of the first part by last will and testament.

"Third: It is further mutually agreed and understood between the parties hereto that should either party bring suit for divorce against the other at any time that they or either of them shall not ask for or accept from the court any sum or allowance or property of any kind or character not provided for in this agreement, it being mutually agreed and understood that this constitutes a settlement of each and all such claims between the parties hereto and a complete and full settlement of property rights between them; except that this agreement shall in no way affect the custody of children, issue of said marriage, and this to be valid and binding no matter what charge might be alleged or proven in any such divorce action. And should the court for any reason whatsoever grant to the said party of the first part a larger sum as alimony, costs, or attorney's fees in excess of said sum of $5,000.00, then and in that event the said party of the first part hereby agrees to waive in a legal and satisfactory manner each and all claims to anything in excess of the said $5,000.00 above mentioned.

"Fifth: It is further agreed and understood between the parties hereto that up to the present time there does not exist between the parties any mutual agreement or promise of marriage but although the same has been in contemplation the said contract of marriage has not yet been entered into but upon the signing of this agreement the said contemplated agreement and promise of marriage shall become binding each upon the other and upon the signing of these presents each of the parties hereto agrees to consummate said vows of marriage in a legal and usual manner."

From the portions of the contract above set out, it will be seen that the limit plaintiff could receive from the defendant in case of separation or divorce would be the sum of five thousand dollars, which sum would include alimony, costs and attorneys' fees. At the hearing of the motion, defendant contended that, while they were living together as husband and wife, he had advanced plaintiff money, which she had used on her own separate property, and which, together with such sums as he had paid her since the separation, far exceeded the sum of five thousand dollars, and therefore the court had no authority to compel him to make any further payments. We do not understand that it is seriously contended by the plaintiff that she has not received at least five thousand dollars from the defendant at the times and in the manner in which he claims that he advanced the same to her. The position of plaintiff is that, admitting that she has received from the defendant the sum of $5,000, as claimed by him, still the order is valid for the reason that the antenuptial contract, wherein it attempts to fix the amount which plaintiff can recover in any future divorce action as alimony, costs and attorneys' fees, is against public policy, and void.

"It is not the policy of the law to encourage divorces." Morgan v. Morgan (Cal. Sup.) 213 Pac. 993.

"Any agreement for divorce, or any collateral bargaining promotive of it, is considered unlawful and void. * * * Under our Code either husband or wife may enter into any agreement or transaction with the other, or with any other person, respecting property, which either might if unmarried. * * * Notwithstanding this freedom to enter into any contract between themselves or with other persons, it has been held in this state repeatedly that an agreement between husband or wife founded upon consideration to withdraw or abandon a defense to a suit for divorce, or do anything to facilitate procuring the same, is illegal and void." Newman v. Freitas, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548.

Quoting further from this case (129 Cal. on page 290, 61 Pac. on page 909 [50 L. R. A. 548]) the court says:

"The courts of other states have expressed themselves similarly in reference to such contracts."

In the case of McCahan v. McCahan, 47 Cal. App. 173, 190 Pac. 458, the parties had entered into an agreement containing the following provision:

"6. In the event that any action for divorce shall ever be instituted between the parties hereto, then and in such event it is agreed that there shall be awarded to the party of the second part the sum of one hundred ($100.00) dollars in full settlement of all her claims for counsel fees and costs herein; and it is further agreed that said sum shall be awarded in one action only."

After the execution of said agreement the husband instituted an action of divorce against the wife, who was the party of the second part in said agreement. Judgment was entered in favor of the husband, and the wife appealed from the judgment, and moved the court for costs and attorney's fees on appeal. The husband, resisting the motion, filed an affidavit in which he alleged the execution of the above-mentioned agreement and that he had fully complied therewith by paying to his wife the sum of $100. The court overruled his objection, and made an allowance of $343 as costs and counsel fees on appeal. The appellate court sustained the order, and held the contract void as against public policy. It not only held the contract void, but it sustained the order of the lower court upon the broad ground that the matter of costs and counsel fees in divorce actions had by legislative enactment been exclusively vested in the discretion of the trial court, and that any agreement made by the parties, attempting to settle such matters, is subject to the examination and sanction of the court.

In Pereira v. Pereira, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107, the parties had entered into an agreement which provided that, if the wife should thereafter procure a divorce against her husband, the latter would pay her the sum of $10,000 in full satisfaction of all her claims for alimony, costs, counsel fees, and her rights in the community property. The lower court declared the agreement void, and the Supreme Court, in affirming the judgment, uses the following language:

> "The real effect of the contract to pay the $10,000, so far as the husband is concerned, would be to provide against liability for a contemplated wrong to be subsequently inflicted by him upon his wife, and to liquidate such liability in advance of the commission of the wrong. The evidence and findings show that the defendant was then possessed of property worth about $77,000, was engaged in a very lucrative business, and was receiving an income of about $11,000 a year which he had every reason to believe would continue. By this contract, if valid, he was left free to inflict upon his wife the most grievous marital wrongs, such as would compel her to obtain a divorce, secure in the protection of his contract that $10,000 would satisfy all her claims against him of a pecuniary nature or in relation to the community property. If he should, after its execution, be moved by evil impulse to commit anew the offenses against his wife which first gave her cause for divorce, or other acts having the same legal effect, the existence of a valid contract of this sort could not but encourage him to yield to his baser inclinations, and inflict the injury. As it was obviously adapted to produce this result, it is to be presumed that this was one of the inducements which made him desire its execution. The law does not countenance such agreements. 'Any contract between the parties having for its object the dissolution of the marriage contract, or facilitating that result, * * * is void as contra bonos mores.'"

Our attention has not been called to any authority prescribing a different rule than that laid down in the cases above cited. The only suggestion we have received from appellant offering any reason why the doctrine enunciated in these cases should not be followed is that in the present action the contract was made prior to marriage, while those considered in the authorities above cited were made subsequent to marriage. We can see no good reason why any such distinction should be made. If contracts of this nature tend to facilitate the dissolution of the marriage relation, then they should not be sanctioned by the courts, irrespective of the time of their execution. If by such an agreement "the husband is left free to inflict upon his wife the most grievous marital wrongs, such as would compel her to obtain a divorce, and at the same time he could rest secure that the payment of the amount stipulated in the contract will satisfy all her claims against him of a pecuniary nature," would the situation of the parties be any different if the agreement had been made prior rather than subsequent to marriage? Would such a provision be any less a menace to the marriage relation if more prior rather than subsequent to its consummation? If the existence of such an agreement would "encourage the husband to yield to his baser inclinations to commit marital offenses against his wife," is there any good reason to believe that his conduct would be less reprehensible from the mere fact that the instrument, by which he had sought thus to protect himself was an antenuptial rather than a postnuptial agreement? We believe that all these questions should be answered in the negative, and that contracts like the one involved in the present action are a menace to the marriage relation, and should not be tolerated, and this irrespective of the time when the same might have been executed in reference to the time of the marriage.

We are therefore of the opinion that the contract in this action is absolutely void, and its existence furnished no ground that would preclude the court from making the order appealed from. We are further of the opinion that no good reason appears why the order appealed from should be disturbed by this court. There was no abuse of discretion on the part of the court in making the same.

The order appealed from is hereby affirmed.

I concur: CONREY, P. J.

HOUSER, J., deeming himself disqualified, takes no part in this decision.

62 Cal. App. 143

PEOPLE v. KNIGHT. (Cr. 1089.)

(District Court of Appeal. First District, Division 1. California. May 8, 1923.)

Criminal law 🔑371(1)—Evidence of similar acts by accused relevant to show intent to commit crime charged.

Where accused admits the commission of an alleged criminal act, but denies that he intended to commit it, evidence of similar acts by him is relevant to show his intent.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

John D. Knight was convicted of committing lewd and lascivious acts on the body of a girl under 14, etc., in violation of Pen. Code, § 288, and he appeals. Affirmed.

William H. Schooler, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

TYLER, P. J. Defendant was charged with having committed lewd and lascivious acts upon the body of a female child under the age of 14 years, with the intent of arousing and gratifying the lusts and passions and sexual desires of himself and such child, as denounced by section 288 of the Penal Code. He was tried and found guilty.

He had been previously convicted of the same offense, but a new trial was granted by the lower court upon the ground that it had permitted the prosecution to introduce evidence of offenses committed against other little girls, for the purpose of showing the disposition of the defendant to commit crimes of the character with which he is charged. The points here relied upon for a reversal of the judgment of conviction present practically the same question, though the evidence was received in this trial upon a different theory.

Briefly stated, the facts are as follows: Defendant at the time of the offense charged was about 57 years of age. He is the father of three adult children. He was divorced from his wife and lived alone in a small cottage in the Mission district. According to his own testimony he was very fond of little children, and his chief pleasure in life was to do things to make them happy. In the basement of his cottage he had erected a swing and slide upon which children might play, and he had also accumulated a large number of so-called funny papers for their amusement, in addition to which he maintained a piano in his home upon which he permitted little children to strum. It was his custom to visit a park in the neighborhood and to attract children by distributing his funny papers to them. He invited numerous young girls to his home, where he amused them upon the swing and slide. The prosecutrix, a little girl 9 years of age, was one of the many children who frequently visited him. At the time the alleged offense was committed she testified that she called on defendant with her little brother, that defendant on that occasion removed his clothing and put on a bath robe, and then removed her underwear and placed his private parts against hers. For this crime defendant was arrested.

When confronted by the prosecutrix with her charges and those of several other little girls, who had accused him of having placed his hands between their limbs while he was swinging them, and also at times when he was reading funny papers to them, defendant did not deny the charges in toto, but declared, according to the testimony of the police officers, that they were true in part only. At the trial and in explanation of his statement defendant testified that he did on certain occasions place his hands upon the children's legs when taking them from the swing and slide, but that his act in so doing was only accidental and done with no evil intent. To refute and negative this innocent motive and intent the state then offered, and there was received in evidence, the testimony of other little girls to show that the defendant had placed his hands under their clothing between their legs on different occasions. The reception of this evidence, it is claimed, justifies a reversal of the case.

It is the general rule that evidence of a distinct crime, unconnected with that charged in the indictment, cannot be received for the purpose of showing a greater probability that the defendant committed the offense charged. One of the fundamental provisions of the federal and state Constitutions is that an accused shall be informed of the nature and cause of the accusation. To admit evidence of such collateral facts would be to oppress the accused by trying him on charges of the nature and cause of which he has not been informed and which he has made no preparation to meet, and by prejudicing the jury against him through the assertion of an offense, the depravity of which would of necessity create prejudice in the minds of the jurors, as it would prompt a more ready belief that the defendant might have committed the act with which he is charged. Accordingly, it has been held in this state that in cases of this character it cannot be shown that a defendant has made a practice of committing lewd acts upon the persons of other children for the purpose of showing a lewd character and strengthening the probability that he committed the offense of which he is accused. People v. Anthony, 185 Cal. 152, 157, 196 Pac. 47.

Certain exceptions exist, however, to the rule just stated, which have been permitted from necessity to aid in the detection and punishment of crime. Among these is the rule that evidence of other crimes is competent to prove the specific crime charged when it tends to establish intent, the absence of mistake, or accident, or a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other. Wharton's Cr. Ev. (10th Ed.) p. 73; Wigmore on Ev. § 357 et seq.; People v. Sindici, 54 Cal. App. 193, 201 Pac. 975.

We do not deem a discussion of these questions necessary, for here no attempt was made to admit the testimony objected to under any one of the exceptions. It was not until defendant claimed an innocent motive in his relations with the prosecutrix that any direct attempt was made to prove that his testimony in this respect was untrue, by showing the commission of similar acts on his part with other children. The real ground upon which the evidence was admitted was upon the theory that, after the defendant denied that the admitted acts were done with lustful intent, it was proper to rebut this declared innocent motive and intent by showing that defendant had committed like lascivious acts upon other little girls. Defendant himself opened the door for the admission of such evidence, and he is therefore in no position to complain of its reception. Where the commission of an act charged to be a crime is admitted by an accused, but he denies that he intended to commit it, evidence of his doing similar acts is relevant to show intention. Underhill on Crim. Ev. (2d Ed.) 89; People v. Hickok (Cal. App.) 204 Pac. 555.

It is claimed by respondent that defendant was not prejudiced or his substantial rights affected by the testimony, for the reason that there was sufficient evidence in the record to indicate that he had committed similar offenses, which went in without objection. The conclusion we have reached makes further discussion of the case unnecessary.

The judgment is affirmed.

We concur: ST. SURE; RICHARDS, J.

191 Cal. 238

FOOTHILLS ORCHARDS CO. v. BROCKMAN et al. (Sac. 3510.)

(Supreme Court of California. June 19, 1923.)

Appeal and error ⚷193(9)—Appeal by defendant whose interest was subordinate to mortgage foreclosed held without merit.

In action to foreclose a mortgage on land, where, if the interest of a defendant in the property was subordinate to the mortgage, it would be foreclosed by the decree, and, if not, would not be affected by it, his appeal, in which he urges for the first time that, as he was mentioned only in the title to the complaint, and his interest in the property was not set out therein, the complaint did not state a cause of action as to him, and, not having stated such cause of action the decree based thereon should be reversed as to him, was without merit.

In Bank.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Foothills Orchards Company against C. W. Brockman and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Samuel D. Weil, of Los Angeles, for appellants.

Woodruff & Shoemaker, of Los Angeles, for respondent.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

PER CURIAM. This is an appeal from a judgment of the superior court of Tulare county in favor of plaintiff in an action to foreclose a mortgage upon real property of defendants Brockman situated in Tulare county.

Defendant Lloyd E. Noble, appellant here, prosecutes this appeal on the judgment roll alone, and here contends for the first time that, as he is mentioned only in the title to the complaint, and his interest in the property is not set out therein, the complaint does not state a cause of action as to him, and that, not having stated facts sufficient to constitute such cause of action, the decree based thereon should be reversed as to him and the cause remanded. Appellant permitted his default to be entered against him, and now seeks for the first time on this appeal to interpose his demurrer and secure relief from the judgment. This appeal is without merit. The defendants' interest in the property is subordinate to the mortgage, and will be foreclosed by the decree, and, if not, it is not affected by it.

The judgment is affirmed.

(191 Cal. 307)

In re RYAN'S ESTATE.

RYAN v. RYAN et al.

(L. A. 7493.)

(Supreme Court of California. June 19, 1923.)

1. Wills 🔑441—Surrounding circumstances not considered in absence of ambiguity.

Where there is no ambiguity in the phrasing of a will, the court may not consider the surrounding circumstances to determine testator's intention, but must find it in the express language used.

2. Wills 🔑296—Extrinsic evidence inadmissible to rebut presumption of revocation by testator's marriage.

Under Civ. Code, §§ 1298, 1299, providing that testator's marriage revokes a will theretofore made, unless provision was made by the will or other settlement for the wife and surviving children of the marriage, or they are so mentioned as to show an intention not to make such provision, and that no other evidence to rebut the presumption of revocation may be received, extrinsic evidence is inadmissible, under sections 1307, 1318, to show whether the will was executed with testator's approaching marriage in mind and with reference to it.

3. Wills 🔑191—Appointment of one, whom testator subsequently married, as executrix, held not provision for her or indicative of intent not to make provision so as to prevent revocation of will by marriage.

A will appointing one as executrix whom testator subsequently married *held* not a provision for her or such mention of her as to show his intent not to make such provision, so as to prevent revocation of the will under Civ. Code, § 1299, in the absence of any thing in the will itself indicating that he contemplated matrimony when it was drawn or named her executrix with such contingency in view; the legal fees she would receive being allowed as earned, and there being nothing inconsistent in her being a legatee as well as executrix.

4. Wills 🔑220—Testator's heirs may contest.

Testator's heirs at law may contest the will.

5. Wills 🔑191—Will unqualifiedly revoked by testator's marriage, not merely as to wife.

Under Civ. Code, § 1299, a will is revoked by testator's marriage, not merely as to the wife, but unqualifiedly, if no provision is made for her or she is so mentioned as to show an intent not to make such provision, and she cannot take her portion as an heir; it being within the Legislature's power to have provided for partial revocation if it had seen fit.

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Petition by Thekla T. Ryan for the probate of the will of James W. Ryan, deceased, contested by Mary N. and Maude Ryan. From a judgment denying probate, petitioner and Norton B. Anderson and another, beneficiaries, appeal. Affirmed.

J. B. McLaughlin, of Los Angeles, James H. Hull, of Platte City, Mo., and R. D. McLaughlin, of Los Angeles, for appellants.

W. W. Hindman, of Los Angeles, for respondents.

LAWLOR, J. This appeal is taken from a judgment denying a petition for the probate of the will of James W. Ryan, deceased, by Thekla Ryan, the petitioner, and Norton B. Anderson and Presley M. Norton, devisees under the will. Decedent's purported will reads as follows:

"City of Los Angeles, County of Los Angeles, State of California. November 14, 1921.

"This is my last will hereby revoking any instrument made prior to this date. I leave to Mable Williams the sum of $250.00. To Medora Williams the sum of $250.00. To Ellen T. Ryan one thousand dollars. To Maude Larkin fifteen hundred dollars.

"The rest of my estate both real and personal to be divided in equal parts. One-half going to Norton B. Anderson or his heirs—and the other one-half to go to Presley M. Norton or his heirs.

"It is my wish that my body be cremated.

"I appoint Thekla T. Mohr executrix of my estate without bond and Robert D. McLaughlin attorney.

"It is my wish that estate be wound up as early as possible. James W. Ryan."

On February 17, 1922, decedent was married to Thekla T. Mohr, named in the will as executrix, and on the 23rd day of the same month he died. The petition for probate was filed on March 8 following. Respondents Mary N. Ryan and Maude Ryan, two surviving sisters of decedent, neither of whom was mentioned in the will, appeared and contested the probate on the ground that the will was revoked by the decedent under section 1299 of the Civil Code, which is as follows:

> "If after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received."

The trial court, over objection by respondents, and subject to subsequent ruling, permitted appellant Thekla Ryan to testify that she had known the decedent about ten years; that they were engaged to be married for about seven years; that they were engaged at the time decedent drew the will; that pursuant to the engagement she married him; and that at the time of making the will decedent knew of her state of health, her financial condition, and her habit of life. In its findings of fact, the court indicated its opinion that no other evidence than the will itself should be received to interpret it; that extrinsic evidence should not have been received; and that respondents' objection should have been sustained. It was further found that no provision was made for appellant Thekla Ryan by marriage contract; that she was not provided for in the will in question and was not mentioned therein in such a way as to show an intention not to make such provision. As a conclusion of law it was found that the will was revoked and not entitled to be admitted to probate.

Appellants contend that section 1299 is to be read in connection with section 1318 of the Civil Code, which provides in effect that a will is to be interpreted according to the intention of the testator, taking into view the circumstances under which it was made. It is insisted that extrinsic evidence may therefore be received to show what the testator's intention was in mentioning appellant Thekla Ryan and in appointing her executrix of the will. It is also claimed that the mention of her as such executrix is a sufficient indication from the will itself to show an intention not to revoke the will, inasmuch as, under section 1298 of the Civil Code, the mention of an heir need not be to give him a legacy to show an intention to exclude him, and that if possible the will must be interpreted in a manner which will not lead to intestacy. Lastly, appellants contend that decedent's sisters, respondents herein, are not proper persons to contest the will and that at most the will is revoked as to the wife only.

[1, 2] In considering the first of these arguments, it must be borne in mind that section 1299 is not concerned with the construction of wills, nor with the interpretation of ambiguous phrases. It refers solely to the revocation of a will by implication from the act of the testator in marrying after the making of the will. It is well settled that where there is no ambiguity in the phrasing of a will, the court may not consider the surrounding circumstances to determine what the testator's intention was, but must find it in the express language he has used. Estate of Willson, 171 Cal. 449, 153 Pac. 927; Estate of Young, 123 Cal. 337, 341, 55 Pac. 1011. In the case at bar there is no doubtful or uncertain language in the will; the entire intention of the testator as to the disposition of his property is plainly expressed. Therefore the general rules relating to the construction of ambiguities by reference to extrinsic matters are not applicable. Section 1299 expressly declares that in determining whether or not a will has been revoked in the manner there provided no other evidence than a marriage contract (Corker v. Corker, 87 Cal. 643, 25 Pac. 922) and the will itself shall be considered. The court in Sanders v. Simcich, 65 Cal. 50, 2 Pac. 741, declared that—

> "It is the policy of the law that wife and children must be provided for. Therefore the Civil Code declares that where an unmarried person has made a will, and afterwards marries, the marriage, whether followed by the birth of issue or not, operates, in case of the survival of wife, or children if any, as a revocation of the will, unless some specific provision has *been made by the will itself*, or by a marriage contract for the surviving wife, or by some settlement or provision for any surviving children of the marriage. (Sections 1298, 1299, supra.) The law presumes that the subsequent marriage of a testator has wrought such a change in his condition in life as to cause him to destroy or cancel a previous will, *and does not admit of evidence to the contrary unless provision has been made according to law for wife and children who have survived him.* (Sections 1298, 1299, supra.)" (Italics ours.)

See, also, Wood v. Corbin, 296 Ill. 129, 129 N. E. 553.

It is further settled that evidence of extrinsic matters may not be admitted to indicate the intention of a testator in omitting an heir from his will under section 1307 of the Civil Code. Estate of Stevens, 83 Cal. 322, 23 Pac. 379, 17 Am. St. Rep. 252.

In view of these considerations we are of opinion it would have been improper to go outside the language of the will itself to ascertain whether or not the will was executed by the testator with his approaching marriage in mind and with reference to it. There was therefore no error in the ruling of the court to that effect.

[3] The question is then presented whether the mention of appellant Thekla Ryan as executrix was a provision for her, or sufficiently showed an intention on the part of decedent not to make a testamentary provision and consequently prevent a revocation of the will. Nothing appears from the will itself which tends to show that decedent contemplated matrimony at the time it was drawn, or that he named appellant Thekla Ryan his executrix with that contingency in view. Her nomination as executrix, with the assurance she would receive the fees provided by law, cannot be regarded as a testamentary provision, for the theory upon which an executor is allowed fees is that he has earned them. Considering its nature and purpose, the statute as declared in Sanders v. Sincich, supra, cannot be regarded as a sufficient provision to prevent the revocation of the will.

Nor would the mere naming of appellant Thekla Ryan as executrix indicate that decedent did not intend to make some gratuitous provision for her upon his death. There would be nothing inconsistent in her acting as executrix and also being a legatee; in fact, it would be most natural in the case of husband and wife. He might have been led to name her his executrix because of his confidence in her ability and integrity, but other considerations would probably influence him in making testamentary provision for her as his wife. We cannot say it appears from this clause of the will that decedent intended not to provide for her even though she should become his wife. This view is not at variance with Estate of Kurtz (Cal. Sup.) 210 Pac. 959, for there the will expressly indicated a disposition to provide in a certain contingency for whoever should be the testator's heirs at the time of his death.

[4, 5] With reference to appellants' last points, it is sufficient to entitle respondents to contest the will that they showed themselves to be heirs at law of decedent. Estate of Land, 166 Cal. 538, 137 Pac. 246. The court found them to be such. As to the contention that the will is revoked as to the wife only, we cannot read into the statute a provision not included therein and hold the will shall be valid except as to her and that she shall be allowed to take her portion as an heir. The statute plainly says the will is revoked and the revocation is not qualified. The act of partial revocation is well recognized, and the Legislature could have provided that the will should be impliedly revoked as to the wife only had it seen fit to do so.

The judgment is affirmed.

We concur: WILBUR, C. J.; LENNON, J.; WASTE, J.; SEAWELL, J.; KERRIGAN, J.

---

191 Cal. 280

In re NELSON'S ESTATE. (Sac. 3332.)

(Supreme Court of California. June 16, 1923.)

1. Evidence 🔑574—Expert testimony held sufficient to sustain finding will was not in handwriting of deceased.

Testimony by experts that in their opinion a will was not in the handwriting of deceased *held* sufficient to sustain a finding to that effect, notwithstanding acquaintances of decedent familiar with his handwriting testified that in their opinion the entire document was in his handwriting.

2. Trial 🔑194(5)—Charge that expert testimony must be received with great caution held properly denied.

In a proceeding to contest a will, denial of a charge to the effect that testimony of expert handwriting witnesses should be received with great caution *held* proper.

3. Trial 🔑207—Instruction held properly refused as not stating legal proposition.

In a proceeding to contest a will, *held*, that the court properly refused an instruction to the effect that it is a rule that the handwriting of a particular person is not always the same and that a person does not always write the same style; such request being not a statement of a legal proposition.

4. Wills 🔑329(5)—Failure to instruct jury should find whether contestant was aunt of deceased held not error.

Failure to give an instruction that it was the duty of the jury to determine whether the contestant of a will was an aunt of deceased *held* not error; the real issue being whether the contestant was a party interested in the estate and for that reason entitled to bring the contest.

5. Trial 🔑260(5)—Denial of instruction covered by another given held not error.

Denial of an instruction concerning the burden on contestant to establish that a will was not entirely in the handwriting of deceased *held* not error, where the court of its own motion had given another instruction amply covering such subject.

6. Evidence 🔑60—The presumption of innocence is applicable in civil as well as criminal cases.

The presumption of innocence is applicable in civil as well as criminal cases.

7. Trial 🔑296(7)—Refusal of instruction as to presumption of innocence and evidence necessary to overcome it held not error in view of another instruction.

In an action to contest a will alleged to have been written in part by the principal legatee, the defendant, refusal to give an instruction, "The law presumes that a person is innocent of crime or wrong. * * * Innocence is always presumed, and the presumption cannot be overcome except by satisfactory proof to the contrary"—*held* not error, where another instruction given stated that all presump-

tions were in favor of the validity of the purported will, and that it was presumed to be in the handwriting of deceased, and particularly since the requested instruction was erroneous in its statement of the measure of proof necessary to overcome the presumption of innocence.

In Bank.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Proceeding by Stina B. Pedersen to contest the will of John N. Nelson, deceased, against Clarence J. Isaacs, administrator, and Ida M. Isaacs and Jennie J. Isaacs, proponents. From an order setting aside probate of the will, proponents appeal. Affirmed.

W. H. Hatton, of Modesto (T. H. Christiansen, of Sacramento, of counsel), for appellants.

T. C. Judkins and Grant & Zimdars, all of San Francisco, and Dennett & Zion, of Modesto, for respondent.

Lucius L. Solomons and Fred C. Peterson, both of San Francisco, amici curiæ.

WILBUR, C. J. This is an appeal from an order of the court setting aside the probate of a will. This order was entered in pursuance of the finding of a jury in a contest instituted after a probate of the will in which the contestant alleged that the will was not entirely written, signed, and dated in the handwriting of the decedent.

The proposed will is in the following words and figures:

"September 20th, 1917.

"J. N. Nelson

"To Whom this is concerned

"I leave all I have Stock Real estate and money & personal property to my cousin Ida M. Isaacs. John N. Nelson.

"Modesto, Cal.

"Stanislau Co."

The contestant claimed that all of this will was written by Ida M. Isaacs, the legatee and devisee therein, excepting the date, the signature, and what followed. That is to say that the words "To Whom this is concerned I leave all I have Stock Real estate and money & personal property to my cousin Ida M. Isaacs" were not written by the decedent.

[1] The sole question submitted to the jury was whether the entire will was in the handwriting of the decedent, and to this question the jury answered, "No." Expert witnesses having testified that in their opinion the will was not in the handwriting of the deceased, such testimony was amply sufficient to sustain the verdict of the jury, notwithstanding the fact that the acquaintances of the decedent familiar with his handwriting testified that in their opinion the entire document was in the handwriting of the decedent.

The appellant bases her claim for a reversal upon certain alleged errors of the trial court in the giving and refusing of instructions.

[2] Appellant contends that the trial court erred in refusing an instruction to the effect that the testimony of expert witnesses should be received with great caution. This instruction was properly refused. Quint v. Dimond, 147 Cal. 707, 714, 82 Pac. 310; People v. Wilkins, 158 Cal. 530, 111 Pac. 612; Rolland v. Porterfield, 183 Cal. 466, 191 Pac. 913; Estate of Hess, 183 Cal. 589, 192 Pac. 35.

[3] The court correctly refused an instruction to the effect that it is the rule that the handwriting of a particular person is not always the same, and it is the rule that the same person does not always write the same style. This instruction did not state a legal proposition. An instruction was proposed by the appellant calling the attention of the jury to the right of every owner to dispose of his property by a will, and instructing the jury that if they found the will in question was made and executed by John N. Nelson "said will cannot be set aside upon allegation and proof that it was not in fact the will of John N. Nelson." This instruction, so far as it related to the issue presented to the jury, was confusing and contradictory and should not have been given.

[4] The appellant complains of the failure to give an instruction that it was the duty of the jury to determine whether or not the contestant, Stina B. Pedersen, was the aunt of the deceased. The question of whether or not the contestant was a person interested in the estate and for that reason entitled to bring the contest was one for the trial judge to determine. Estate of McKenna, 138 Cal. 439, 71 Pac. 501; Estate of Land, 166 Cal. 538, 137 Pac. 246; Estate of Mauvais, 43 Cal. App. 779, 185 Pac. 987. The issue as to whether or not the contestant was sufficiently interested in the estate to maintain the contest was expressly reserved by the court, for the jury were instructed that the sole issue presented to them was whether or not the will was entirely written, signed, and dated in the handwriting of the decedent.

[5] The appellant offered an instruction to the effect that—

> Before the jury could set aside the will on the ground it was not in the handwriting of the decedent, "the testimony should make it appear clearly, directly, and positively that the will in question is not entirely in the handwriting of John N. Nelson, deceased, and unless the weight of the testimony makes it appear to you clearly, directly, and positively that said will is not entirely in the handwriting of John N. Nelson, deceased, your verdict should be in favor of sustaining the will and against the alleged contestant, Stina B. Pedersen."

The jury were elsewhere instructed:

> "And if you are not satisfied from a preponderance of the evidence that some part of said purported will is not in the handwriting

of the deceased, John N. Nelson, then you should answer said interrogatory in the affirmative."

This latter instruction that the burden of proof was upon the contestant was given by the court of its own motion. If the requested instruction to the effect that it must appear "clearly, directly, and positively that said will in question is not entirely in the handwriting of John N. Nelson, deceased," amounted to any more than the instruction already given that the burden of proof was upon the contestant, it was clearly erroneous and should not have been given. If not, it was amply covered by the instruction given by the court of its own motion.

A more serious question, however, is presented by the refusal of the court to give an instruction that there was a presumption of law that Ida M. Isaacs was not guilty of crime or wrong. This instruction was proposed in the following form:

> "The law presumes that a person is innocent of crime or wrong and this presumption of law prevails in civil as well as in criminal cases, and the jury must find in accordance with this presumption, unless it be controverted and overcome by other evidence.
>
> "Innocence is always presumed, and this presumption cannot be overcome except by satisfactory proof to the contrary.
>
> "So in this case, the presumption of law is that Ida M. Isaacs is innocent of crime or wrong, and this presumption cannot be overcome except by satisfactory proof to the contrary."

[6] The presumption of innocence is applicable in civil as well as criminal cases (Code Civ. Proc. § 1963, subd. 1; Hunter v. Hunter, 111 Cal. 261, 267, 43 Pac. 756, 31 L. R. A. 411, 52 Am. St. Rep. 180; Cooper v. Spring Valley Water Co., 16 Cal. App. 23, 24, 116 Pac. 298; Wilkinson v. Standard Acc. Ins. Co., 180 Cal. 252, 180 Pac. 607. It is contended that the instruction was not pertinent to the issues in the case for the reason that there was no claim that the will was forged. The evidence of the expert witness called by the respondent was to the effect that the portion of the will claimed not to be in the handwriting of the decedent was in the handwriting of the legatee and devisee, Ida M. Isaacs. It is suggested that this, however, does not involve any crime or wrong, because if the will was signed by the decedent it made no difference who wrote the will so far as the question of forgery is concerned. The fact, however, is that Ida M. Isaacs, by permitting the will to be proposed and probated and by permitting her attorneys to represent to the court by her pleadings and by her opposition to the contest that the will was entirely in the handwriting of the decedent, is endeavoring to establish the fact that this portion of the will alleged to have been written by her was in fact written by the testator. If, as a matter of fact, the will was actually written by her, she is attempting to perpetrate a fraud upon the heirs of the deceased by proposing and seeking the benefit of a will which she herself wrote. If, in fact, she did so at the direction of the testator and was not guilty of forgery in originally writing the will, it is clear that she is guilty of wrong in attempting to uphold the document as the will of the decedent. Whether or not the crime of forgery has been committed by her is a matter which we need not determine upon this appeal, for the reason that it is clear that the presumption of innocence applies to the situation thus presented by the record.

[7] We will proceed to consider whether the failure to give the instruction requested was erroneous. The jury were instructed with reference to the burden of proof and presumption of law in favor of the validity of the will as follows:

> "If you find from the evidence that the purported will in question was admitted to probate before the filing of the petition to revoke the probate of said 'purported' will, then all presumptions are in favor of the validity of said 'purported' will and the presumption of law is that said 'purported' will is entirely in the handwriting of John N. Nelson, deceased."

This latter instruction, given at the request of the appellants, erroneously states that the admission of the will to probate created a presumption in favor of the validity of the purported will. It is true that the burden of proof is upon the contestant, but the rule is the same both before and after probate. Estate of Latour, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441; Tracy v. Muir, 151 Cal. 363, 368, 90 Pac. 832, 121 Am. St. Rep. 117. This instruction that "*all* presumptions are in favor of the validity of said purported will" and that "the presumption of law is that said purported will *is entirely in the handwriting of* John N. Nelson, deceased," seems to be more favorable to the appellants than the requested instruction that it was presumed that the will was *not written by Ida M. Isaacs*. (Italics ours.) However that may be, the refusal of the instruction was justified upon an entirely different ground, that is, that the requested instruction was itself erroneous in its statement of the measure of proof necessary to overcome the presumption of innocence.

The proposed instruction requires the presumption of innocence to be overcome to the "satisfaction" of the jury. The presumption of innocence in a civil case is overcome by the preponderance of the evidence. In Boa v. San Francisco-Oakland T. Rys., 182 Cal. 93, 187 Pac. 2, it was held that the court might very properly have refused an instruction which stated that the burden of proving contributory negligence was on the defendant and that it "must be established by the defendant *to your satisfaction by a preponderance of the evidence*, and if in your minds the evidence is evenly balanced, the defense fails in that particular." (Italics ours.) In that case we said:

> "In this case the trial court could have very properly refused to give the instruction in question, and such a ruling would have been commendable, but, having given the instruction, this court is now required to determine whether the language employed, when considered in connection with the other instructions given, was such as would probably mislead the jury to the prejudice of appellant."

In the case at bar the requested instruction did not state that the presumption of innocence must be overcome "to the jury's satisfaction *by a preponderance of the evidence*," but that it must be overcome to their satisfaction. (Italics ours.) We must therefore hold that there was no error in refusing this instruction, even though a correct instruction as to the presumption of innocence was proper in this case. Boa v. San Francisco-Oakland T. Rys., 182 Cal. 93, 187 Pac. 2.

Judgment affirmed.

We concur: LENNON, J.; LAWLOR, J.; WASTE, J.; KERRIGAN, J.; SEAWELL, J.; MYERS, J.

191 Cal. 329

STEVENS v. STORKE et al. (L. A. 6900.)

(Supreme Court of California. June 28, 1923.)

1. Libel and slander 🔑19—Newspaper article must be considered as entirety.

In determining whether, under Civ. Code, § 45, a newspaper article is libelous, it must be considered in its entirety, and may not be divided into segments and each portion treated as a separate unit.

2. Libel and slander 🔑16—Newspaper article exposing plaintiff to hatred and contempt libelous per se.

A newspaper article, the plain import of which was that plaintiff was a man of such type that the mere fact that he was supporting a particular candidate for political office should cause people to vote for some one else, tending to expose plaintiff to hatred, contempt, and obloquy was, under Civ. Code, § 45, libelous per se.

3. Libel and slander 🔑18—Newspaper article stating that plaintiff had charged county for negligible services and had put in bad roads held libelous.

A newspaper article stating that plaintiff, a contractor engaged in the business of preparing road materials, had accepted $7.50 per day from a county board of supervisors for overseeing one man who was paid $2, and that he had put in bad roads, *held* libelous, under Civ. Code, § 45, as tending to injure him in his business.

4. Libel and slander 🔑6(1)—Newspaper article held libelous as general attack on plaintiff's reputation.

A newspaper article referring to a libel suit wherein plaintiff had recovered damages, and stating that people wondered how plaintiff could be damaged in reputation $5,000 worth *held* libelous, as general attack on plaintiff's reputation.

5. Libel and slander 🔑48(1) — Newspaper may not publish false and defamatory matter concerning private citizen merely because he promotes his own political views.

While a newspaper stands in such relation to the people that, with regard to publications concerning local public officers it comes within the scope of Civ. Code, § 47, subd. 3, if the matter published has the other characteristics of a privileged communication, the duty of a newspaper to the public does not justify the publication of false and defamatory matter concerning a private citizen, merely because he is active in promoting his own political views.

6. Libel and slander 🔑5—Plaintiff need not prove malice in fact, where article libelous per se and not privileged.

Where a newspaper article is libelous per se and not privileged, plaintiff need not prove malice in fact.

7. Libel and slander 🔑112(3)—Plea of truth of libelous publication held not sustained by evidence.

In an action for libel, based on the publication by defendant of a newspaper article charging plaintiff with having laid bad roads as a highway contractor, evidence *held* not to sustain a plea of the truth of the publication.

8. Appeal and error 🔑1050(1)—Libel and slander 🔑104(3)—Admission in evidence of prior publication in libel suit, if error, held harmless.

In an action for libel, based on the publication of a newspaper article, a prior publication by the same defendants was admissible to show actual malice if relating to plaintiff, and if the jury considered it not to refer to him its reception was harmless.

In Bank.

Appeal from Superior Court, Santa Barbara County; Benjamin K. Knight, Judge.

Action by E. P. Stevens against Thomas M. Storke and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Ford & Bodkin, of Los Angeles, John T. McCurdy, of Santa Barbara, and Leon R. Yankwich, of Los Angeles, for appellants.

George L. Sanders, of Los Angeles, and John C. Benton, of Santa Barbara, for respondent.

LAWLOR, J. This action was brought by plaintiff, E. P. Stevens, against defendants, Thomas M. Storke and C. A. Storke, who were respectively the publisher and editor of the Daily News and the Independent, a newspaper published in the city of Santa Barbara, to recover damages for injury to his "reputation and good name as a man and a citizen, and in his business as a contractor for the paving of streets and roads," and for mental suffering caused by the publication in the said paper of an alleged libelous article of and concerning the plaintiff. The article in question constituted a part of an editorial published in opposition to the candidacy for public office of a judge of the superior court, whose name is not material here, and is as follows:

> "Judge —— has been notorious in creeping out from under difficulties by calling in an outside judge. When there has been any matter before his court that was politically dangerous for him to try, he has called in a judge from an outside county. Take the case of Stevens v. Snow, a libel case, recently tried. The plaintiff was that same Ed. Stevens who laid down the asphalt plaster upon Chapala street. He is the same Stevens who laid the bad pavement that is found between here and the Bishop ranch. He is the same Ed. Stevens who was employed in the good old times of Conover and the old board of supervisors at $7.50 per day to oversee one man at $2 per day, and who in his testimony before the grand jury he denominated as the crew. This is the same Ed. Stevens who was indicted and acquitted by the grand jury a few years ago for some offense against the county treasury. This case was before the superior court of the county of Santa Barbara. Judge —— dodged this case, and called in a foreign judge to try the case. Some people have wondered how Ed. Stevens could be damaged in reputation five thousand dollars' worth, but the jury decided that he was. Ed. Stevens is now working zealously for the re-election of Judge ——."

It was admitted the article was published, and that it referred to the plaintiff.

Upon the trial, the court instructed the jury that the article was libelous per se and submitted to them only the issues of its truth or falsity and of the amount of damages to which plaintiff would be entitled if they should find it was false. The jury returned a verdict in favor of plaintiff and assessed the damages at $1,000. Judgment was entered for plaintiff upon the verdict, and defendants have appealed.

Appellants contend the court erred in overruling their demurrer interposed to the complaint on the ground that it failed to state a cause of action; in denying their motion for a directed verdict in their favor; in instructing the jury that the article was libelous and unprivileged; in refusing to instruct the jury that the article was privileged, and that respondent could not recover without proof of express malice; and in receiving in evidence an article previously published in their paper as tending to establish malice. It is further claimed the verdict is not supported by the evidence, in that malice in fact was not proved and in that appellants proved their allegations of the truth of the alleged libelous statements.

A determination of these questions depends primarily upon whether or not the article was in fact libelous per se, whether or not it was privileged under the circumstances, and whether or not the implied findings of the jury that the facts therein stated were false was justified.

For the purpose of their argument, appellants divide the article into four paragraphs, the first containing the statement that respondent laid the bad pavement, the second that he was employed at $7.50 per day to oversee one man at $2 per day, the third that he was indicted for an offense and acquitted, and the fourth that some people wondered how his reputation could be damaged $5,000 worth. It is insisted that there is nothing in the first paragraph which could constitute a libel, as it merely purports to say that a certain piece of public pavement laid by respondent is bad, without blaming respondent for the condition; that criticism of one's goods or of the product of one's labor is not a libel on the producer, unless such criticism imports that the person is guilty of deception; that to be libelous the words must impeach a person's knowledge or skill at his occupation, and are not such if they refer to one piece of work only. With reference to the second statement appellants contend that to accuse a person of a lawful act is never libelous, and that this statement only accuses respondent of overcharging for his work, which is a perfectly proper thing to do. Statement three is asserted not to be libelous for the reason that it states respondent was acquitted of the offense with which he was charged, and that, while it is libelous to say a person was convicted or guilty of a crime, it cannot be to say that he was acquitted. The fourth statement is claimed to be susceptible of the meaning that respondent's character is so above suspicion that the "claws of calumny cannot reach him," and it is urged that to hold that the statement, "one wondered how a man's reputation could be injured five thousand dollars' worth, is libelous, is to misconceive entirely the nature of the action of libel. * * * A verdict for plaintiff in the sum of one dollar as effectively indicates his character as a verdict for thousands." It is further insisted that the article is directed at Judge ——, that its force is directed at him, and that plaintiff's name was brought in but incidentally, merely by way of argumentative illustration. In support of these various propositions are cited many authorities.

Section 45 of the Civil Code provides:

> "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or

avoided, or which has a tendency to injure him in his occupation."

[1] In determining whether or not, under this definition, an article is libelous, it must be considered in its entirety. It may not be divided into segments and each portion treated as a separate unit. Van Vactor v. Walkup, 46 Cal. 124; Brewer v. Chase, 121 Mich. 526, 80 N. W. 575, 46 L. R. A. 397, 80 Am. St. Rep. 527; Graves v. Waller, 19 Conn. 90. Thus, in Bettner v. Holt, 70 Cal. 270, 11 Pac. 713, it was held that, in determining whether or not a libel was charged—

> "A court of justice is to put such construction upon the words which it contains as may be derived 'as well from the expressions used *as from the whole scope and apparent object of the writer.*' Spencer v. Southwick, 10 Johns. 259; Cooper v. Greely, 1 Denio, 358." (Italics ours.)

[2] The article concerning respondent in the case before us manifestly was published to disparage him; its plain import being that he was a man of such type that the mere fact he was supporting a particular candidate should cause people to vote for some one else. In our opinion the remarks were of such a nature that they may fairly be said to expose respondent to hatred, contempt, and obloquy.

Considering the statement that respondent laid the asphalt plaster and bad paving, although appellants have argued and cited cases to the point that criticism of one piece of work is not libelous—

> "disparagement of property may involve an imputation on personal character or conduct, and the question may be nice, in a particular case, whether or not the words extend so far as to be libelous. * * *" Dooling v. Budget Pub. Co., 144 Mass. 258, 10 N. E. 809, 59 Am. Rep. 83.

The quality of the pavements was not involved in the article; there was no criticism of respondent's streets as a "matter of public interest and concern," which every one might comment upon provided he did so honestly and without malice. Bearce v. Bass, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446. When read in connection with the remainder of the article, it is apparent the comments were directed at respondent personally; one of the reasons advanced why his support of the judge's candidacy should lead people to vote against him being that respondent had put in the asphalt plaster and the bad pavement. The context shows the remark to be a personal attack on respondent because of the manner in which he had done the work.

In this connection, it may be stated that in our opinion the evidence does not support appellants' contention that if respondent ever was a road builder or contractor he had ceased to be one at the time the article was published, and therefore could not be injured by reflections relating to that occupation. Respondent testified that it was not true he had never bid on nor sought contracts for the paving of streets; that at the time the article was written he was contracting, not to lay roads, but to mix the material at his plant in connection with laying the roads; that he had made a bid to lay one piece of pavement as well as furnish the asphalt during the five years preceding the trial. In response to a question as to what roads he had laid as a contractor during that period he stated he had not been in the contracting business at all. It appears from the evidence that the work respondent did on the Bishop road and Chapala street was to furnish and mix the asphalt; that on Chapala street he also did certain grading. This was such work as he was still doing regularly as part of his occupation. Appellants cannot be heard to say that it constituted "laying" a pavement at the time the article was published and not at the time of the trial.

[3] With respect to the statement that respondent accepted $7.50 per day from the board of supervisors for overseeing one man who was paid $2, it may be, as argued by appellants, that such conduct on respondent's part would not actually be criminal. But it plainly indicates that he was charging the county for negligible services, which, together with the statement that he had put in the bad roads, was clearly calculated to prejudice him among the taxpayers.

[4] The last statement, that some people had wondered how respondent's reputation could be damaged $5,000 worth, is not susceptible of the construction placed upon it by appellants—that respondent's reputation was so unblemished that it could not be harmed. When it is considered with the remainder of the article it could mean only that his reputation was so poor some people wondered that it could be worth $5,000. The effect of such a statement would be to expose respondent to contempt. In their answer appellants have alleged that "the reason why the persons hereinbefore named expressed wonder and surprise how plaintiff could be damaged by said article (the one alleged to be libelous in Stevens v. Snow) was and is that said article is not libelous." But the article does not state that people wondered how the article involved in the case of Stevens v. Snow had damaged respondent $5,000 worth, but that they had wondered how he could be damaged in reputation $5,000 worth. The statement is not limited to the effect of the verdict in Stevens v. Snow, but is a general attack on respondent's reputation.

In support of their contention that the force of the publication is spent on the judge, appellants have cited Diener v. Star-Chronicle Publishing Co., 230 Mo. 613, 132 S. W. 1143, 33 L. R. A. (N. S.) 216. The alleged libel in that case consisted of part of an article urging the defeat of a candidate for coroner, and contained the following:

> "Isn't Coroner Jules C. Barron, present incumbent and candidate for re-election, the public official who joined with the police in letting Health Commissioner Bond's chauffeur go free, without bond or charge or investigation, after the latter had run down and killed a little child in the street, and if he is, would this be a good reason for continuing his term of service?"

The court decided the use of the word "killed" did not import a criminal killing and as one fact tending to show how strained such an interpretation would be, it was pointed out that the article was directed at the coronor, and that the plaintiff was mentioned but incidentally. In view of that fact it was held the chauffeur could not maintain an action for libel. But there is nothing to show that, had the words spoken of the chauffeur actually imported a felonious killing, they would not have been libelous merely because the article in which they were contained referred chiefly to some one else.

2. Appellants contend that the article was qualifiedly privileged, and that respondent's failure to prove malice made the privilege absolute, in that in publishing the remarks concerning him appellants were acting as interested parties, communicating matters to others who were also interested in the subject. First, it is insisted that the article referred not to respondent's private affairs, but to the manner in which he performed a public work, namely, the building of public roads, in which taxpayers were interested (citing Bearce v. Bass, supra), and, second, that by espousing and advancing the candidacy of the judge he became for the time a public man, concerning whom comments might be made under the asserted privilege, on the ground that the public at large were affected by his acts. Odgers, Libel and Slander (5th Ed.) p. 193; Flanagan v. Nicholson Pub. Co., 137 La. 588, 68 South. 964, L. R. A. 1917E, 510, Ann. Cas. 1917B, 402.

[5] In our opinion neither of these claims of privilege is justified. As pointed out above, the remarks were not intended as criticisms of the road work itself, nor were they addressed to respondent as a builder of public roads. They were directed at respondent personally. Moreover, assuming the privilege to exist in the matter of the roads, it would not extend to the statement that people wondered how respondent's reputation could be damaged $5,000 worth. Concerning the second claim, while it has been held that a newspaper stands in such relation to the people that with regard to publications concerning local public officers it comes within the scope of subdivision 3, § 47, Civil Code, if the matter published has the other characteristics of a privileged communication (Snively v. Record Publishing Co., 185 Cal. 565, 198 Pac. 1), "the duty of a newspaper to the public does not justify the publication of false and defamatory matter concerning a private citizen merely because he is active in promoting his own political views" (Newby v. Times-Mirror, 173 Cal. 387, 394, 160 Pac. 233, Ann. Cas. 1917E, 186).

[6] Inasmuch as the article was libelous per se and was not privileged, it was unnecessary for respondent to prove malice in fact (Davis v. Hearst, 160 Cal. 143, 116 Pac. 530; Snively v. Record Publishing Co., 185 Cal. 565, 198 Pac. 1), and we need not consider appellants' contentions on that subject.

[7] 3. In support of the claim that the plea of the truth of the publication was sustained, appellants cite Hearne v. De Young, 119 Cal. 670, 52 Pac. 150, 499, to the effect that—

> "A defendant is not required in an action of slander or libel to justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting of the libelous charge be justified. Immaterial variances and defects of proof upon immaterial matters go for nothing, and, if the gist of the charge is established by the evidence, the defendant has made his case."

As proving the truth of the statement that respondent was paid $7.50 per day for overseeing one man, we are referred to the testimony of one F. F. Curry, who stated that he was a laborer employed under respondent at the La Paterra switch, where part of the work for the road to Bishop ranch was being done; that part of the time there were other persons working with him under respondent and part of the time there were not; that he thought he was working alone on December 21, 22, and 23, 1914. Respondent also testified that at that time he was working as superintendent of the asphalt plant at the switch, and that he had only F. F. Curry working there, removing an obstruction so the cars could get by. But from his testimony it appears that at about the same time he also had six or seven men working at the same place shoveling back a bulkhead which had caved in during a rain, and that he had sixteen or seventeen men working at the asphalt plant.

As demonstrating the truth of the statement concerning the value of respondent's reputation, it is pointed out that James Ross, sheriff of the county, stated that at least a dozen people wondered at the size of the verdict in the case of Stevens v. Snow, and appellants state:

> "Now, when a dozen or so people expressed surprise at the size of the verdict in plaintiff's favor in the libel action of Stevens v. Snow, which fact was brought to the attention of one of the defendants, it was legitimate for him to infer that these same people wondered how the plaintiff's reputation could be injured in that amount and to so state."

This reasoning cannot be held to justify the alleged libelous statement. As already indicated, the wonderment as reported in the article was not confined to the size of the verdict in the particular case of Stevens v. Snow, but was as to "how Ed Stevens could be damaged in reputation five thousand dollars' worth." For this reason the statement that "the jury decided he was" does not take the sting from the article. Even if the testimony referred to were the same as the remark published, it alone would not justify the publication.

> "If A. says B. is a thief, and C. publishes the statement that A. said B. was a thief, in a certain sense this would be the truth, but not in the sense that the law means. It would constitute no defense to C. for it would be but a repetition by him of a slanderous charge. His defense must consist in showing that in fact B. is a thief." Gilman v. McClatchy, 111 Cal. 606, 612, 44 Pac. 241, 242.

Appellants contend that if there is any libel in the statement that respondent laid the bad pavement, the sting is—

> "not that plaintiff physically 'laid' the Goleta road [the road to Bishop's ranch], but that the road, with the building of which plaintiff was connected, is bad. The truth of this 'sting' the defendants have established, by showing that the improper preparation and mixture of the asphalt, for which plaintiff is chiefly responsible, is the cause of the bad condition of the road."

A mass of testimony was introduced by the parties upon this issue as tending to prove whether or not respondent could be said to have laid the pavement and whether it was in fact bad. Experts were examined and extended discussions were entered into respecting the characteristics of asphalt and the various methods of preparing it for use in pavements. Appellants refer to the testimony of witnesses P. B. Jolley and Peter Irvine, who were employed in building the roads in question, and to that of A. W. Conover, who was a member of the board of supervisors when the roads were put down. According to these witnesses, respondent had charge of the heating of the asphalt for the pavements, but did not supervise the laying of it, although he often conferred with those in charge of laying it concerning the progress of the work. The witness A. W. Conover stated that he, not respondent, was responsible for the roads and that Peter Irvine was employed to oversee the entire work. Witnesses Samuel Bingham and A. S. Cooper testified that because of burned spots the Chapala pavement was not good and that there were a few such places in the Bishop road. On the other hand, respondent stated the Bishop road was a good one, and the witness P. B. Jolley stated that no burned material went into it, that the material was first class, and that the asphalt was tested by a man named Fast, a county inspector. Frank F. Flournoy, who was county engineer at the time, stated that, when the Bishop road was laid—

> "The gutters or drain ditches were all cleaned out and the material from those gutters and drain ditches was piled upon the road bed. After the winter's rain came down from the mountains through these different creeks—I think something like three or four creeks crossed this road—it filled up these gutters to a point higher than the road bed. * * * It filled up the drain ditches and left the water underneath the asphaltum, and the asphaltum would not hold up with a water-soaked foundation."

Respondent testified that apart from the two-mile section which was broken up on account of overflow water the road was good, and that the portion so broken up was good aside from the effect of the water. Both these witnesses and Charles Winters testified there was no change in the road for three or four years after it was put in, that it lasted that length of time before the damage from the water was done.

With reference to the defect in the Chapala pavement, that the asphalt was burned, respondent testified that "the city had a man to look after that proposition [the heating of the asphalt] at the plant, and he was the man that took the degrees of heat. I do not know anything about to what degrees it was het, to tell you the truth;" that "we were doing the work on that Chapala street job under two inspectors, and we tried to follow the instructions of the inspector, as much as we possibly could." From all this testimony the jury might have concluded that respondent was not to blame for the bad condition of the Bishop road, but that it was due to action of the elements, and that, assuming the asphalt on Chapala street actually was burned, the city inspectors, and not respondent, were responsible.

[8] There was no prejudicial error in admitting in evidence the prior publication of October 1st. This was offered and received in evidence for the sole purpose of proving actual malice, and its effect was carefully limited to that subject by the court in its instructions. This was a material issue in the case, because the complaint alleged actual malice and prayed for punitive damages. If the jurors were of the opinion that the publication of October 1st referred to the respondent, it was proper to be considered by them upon the question of actual malice. Scott v. Times-Mirror Co., 181 Cal. 345, 184 Pac. 672, 12 A. L. R. 1007; Earl v. Times-Mirror Co., 185 Cal. 165, 196 Pac. 57. If they were of the opinion that it did not refer to the respondent, we are unable to see how the appellants could have been harmed by its admission in evidence.

The judgment is affirmed.

We concur: WILBUR, C. J.; WASTE, J.; MYERS, J.; KERRIGAN, J.; LENNON, J.; SEAWELL, J.

191 Cal. 364

AMERICAN NAT. BANK OF SAN FRANCISCO v. A. G. SOMMERVILLE, Inc., et al. (S. F. 9869.)

(Supreme Court of California. June 29, 1923.)

1. Estoppel 🔑78(2)—Written acknowledgment of receipt of automobiles in conditional sales contract held not to estop purchaser from denying such receipt.

In an action by the assignee of conditional sales contracts covering automobiles, wherein defendant alleged that he had never received the automobiles, although the contract acknowledged receipt thereof, no estoppel by contract arose by reason of such acknowledgment, since it was in effect but an acknowledgment of the receipt of the consideration, which is always open to be disputed, in view of Code Civ. Proc. § 1962, subd. 2.

2. Estoppel 🔑78(2)—Purchaser of automobiles held not estopped to deny that he received them.

In an action by an assignee of conditional sales contracts, covering certain automobiles and reciting receipt of the automobiles by the purchaser, and that, if the vendor in good faith should assign the contract and moneys payable thereunder, the purchaser should be precluded from attacking the validity of the contracts for want of failure of consideration, *held*, that the contract did not estop the purchaser from denying that he had received the automobiles, in view of Civ. Code, § 1459, relating to the transfer of nonnegotiable written contracts for the payment of money or personal property; such a contract being nonnegotiable under section 3082, as added by St. 1917, p. 1532.

3. Bills and notes 🔑144—Parties may not impart character of negotiability to writing not negotiable under general law merchant or by statute.

Parties may not impart the character of negotiability to any writing not of itself a negotiable instrument under the general law merchant or by the statutes of the state.

4. Customs and usages 🔑8—Custom can never overcome positive statutory provision.

Custom, while often important in assisting courts to interpret statutes properly, never overcomes the positive provisions of statutes.

5. Estoppel 🔑78(1)—No estoppel by contract, unless contract valid.

There can be no estoppel by contract, unless the contract itself is valid.

6. Contracts 🔑85—Stipulations to waive want or failure of consideration may be held voidable at debtor's instance, whenever want or failure of consideration appears.

Stipulations in written contracts to waive the defense of want or failure of consideration may be held voidable at the instance of the debtor, whenever the want or failure of consideration in the inception and execution of the contract itself is made to appear.

7. Estoppel 🔑52—Doctrine of "estoppel in pais" stated.

The doctrine of "estoppel in pais" proceeds on the theory that the party has by his declarations or conduct misled another to his prejudice, so that it would be a fraud on the latter to allow the true state of facts to be proved.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Estoppel in Pais.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; H. D. Burroughs, Judge.

Action by the American National Bank of San Francisco against A. G. Sommerville, Inc., and Richard F. Tomlinson, to recover on contracts for conditional sale of automobiles. Judgment for plaintiff, and defendant Tomlinson appeals. Reversed.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant.

Goldman, Nye & Surr, of San Francisco, for respondent.

WASTE, J. The appeal in this case presents for consideration the effect of certain stipulations in executory contracts of conditional sale and purchase of automobiles. The first acknowledges the receipt by the purchaser of the articles sold, and the second purports to be a waiver by the purchaser of the defense of want or failure of consideration in the event of an assignment and transfer of the contract in good faith by the vendor. A rehearing was granted after decision and judgment (64 Cal. Dec. 393), for the reason that there seemed to be a misapprehension in the minds of the legal profession concerning the effect of the decision; this misunderstanding arising, perhaps, from the failure of the former opinion to sufficiently differentiate in the application of the doctrine of estoppel by contract and estoppel in pais to the facts of the case. On reconsideration we adhere to the conclusions arrived at upon the former hearing.

The defendant A. G. Sommerville, Inc., entered into two executory contracts of purchase and sale with the defendant and appellant Tomlinson, whereby the latter agreed to purchase from the former two automobiles with complete equipment for $3,900 each. Payment by the purchaser of the sum of $1,500 on each sale is acknowledged, and provision is made for installments thereafter to be paid. The agreements are in writing and are in the form of conditional sales contracts, providing that title to the automobiles shall remain in the seller until all payments therein provided for are made and all the conditions fully complied with by the vendee. Each of the contracts contains a stipulation, to wit, "The second party hereby acknowledges receipt of said property," referring to the automobile, and also the following provision:

> "As a part of this contract of conditional sale, it is further agreed that in the event the first party shall in good faith assign and transfer this contract, and the moneys payable thereunder, to a third party, then the second party shall be precluded from in any manner attacking the validity of this contract on the ground of fraud, duress, mistake, want of consideration, or failure of consideration, or upon any other ground, and all moneys payable under this contract by the party of the second part shall be paid to such assignee or holder without recoupment, set-off or counterclaim of any sort whatsoever."

Upon the same day they were executed A. G. Sommerville, Inc., transferred the two contracts to the American Investment Company. That corporation thereafter assigned and transferred the contracts to plaintiff, which brought this action against both parties to the agreements, alleging that none of the deferred payments had been made, and that there was due, owing and unpaid upon each of the contracts the sum of $2,400, with interest and attorney's fees. For these amounts plaintiff demanded judgment. A. G. Sommerville, Inc., failing to appear and answer the complaint, its default was entered. Defendant Tomlinson, after demurrer overruled, filed his answer to the complaint. He admitted the signing of the two executory contracts, but otherwise, and for want of information and belief, denied practically all of the averments of the complaint. As a separate and affirmative defense he alleged that he had never received either of the automobiles, and that there was a total failure of consideration for each and both of the contracts, in that defendant Sommerville, Inc., had wholly failed and refused to deliver, and that neither of the automobiles was or ever had been in existence. He further alleged that he had never received any automobiles, or anything of value, as a consideration for the execution of the contracts. By way of counterclaim, he pleaded a written agreement between himself and the Argonaut Motors Company, the obligations of which, he alleged, A. G. Sommerville, Inc., had assumed prior to the filing of plaintiff's action, and by reason of which, he asserted, that corporation to be indebted to him in the sum of $13,100.

When the cause came on for trial on the issues thus framed, stipulations were entered into between the parties as to due incorporation of the plaintiff and of A. G. Sommerville, Inc., and American Investment Company, and as to certain payments having been made to the latter by the defendant Tomlinson. Due transfer of the contracts was admitted, it being stipulated that plaintiff had accepted such assignment in good faith. Evidence of the amount of principal and interest due upon the contracts was offered and admitted, and the plaintiff rested its case. Defendant Tomlinson thereupon moved for a nonsuit upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and upon the further ground that there was neither allegation nor proof of the delivery of the personal property to him or that A. G. Sommerville, Inc., had ever performed its part of the obligations imposed by the contracts. This motion was denied. Thereupon defendant Tomlinson, called as a witness in his own behalf, offered to prove that neither of the automobiles mentioned in the complaint had ever been delivered to or received by him, and, further, that nothing of value had been received by him as consideration for the making of either of the agreements. Upon the objection of the plaintiff that such evidence was incompetent and immaterial, for the reason that by the stipulations of the contracts defendant Tomlinson was precluded from interposing the defenses and counterclaims set out in his answer, the trial court excluded the proffered testimony. It also sustained plaintiff's objection to all evidence offered in support of the counterclaim alleged to exist against A. G. Sommerville, Inc.

The trial court found the due execution and assignment of the contracts for the purchase of the automobiles, and the existence in said agreements of the stipulations acknowledging receipt of the property and the purported waiver of defenses in the event of an assignment in good faith. It further found that, by reason of the acknowledgment of defendant Tomlinson to the vendor to the receipt of the automobiles, contained in the contracts, a prima facie case of delivery had been made, and that evidence of want of consideration for the contracts, or of failure of consideration therefor, was incompetent, irrelevant, immaterial, and wholly inadmissible, by reason of the agreement of Tomlinson, contained in the waiver clause of the contract, by which he was precluded from raising any such defense or from asserting any counterclaim as against this plaintiff. "Because of such admission of receipt for said car in the contract, and because of the legal inability of the defendant to introduce evidence attacking such receipt, or raising a defense of want or failure of consideration" (such is the language of the decision), the court found that A. G. Sommerville, Inc., had performed all the terms and conditions imposed upon it by the contracts in favor of defendant Tomlinson. Judgment was accordingly entered in favor of plaintiff for the unpaid principal of the two contracts, together with interest and attorney's fees, amounting in the aggregate to $4,365, in addition to plaintiff's costs. It is from this judgment that the defendant Tomlinson has taken and prosecutes this appeal.

[1] The question presented for consideration is whether or not the trial court was in

error in refusing to permit the defendant Tomlinson to introduce testimony tending to prove that the personal property described in the contracts of conditional sale had never been delivered to him, and that there was, therefore, a total want or failure of consideration for the agreements. The question, reduced to its simplest form of statement, is this: Was the defendant Tomlinson estopped by the stipulations in his contract to show by proper evidence as against this plaintiff that the consideration for the contracts had failed? Were we dealing alone with the acknowledgment by the vendee of the receipt of the automobiles, we might consider it to be now well settled in this state that no estoppel by contract arose by reason of such acknowledgment, since the acknowledgment of the receipt of the articles is in effect but an acknowledgment of the receipt of the consideration received by the defendant for the contract, and it is always open to a party to dispute such recital. Code Civ. Proc. § 1962, subd. 2; Parker v. Funk, 185 Cal. 347, 352, 197 Pac. 83; Ashley v. Vischer, 24 Cal. 322, 326, 85 Am. Dec. 65. In Parker v. Funk, supra, it was distinctly held by this court that the acknowledgment by a vendee under a conditional contract of sale of the receipt of the subject-matter of the sale was in effect but an acknowledgment of the receipt of consideration for such sale, and that it was open to dispute by the vendee against the vendor or his assignee by showing against either that there was no consideration or that the consideration had failed. It would seem to follow in this case, as in that, that no estoppel by contract arose by reason of the acknowledgment of the receipt of the automobiles which would suffice lawfully to preclude the defendant Tomlinson from proving that, through the nondelivery to him of the personal property covered by the contracts, consideration therefor had wholly failed.

[2] Nor do we think that the right of defendant Tomlinson to have made this proof was impaired, in so far as an estoppel by contract is concerned, by the further stipulation in the contract to the effect that, in the event the vendor in good faith assigned and transferred the contract and the moneys payable thereunder to a third party, the vendee should be precluded from attacking the validity of the contracts for want or failure of consideration. To give such effect to the provision in the contracts would practically be to nullify the general rule relating to the assignment of nonnegotiable instruments embodied in section 1459 of the Civil Code, which provides that:

> "A nonnegotiable written contract for the payment of money or personal property may be transferred by indorsement, in like manner with negotiable instruments. Such indorsement shall transfer all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the indorsement."

This section not only fails to confer upon nonnegotiable instruments the immunity which belongs to negotiable paper, but expressly withholds it, and saves to the defendant in an action brought by an assignee any defense which he might have had against the assignor before the assignment of notice thereof. To give countenance to respondent's contention would, in effect, be permitting parties to contracts to create a new form of negotiable instruments.

[3] Conditional contracts of sale are nonnegotiable instruments in this state. Civ. Code, § 3082 (as added by St. 1917, p. 1532). Parties may not impart the character of negotiability to any other writing not of itself a negotiable instrument under the general law merchant or by the statutes of the state. The character of such an instrument as being negotiable or otherwise must appear not by force of the mere stipulation of the parties that it shall be such, but must be implied by law as the result of the form and effect of the instrument itself. See Witte v. Vincenot, 43 Cal. 325, 329–331. Counsel in the brief of amicus curiæ urge upon our consideration the fact that large sums of money are "now invested by banks and other financial institutions in this state in automobile paper similar to that here involved," and that "a very material element of inducement to engage in this business is the safety afforded, or as was thought to have been afforded by the particular provisions here in question, without which provisions, regarded as quite essential in the transaction of this particular business, the continuance of the same would certainly be less attractive." This is, in effect, but a restatement of the argument made in Kohn v. Sacramento Elec., Gas & Ry. Co., 168 Cal. 1, 7, 141 Pac. 626, to the effect that, bonds having been so long treated as negotiable instruments, the courts should respect the custom of the country and make the letter of the statutes bend to it. We make the same answer:

> "Custom is often very important, it is true, in assisting courts to interpret statutes properly, but it never overcomes the positive provisions of statutes."

[4] While the precise question of the validity or invalidity of stipulations foreclosing the right of a party to an instrument otherwise nonnegotiable from setting up the defense of failure or want of consideration in an action brought upon the contract has not heretofore been passed upon by this court, there are certain well-defined rules of law in respect to situations so nearly analogous as to be of persuasive force in directing our conclusions in the instant case. The nonenforcement of illegal con-

tracts, such being a matter of public interest, has received much attention from the courts, and it has been universally held that a party to such an agreement may not, either by stipulation at the time of the execution thereof, or afterwards, waive his right to urge the illegality in any action thereon instituted by the other party thereto. The same rule of public policy which forbids the execution of the contract forbids the giving of a quasi-validity thereto by the waiver of such defense. 15 Am. & Eng. Ency. of Law (2d Ed.) 1014. Whenever the illegality appears, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection is tainted with the vice of the original contract, and void for the same reason. Coppell v. Hall, 74 U. S. (7 Wall.) 542, 558, 19 L. Ed. 224; Faircloth v. De Leon, 81 Ga. 158, 161, 7 S. E. 640; Shenk v. Phelps, 6 Ill. App. 612; Braxton v. Liddon, 49 Fla. 280, 289, 38 South. 717; Fay v. Ind. Lbr. Co., 178 Ala. 166, 168, 59 South. 470; Wilcox v. Howell, 44 N. Y. 398, 402; Bridger v. Goldsmith, 143 N. Y. 424, 38 N. E. 458. In other words, there can be no estoppel by contract unless the contract itself is valid.

[5, 6] While some of the foregoing cases refer to fraud in the inception or execution of contracts, the fact remains that fraud in the creation of a contract does not render the instrument more vulnerable than does want or failure of consideration, which renders every agreement voidable and incapable of enforcement (Gamble v. Tripp, 99 Cal. 223, 226, 33 Pac. 851; Wheat v. Bank of California, 119 Cal. 4, 6, 50 Pac. 842, 51 Pac. 47), and this defense is available even as against the assignee of the contract (Crawfis v. Edwards, 178 Cal. 805, 175 Pac. 410; Briggs v. Crawford, 162 Cal. 124, 129, 121 Pac. 381). Following the analogy of the fraud cases, we see no reason why stipulations to waive the defense of want or failure of consideration may not be held voidable at the instance of the debtor, whenever the want or failure of consideration in the inception and execution of the contract itself is made to appear. If such stipulations be regarded as collateral agreements, in a sense ancillary to the main contract, under such circumstances there would appear to be no consideration whatever to support them. On the other hand, if they be regarded as an essential part of the main contract, they would have to find support in the same consideration which sustains the main contract. When that consideration fails, the particular covenant must be held to have fallen with it. The respondent has cited, and strongly relies upon, the case of Anglo California Trust Co. v. Hall (Utah) 211 Pac. 991, as upholding its contention. The question there considered was whether or not a party could in his contract waive, as against the assignee, a breach of warranty. The court held that in the absence of fraud or duress it might be done. Some general language in the opinion in that case, which might be given application to a waiver by contract of the defense of want or failure of consideration, amounts to dicta, and is not consonant with our views.

[7] We conclude, therefore, that, if an estoppel against the defendant Tomlinson exists in this case, it must be one arising in pais, which is a very different thing from an estoppel by contract, and by means of which a party to a contract may well be held to be estopped from denying the validity of the instrument which, if it were not for such estoppel, would undoubtedly be held to be invalid. The doctrine of estoppel in pais proceeds upon the theory that the party has, by his declarations or conduct, misled another to his prejudice, so that it would be a fraud upon the latter to allow the true state of facts to be proved. The representation must be one intended by the party making it to be acted upon by the other, or made under such circumstances that the other had the right to believe that it was so intended. Otherwise there is no fraud or anything in the nature of fraud. Parker v. Funk, supra. There is no doubt that, upon a proper showing being made, a party to a contract will be estopped from setting up, as against an assignee of the other party to the contract, either that there was no consideration or that there was a total or partial failure of consideration. If, for example, in this case it had appeared that plaintiff, before purchasing the contracts of sale, had inquired of defendant Tomlinson whether or not the latter had actually received the automobiles, saying that it was thinking of purchasing the contracts, and Tomlinson replied that he had received the machines, and if, in reliance upon such representations, plaintiff had then purchased the contracts, there could be no question, we take it, that Tomlinson would not now be permitted to rely upon the defense that he had never received the automobiles. It makes no particular difference how the representation by the vendee, which was acted upon by the assignee, was made; the essential thing being that it was made for the purpose of being acted upon, and that it was acted upon. Such a representation no doubt can be, and frequently is, made in the contract itself, and is made there for the purpose of assurance to any one considering the purchase of the contract.

In such a case, if one purchases in reliance upon this assurance, the other party to the contract, in this case, for example, the vendee of the automobiles, is estopped from denying that he actually received the machines which constituted the consideration for the contract. Such an estoppel, although it relates to a contract, is an estoppel in pais. It is an application of the fundamental, equitable, and moral rule that a man may not be permitted to deny the truthfulness of an assurance which he has given to another, for the purpose of having it acted upon by the latter, and which the latter has acted upon. As was said in Parker v. Funk, supra:

> "It is, of course, not difficult to imagine a case where a recital is put into a contract for the very purpose of having it acted on. For example, conditional sales contracts of automobiles are largely dealt in by way of sale and assignment, and if it appeared in the present case that the defendant had acknowledged the receipt of the subject of the sale prior to his actually having received it, in order that his vendor might the more easily realize upon the contract, or even under circumstances such that he should have known that some one in reliance upon the recital would not improbably purchase the contract as one for the sale of a completed and delivered article, he would undoubtedly be estopped from showing the contrary. Fugate v. Hansford's Ex'rs, 3 Litt. (Ky.) 262; National, etc., Co. v. Sherwood, 165 Cal. 1, 130 Pac. 881."

It is not at all impossible that such was the fact in this instance, but, if it were, it devolved upon plaintiff to prove it. Parker v. Funk, supra. That was all that was necessary to be done to entitle plaintiff to recover. It had established a prima facie case, subject to having its cause of action defeated by the proof which the defendant Tomlinson offered, and which he should have been permitted to introduce, regardless of whether or not such proof conformed or did not conform to the face of the contracts. Plaintiff in rebuttal would have had full opportunity to show that the acknowledgment of the receipt of the automobiles, and the waiver of the defense of want or failure of consideration, were inserted in the contracts under such circumstances as to permit it to invoke the doctrine of estoppel in pais. All these facts were open to investigation, and upon a full inquiry the court could have readily determined the question. Rauer v. Fay, 110 Cal. 361, 368, 42 Pac. 902. It follows, therefore, that the trial court was in error in refusing to permit the introduction of the testimony offered by the defendant Tomlinson in support of his defense of want or failure of consideration.

The offer of the defendant Tomlinson to support his alleged counterclaim against the defendant A. G. Sommerville, Inc., presented an immaterial issue in the present case. If he should be successful in establishing a want or failure of consideration for the contracts, the action fails. If, on the other hand, he is estopped in some way to deny the effect of the clause waiving certain defenses, recoupment, set-off, or counterclaim in the event of an assignment in good faith, he is bound by his stipulations.

The judgment is reversed.

We concur: WILBUR, C. J.; MYERS, J.; KERRIGAN, J.; LAWLOR, J.; SEAWELL, J.

---

62 Cal. App. 226

NORTON v. ROSENKRANZ et al.

(Civ. 4481.)

(District Court of Appeal, First District, Division 1, California. May 18, 1923.)

1. Vendor and purchaser 🔑123—Finding that building did not conform to contract sustained by evidence.

Evidence in action by purchaser to rescind an executory contract of sale of real estate, providing for the erection of a bungalow on the land by the vendor, *held* to sustain finding that the building erected did not conform to the contract.

2. Vendor and purchaser 🔑116—Purchaser need not surrender executory contract before action to rescind.

Under Civ. Code, § 1691, providing that a party to rescind a contract must restore to the other party everything of value which he has received from him under the contract, the purchaser under an executory contract for sale of land on which he has made payments need not, before suing to rescind, surrender or offer to surrender the contract.

3. Vendor and purchaser 🔑123—Evidence sustained finding that purchaser had no possession to surrender.

In action by purchaser to rescind, evidence *held* to sustain finding that he had no possession, as respects his duty to surrender possession before suing, notwithstanding his permitted planting of trees and housing of an automobile on the premises in a garage.

4. Vendor and purchaser 🔑107—Purchaser suing to rescind not in default though failing to make payment after concluding not to accept.

As respects purchaser's right to rescind contract to purchase land with a building to be erected thereon by the vendor, purchaser *held* not in default, though he failed to make payment which became due after he concluded not to accept the building because of defects.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Margaret Norton against Elias V. Rosenkranz and another. Judgment for plaintiff, and defendants appeal. Affirmed.

E. V. Rosenkranz, of Los Angeles, for appellants.

W. H. Thomas, of Los Angeles, for respondent.

TYLER, P. J. Action to rescind an executory contract of sale of certain real property upon the ground of fraud. The trial court found on all the material issues in favor of plaintiff, declared the agreement void, and rendered judgment in her favor in the sum of $1,748.78. Motion for a new trial was made and denied. This is an appeal from the judgment. Defendant Firth having died during the pendency of the action, Elias V. Rosenkranz and Title Insurance & Trust Company have by stipulation been substituted as defendants in his place and stead.

The facts as recited in the amended complaint show, in substance, that plaintiff entered into an agreement with defendant Firth for the purchase of certain real property situated in Los Angeles county. The property consisted of two lots in a particular tract. The contract price of one of the lots was $800 and that of the other $825. In the performance of her contract and up to a period of time hereinafter referred to plaintiff paid for one of the lots in full, and there was due and owing upon the other the sum of $471.25. On the 31st day of August, 1920, negotiations were had between the parties looking to the improvement of the lots. Defendant, who was a builder, represented to plaintiff that it would be a good investment for her to erect a bungalow upon the property, and he offered to cancel her contracts in relation to the same and to construct the bungalow on payment of the further sum of $6,791.28, the amount to be paid in certain installments commencing September 30, 1920, and during the progress of the work. Plaintiff consented to this arrangement, her contracts were canceled, and a new agreement was thereupon entered into between the parties, by the terms of which defendant agreed to erect a seven-room bungalow according to certain plans and specifications, and in a first-class manner. This contract is silent as to the time when the bungalow was to be finished, plaintiff, however, alleging that by oral agreement completion was to be had by December of the same year. It is charged that, while this period for construction was a reasonable time to insure the completion of the structure, defendant failed to complete the same until March of the following year, and that when so completed the building did not comply with the plans and specifications in many particulars, the alleged defects being set forth in detail in the complaint. It is further charged that the promises of defendant in relation to the manner in which the building was to be constructed were all and each of them false, and made with the intent to deceive plaintiff into entering into the agreement whereby she transferred her interest in the real property above mentioned to defendant. Then follow allegations of the giving notice of rescission and other matters, a recital of which is unnecessary for the purpose of the decision.

The prayer of the complaint asks that the contract be delivered up and canceled, and that plaintiff recover the sum of $2,500, the amount it is alleged she paid under the different contracts.

Defendant, answering, admitted that the structure as completed was not a first-class job, but by way of defense he alleged that this result was due to general conditions prevailing in the vicinity at the time of the performance of the contract which affected labor and materials, and that the structure as completed substantially complied with the terms of the contract. He further alleged that plaintiff was in default both before and at the time of her rescission, and was therefore in no position to claim the relief here sought. He also alleged as a further reason against the maintenance of the action that prior to her rescission plaintiff accepted the building and went into possession, and that she has never returned or offered to return such possession or any of the benefits received by her under the contract.

The case was tried without a jury. The court found, in substance, that the building was improperly constructed, and that plaintiff had rescinded the contract, which it found to be void and of no force or effect. It further found that plaintiff never went into possession of the premises, and that her allegation that she had received no benefits under the contract was true. As above recited, a money judgment was thereupon rendered in her favor in the sum of $1,748.78, the amount found to have been paid by her to the defendant under her agreement up to the time when she concluded that the building was not being properly erected, and when she concluded not to accept it.

[1] Among the grounds relied upon for a reversal is the claim that the evidence does not support the finding that the building did not conform to the terms of the contract. Upon this subject there is testimony to show that it was erected in a very poor and imperfect manner, contrary to the plans and specifications and in violation of the provisions of the Dwelling House Act. The doors were short, and to remedy this defect they had to be spliced so as to be made to fit; the roof had spread by reason of the settling of its supports and from insufficient bracing, and one side of the building was bulged out; the windows and roof leaked; the plastering cracked on account of the sinking of the archway, and the windows and sills were out of alinement. Experts testified to many other defects.

This evidence is sufficient to warrant the finding, as expressed by the trial judge who viewed the premises, that it was, in the language of one of the experts, "the rottenest job of carpentry and building that he had ever seen." There is therefore no merit in the contention that the evidence fails to support the findings in this particular.

[2] It is next claimed that the evidence fails to show that the plaintiff ever accomplished a rescission of the contract, for the reason that she never restored or offered to restore the things of value she had received

under the contract, as required by section 1691 of the Civil Code. The rule announced by this section is based upon the principle that he who seeks equity must do equity. In this connection it is well settled that any person demanding a rescission of a contract to which he is a party must restore or offer to restore to the other whatever he may have received under the contract in the way of money, property or other consideration of benefit. It is only by doing this that he can entitle himself to the return of what he, on his part, may have given or paid, and to be released from the contract. Such, in effect, are the requirements of the section above referred to. Restoration to the status quo ante, however, is not essential in all instances. There are situations where the party who seeks to rescind has received nothing of value, and under such circumstances, as there is nothing to restore, the rule does not apply. Larkin v. Mullen, 128 Cal. 449, 60 Pac. 1091; Spreckels v. Gorrill, 152 Cal. 383, 92 Pac. 1011. In the instant case one of the things that it is claimed plaintiff received under the contract was the muniment of title evidenced by the executory contract here sought to be rescinded. It is admitted that plaintiff failed to tender a return of this instrument. In her complaint she sets forth that she received nothing, and the court so found.

This contention presents the question whether or not under the circumstances of the case plaintiff was bound to surrender or offer to surrender her executory contract of sale to defendant before being entitled to rescind. In support of this claim it is in substance argued that plaintiff, by virtue of her contract, received an equitable title in and a lien upon the property, and the only means by which she could restore the defendant to his original status was by giving or tendering him a return of this instrument or a quitclaim deed relinquishing her interest, and that such tender was a condition precedent to her right of recovery.

We see no merit in this contention. One seeking the rescission of a contract is not required to make a tender or offer of restoration of that which he would be entitled in any event to retain. Here plaintiff had conveyed to defendant her interest in the lots acquired by her under her original contract with defendant, and she was entitled to retain her contract evidencing this interest for her own protection in the event that rescission should be denied her. 2 Black on Rescission and Cancellation, § 621. It is not claimed that any sale was effected under the executory agreement, as the contract provided that a conveyance was to be made only upon full performance; but, even conceding, for the purpose of the case, that the outstanding unrecorded executory agreement constituted a cloud upon the title to the property, and was therefore a thing of value within the meaning of the Code section, it was an interest which plaintiff had acquired, and one she was entitled to retain by reason of her payments, and until a determination of her rights was had she was not bound to relinquish this evidence of interest.

In conformity with this view it has been held that, where a plaintiff was seised in fee of two pieces of land, and was induced by fraudulent representations as to his title to relinquish one piece in consideration of a deed to the other, in order to maintain an action to set aside his conveyance of the one piece upon discovery of the fraud, it was not necessary to restore the other so as to put the parties in statu quo. Du Pont v. Du Bos, 52 S. C. 244, 29 S. E. 665. See, also, Matteson v. Wagoner, 147 Cal. 739, 82 Pac. 436; Wills v. Porter, 132 Cal. 516, 64 Pac. 896; 2 Black on Rescission, p. 1432.

The court had under the pleadings power to do exact justice between the parties and place them both in statu quo by adjudging their rights in and to the property, and its judgment determines such rights, and is res adjudicata upon the subject. This is all that plaintiff sought by her action. Wills v. Porter, supra; Schneider v. Schneider, 125 Iowa, 1, 98 N. W. 159.

[3] In this connection it is further contended that plaintiff had possession and use of the premises both before and after the attempted rescission. The court found otherwise. The evidence upon the subject sustains the finding. It in effect shows that plaintiff during the construction of the bungalow lived on adjoining property, and that she housed her automobile in a garage built and located on the back portions of the lots in question, but that the occupation of the garage was not intended to constitute possession in her, but that, on the contrary, it was understood by the parties to be a mere accommodation. It further shows that, while plaintiff also planted certain trees in anticipation of her acquirement of the premises, this act was also done under a privilege, and was not intended by the parties as one indicating possession. Under the contract and pending performance thereof plaintiff had no right to possession of the property (Havens v. Alameda County, 30 Cal. App. 206, 157 Pac. 821); and, as the court found, she acquired none by her agreement.

[4] And, finally, it is claimed that plaintiff was in default in her payments. The bungalow was completed in March, 1921, and possession was tendered plaintiff. It is true that at this time she had not made her February payment, but the evidence shows that prior to this time she had concluded not to accept the building for the reasons heretofore stated. Under such circumstances she was entitled to withhold further payments.

No other questions are presented.

The judgment is affirmed.

We concur: RICHARDS, J.; ST. SURE, J.

(62 Cal. App. 117)

GENERAL MOTORS ACCEPTANCE CORPORATION v. CODIGA. (Civ. 4443.)

(District Court of Appeal, First District, Division 2, California. May 5, 1923.)

1. Contracts 🔑127(4) — Parties to litigation may not stipulate away jurisdiction of any court.

A stipulation by the parties to an action as to the place of trial has no force or effect, unless the trial court sees fit to make an order changing the place of trial in accordance with such stipulation.

2. Judgment 🔑45—Provision of note providing for confession of judgment by maker's attorney held invalid.

A stipulation in a note authorizing, irrevocably, any attorney at law to appear for the maker in any court of record in the United States and waive the issue and service of process and confess judgment in favor of the holder for such amount as may appear to be unpaid, together with the costs, violates Code Civ. Proc. § 1133, setting out the requirements of the statement in writing and the form thereof in confessions of judgment.

3. Venue 🔑17—Covenants in note held not to waive venue.

The provisions in a note authorizing any attorney at law to appear for the maker in any court of record in the United States, waive the issue and service of process, and confess judgment, and providing for an attorney's fee in case of enforced collection, and waiving all benefits of valuation, appraisement, and exemption, laws and rights of appeal, releasing all errors, *held* not to authorize plaintiff to bring an action thereon in any court of competent jurisdiction.

4. Contracts 🔑153 — Courts not inclined to strain construction of invalid contract to place an interpretation not written therein.

Courts are not inclined to go out of their way, when confronted with an invalid covenant, to search for ways and means of saving something from the wreck and thus placing an interpretation upon the contract which the parties never wrote therein.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the General Motors Acceptance Corporation against Joseph Codiga. From an order denying a change of venue, defendant appeals. Reversed.

Nutter, Hancock & Rutherford, of Stockton, and Frank R. Wehe and C. S. Morbio, both of San Francisco, for appellant.

Haswell & Pierce, of San Francisco, for respondent.

STURTEVANT, J. The defendant was sued on a promissory note, and at the time that he appeared in the action he filed a demurrer and moved to change the place of trial of the action from the superior court of the state of California, in and for the city and county of San Francisco, to the superior court in and for the county of San Joaquin. His motion was denied, and the defendant has appealed.

The record does not disclose any points with reference to the form of any paper, nor any question as to procedure, except as to the following matters. In its complaint the plaintiff pleaded an action on a promissory note, and in doing so it set forth a complete copy of the note and the indorsements thereon. In its reply to the defendant's moving papers, the plaintiff filed a counter affidavit in which it set forth certain of the covenants contained in the note, and thereupon it based its contention—

> "That by reason of such right, as provided for in said note, plaintiff corporation as the holder in due course of said note has brought the action hereinabove referred to in the superior court of the state of California, in and for the city and county of San Francisco."

If the passages contained in the promissory note sustained the plaintiff's position, then the judgment should be affirmed, otherwise it should be reversed. Those passages, in so far as they are pertinent to the question before this court, are as follows:

> "And I (we) hereby authorize, irrevocably, any attorney at law, to appear for me (us) in any court of record in the United States and waive the issue and service of process and confess a judgment against me (us) in favor of the holder hereof, for such amount as may appear to be unpaid hereon, together with costs.
>
> "And I (we) agree, in the event this note be placed in the hands of an attorney for collection, to pay 15 per cent. of the amount due hereon as attorneys' fees.
>
> "And I (we) hereby agree to waive all benefits of valuation, appraisement and exemption laws, and all rights of appeal, and to release all errors."

The respondent at once claims that the language "in any court of record of the United States" for manifest reasons should be construed as though it were written in any superior court of the state of California, and thereupon the respondent contends that the covenants quoted entitle the respondent to claim that—

> "'The greater' (right to judgment against defendant by confession in any court of competent jurisdiction) includes 'the less' (the right to the trial of an action on such cause in any court of competent jurisdiction)."

To support it in this contention, the respondent cites and relies on State ex rel. Schwabacher Co. v. Superior Court, 61 Wash. 681, 112 Pac. 927, Ann. Cas. 1912C, 814. The case does not support the claim. In the Schwabacher Case the contract before the court contained a passage as follows:

> "And in case suit be brought to collect this note or any part thereof * * * the maker agrees that the venue of said suit or action, may be laid in King county, Washington."

Furthermore, section 216, Rem. & Bal. Code, of the state of Washington, provides:

> "Notwithstanding the provisions of section 209, all the parties to the action by stipulation in writing * * * may agree that the place of trial be changed to any county of the state, and thereupon the court must order the change agreed upon."

[1] In California we have no such statute; but, in the event that the parties stipulate, their stipulation will have no force or effect unless the trial court sees fit to make an order changing the place of trial in accordance with the stipulation of the parties. In other words, in California, parties to litigation may not as of right stipulate away the jurisdiction of any court. In the second place, the covenant contained in the instrument before the court in the Schwabacher Case contained language that is quite different from the language contained in the note which was the subject-matter of this suit. The respondent does not claim that the courts have any power to make contracts for the parties, but the respondent has cited many authorities and has made many arguments to the effect that the covenant contained in the note in suit should be given the same construction as the covenant contained in the note involved in the Schwabacher Case. It will serve no purpose for us to answer each one of those arguments. It is patent from a most cursory reading of the covenants which we have quoted above that the covenants do not singly or collectively speak on the subject of the place of trial.

[2-4] The first covenant authorizes any attorney at law to appear and confess judgment; the second covenant provides for the allowance and the amount of an attorney fee; and the third covenant waives numerous rights, but does not even purport to mention a motion to change the venue. Counsel do not claim that either of the two latter elements is involved in this appeal. The first element is invalid because it is in violation of section 1133 of the Code of Civil Procedure. The respondent does not even claim that it is a valid covenant within the provisions of our Code, but contends that it is so broad as to support the respondent's position in this case. With this claim we cannot agree. It is not so written on the face of the paper, and, with reference to contracts such as the one before the court, courts are not inclined to go out of their way, when confronted with an invalid covenant, to search for ways and means of saving perchance something from the wreck and thus placing an interpretation on the contract which the parties never wrote therein. Borderre v. Den, 106 Cal. 594, 600, 39 Pac. 946. A similar contention was made to the Supreme Court of Washington. Kanaskat Lumber & Shingle Co. v. Cascade Timber Co., 80 Wash. 561, 142 Pac. 15. To that contention the court replied as follows:

> "The duty of courts when construing questioned contracts to search out the intention of the parties is well established, but that duty arises out of an ambiguity or omission that demands the reception of testimony to illustrate their meaning, or to harmonize apparent conflict.
>
> "There is a presumption of finality which attends all written contracts, and courts will not deliberately raise doubts or conjure ambiguities for the mere pleasure of construing them. Fairbanks Steam Shovel Co. v. Holt & Jeffery, 79 Wash. 361, 140 Pac. 394.
>
> "Nor will the fact that a party has made a hard or improvident bargain warrant the court in binding the other party to terms raised by construction or implication."

As there was no other question involved, it follows that the motion to change the venue should have been granted. The order denying the motion is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

62 Cal. App. 797

GENERAL MOTORS ACCEPTANCE CORPORATION v. PARKER. (Civ. 4445.)

(District Court of Appeal, First District, Division 2, California. May 11, 1923.)

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the General Motors Acceptance Corporation against John A. Parker. From an order denying motion for change of venue, defendant appeals. Reversed.

Edward Bickmore, of Merced, and Thos. W. Firby, of San Francisco, for appellant.

Haswell & Pierce, of San Francisco, for respondent.

STURTEVANT, J. This is an appeal from an order refusing to change the place of trial. The facts are almost identical with, and the case involves no principle except as passed on by this court in General Motors Acceptance Corporation v. Joseph Codiga (Civ. No. 4443) 216 Pac. 383, filed May 5, 1923. The case was submitted by stipulation on the briefs filed in that case.

On the authority of the Codiga Case, the order denying the motion to change the place of trial is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

(62 Cal. App. 185)

BERENDSEN et al. v. BABDATY et al.
(Civ. 4234.)

(District Court of Appeal, Second District, Division 1, California. May 10, 1923.)

Appeal and error 🔑771—Failure to file brief within time required held not "excusable neglect" under statute.

Evidence that counsel was under an unusual pressure of work, and that his health was poor, though not such as to preclude him from attending to any business, *held* insufficient to excuse under Code Civ. Proc. § 473, his failure to file his brief within the time required, nor would the fact that he relied upon his stenographer or clerk to notify him of the condition of his calendar, which was not done, constitute excusable neglect.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Excusable Neglect.]

Appeal from Superior Court, Los Angeles County; E. A. Luce, Judge.

Action by J. C. Berendsen and others against A. Babdaty and others. Judgment for plaintiffs, and named defendant appeals. On motion to dismiss. Motion granted.

C. M. Mooslin and Bernard Potter, both of Los Angeles, for appellant.

Samuel H. French, of Los Angeles, for respondents.

HOUSER, J. Plaintiffs have presented a motion to dismiss the appeal of defendant Babdaty herein for the reason that he has failed to file his opening brief within the time allowed by rule of this court, and the said defendant has filed a motion to be relieved from such default.

It appears that appellant was first late in filing the transcript on appeal, in that while it should have been filed not later than January 3, 1923, it was not until February 12, 1923, that it was actually filed. At that time the attorney representing plaintiffs wrote a letter regarding the matter of further delay to Bernard Potter, Esq., who was representing the appellant. It is not denied that the letter was received by Mr. Potter. A copy of the letter is as follows:

"February 12th, 1923.

"Mr. Bernard Potter, Title Insurance Building, Los Angeles, Calif.—Dear Mr. Potter: I have just signed the stipulation and acknowledged service on your transcript in the Babdaty case, and Parker & Stone told me that they would call for it to-morrow, and it will then be filed. In view of the very considerable delay in filing the transcript, which was inexcusable in your client, I am going to insist on the brief being filed within the proper time, which, as I figure it, will be on or before Thursday, March 15th. In view of the consideration which I have shown in the matter of the transcript, I think you will agree with me that this is only fair, and will also understand that my complaint in the matter is directed at your client and not at your own good self.

"With best personal regards, I am,
"Yours very truly, Samuel H. French."

Subdivision 4 of rule 2 of this court (176 Pac. viii) provides that—

"Within thirty days after the filing of the transcript, the appellant shall file with the clerk his printed points and authorities."

As is stated in the letter to Mr. Potter, the appellant's opening brief was due to be filed with the clerk of this court not later than March 15, 1923. On April 13, 1923, which was 29 days after appellant's opening brief was past due, and no brief having been filed in his behalf, respondents served upon attorneys for appellant their notice of motion to dismiss the appeal herein. Appellant does not contest the facts, but seeks to be relieved because of "mistake, inadvertence and excusable neglect" under the provisions of section 473, Code of Civil Procedure. An affidavit of merits has been filed, together with an affidavit by Mr. Potter, to the effect that it has never been the intention of appellant to abandon the appeal, but that it has always been his endeavor in good faith to present it to the court; that although there is associate counsel in the case, and notwithstanding the fact that for several months last past Mr. Potter has been ill and in no fit condition to attend to business, Mr. Potter has had sole charge of the case and that he had been exceedingly busy in court and out of court for many weeks preceding the date of the filing of the motion to dismiss the appeal; that the reason Mr. Potter did not seek an extension of time within which to file appellant's points and authorities was that he expected to have his brief prepared and served within time and did not realize, on account of being engaged in court almost constantly, that the time was expiring or had expired and did not realize that the same had expired until the notice of motion to dismiss was served; that through inadvertence and neglect he did not examine his calendar, nor was his attention directed thereto; that it has been the habit of one of his stenographers to direct his attention to matters that were arising before they came on for hearing, but that some weeks before the opening brief became due the stenographer who had attended to such matters had left Mr. Potter's office, and the clerk maintained in the office was not in the habit of performing such duty.

Aside from the presumed knowledge possessed by the attorney representing appellant as to the time within which his points and authorities should, under the rule, be filed with the clerk of this court, the letter which was written to appellant's attorney by the attorney representing respondents particularly directed attention to former delays with reference to the filing of the transcript on appeal and, after pointing out that as to the briefs he would insist on their being filed within the proper time, specified "Thursday, March 15th," as being the limit for filing same.

The fact that appellant's counsel was under an unusual pressure of work and that his general health was poor cannot be accepted as a sufficient reason for excepting his case from the salutary rule requiring briefs to be filed within a certain time. If the law matters intrusted to his care were demanding so much of his time that it was an impracticability, considering the state of his health, for him to properly attend to the preparation of the opening brief in this case within the time permitted under the rule, the probabilities are that he could have obtained an extension of time either from opposing counsel or by an order of this court. It is said in Bailey v. Taaffe, 29 Cal. 424, that—

> "The relief sought is asked solely on the score of excusable neglect; and upon that subject all that is said is in substance that on account of the complicated condition of the defendant's title, and from the fact that the complaint was verified, more time was required to prepare the answer than is required in ordinary cases, and that during a portion of the time allowed for answering, the attorney employed to conduct the defense was compelled to be absent from town. But so far as all this tends to establish a legal excuse, it is completely and conclusively answered by the fact that no reason is given why, if more time was required, either on account of the complications suggested, or on account of the necessary absence of counsel, an application to opposite counsel, or if denied by him, to the court, for an extension of time was not made. If there was any good reason for an extension, doubtless it could have been readily obtained from opposite counsel by stipulation. If not, it certainly could have been obtained from the court by an order to that effect. There is therefore no pretense but that an extension of time could have been readily obtained from one source or the other had an application been made, and there is no pretense that an opportunity to make the application was, from any cause, not afforded. * * * In view of these facts, it cannot be said with any show of reason that the failure to answer in time is shown to have been excusable within the meaning of the law."

To the same effect, see Shain v. People's Lumber Co., 98 Cal. 122, 32 Pac. 878, where the court concludes the matter with the statement that—

> "If he neglects to procure a stipulation from the respondent, or an order of the court upon a proper affidavit, he is not in a position to resist a motion of the respondent to enforce the penalty which the rules have declared shall follow such neglect."

As showing generally that appellant is not entitled to the relief which he seeks, see McFadden v. Dietz, 115 Cal. 697, 47 Pac. 777; Suman v. Archibald, 116 Cal. 42, 47 Pac. 865; Pilger v. Strassman, 119 Cal. 692, 52 Pac. 40; McCabe v. Healey, 139 Cal. 30, 72 Pac. 359; Coats v. Coats, 146 Cal. 443, 80 Pac. 694; Egressy v. Stansbury, 149 Cal. 392, 87 Pac. 280; Barnhart v. Conley, 17 Cal. App. 230, 119 Pac. 200; Pierce v. Employers' Ind. Exchange, 33 Cal. App. 98, 164 Pac. 403.

Counsel's illness apparently was not so serious as to prevent him from attending to some of his business for other clients, and the fact that he chose to attend to such business rather than to the matter of preparing the brief in this case does not present a satisfactory reason for granting relief to appellant. Elliott v. Shaw, 16 Cal. 377; Ekel v. Swift, 47 Cal. 619; McGuire v. Drew, 83 Cal. 225, 23 Pac. 312.

That counsel did not personally examine his calendar, nor have his attention directed by either his stenographer or by his clerk to the fact that his brief either was about to become due or that the time had elapsed within which under the rule he might properly file same, is not enough to bring his neglect within the terms of the statute. The purpose of the rule is not only to facilitate the business of the court, but as well for the convenience and ultimate advantage of litigants. In order that it may be of value, it must be enforced.

It follows that respondents' motion to dismiss the appeal should be granted, and that appellant's motion to be relieved from his default should be denied. It is so ordered.

We concur: CONREY, P. J.; CURTIS, J.

---

62 Cal. App. 168

In re GRAVES. (Cr. 984.)

(District Court of Appeal, Second District, Division 2, California. May 9, 1923.)

Appeal and error ⚷458(2)—Attorney and client ⚷56—Supersedeas will not issue to suspend judgment suspending attorney from practice of law, as such judgment is self-executing.

Supersedeas will not issue where the judgment does not command or permit any act to be done, or where it is not of a nature to be actively and affirmatively enforced by execution or otherwise; and, since a judgment suspending an attorney from the practice of law is self-executing, and requires no further action to be taken by the court below upon which supersedeas could act, the writ will not issue to suspend such judgment.

Application by M. O. Graves for a supersedeas to stay a judgment suspending him from the practice of law pending appeal. Writ denied.

Wheaton A. Gray and M. O. Graves, both of Los Angeles, for petitioner.

Frank C. Collier, of Los Angeles, for respondent Los Angeles Bar Association.

FINLAYSON, P. J. This is an application for a supersedeas. By a judgment of the superior court for Los Angeles county, made January 22, 1923, petitioner was suspended from the practice of law for one year. From that judgment he has taken an appeal to this court, and now asks for a supersedeas to stay the judgment of suspension pending his appeal.

This is not a case for the issuance of supersedeas. The judgment of suspension acts directly against petitioner, without the necessity for process or proceedings of any kind for its enforcement. Tyler v. Presley, 72 Cal. 290, 13 Pac. 856. It is true that the power to issue the writ of supersedeas is inherent in an appellate court, but it will only be issued to restrain proceedings upon the judgment from which the appeal has been taken. Its effect is merely to stay proceedings for the enforcement of the judgment. It does not reverse, suspend, supersede, or impair the force of the judgment itself. That remains in all respects the same. The general rule, therefore, is that supersedeas will not issue where the judgment does not command or permit any act to be done, or where it is not of a nature to be actively and affirmatively enforced by execution or otherwise. Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 Pac. 123; Tyler v. Presley, supra; Hoppe v. Hoppe, 99 Cal. 536, 34 Pac. 222; Taylor v. Superior Court, 44 Cal. App. 23, 185 Pac. 994; Wood v. Board of Commissioners, 50 Cal. App. 594, 195 Pac. 739. Here the judgment of suspension is self-executing. There is no further action to be taken thereon by the court below, and consequently nothing upon which the supersedeas can act.

The application is denied.

I concur: WORKS, J.

CRAIG, J. I concur. During the argument counsel for petitioner insisted that, although supersedeas may not issue to suspend the operation of a self-executing judgment, it should issue in this case because a contempt proceeding might be instituted should he practice law during the pendency of this appeal. A contempt proceeding would be independent from, although of course an outgrowth of, the disbarment case. The possibility of such a proceeding does not make the judgment of suspension any less self-executing, nor does it create a ground for the issuance of a supersedeas. Wolf v. Gall, 174 Cal. 140, 162 Pac. 115.

---

62 Cal. App. 209

REED v. PALMER et al. (Civ. 4463.)

(District Court of Appeal, First District, Division 1, California. May 15, 1923.)

1. Sales 🔑345—Where seller undertakes to keep goods safely, his failure to do so prevents recovery.

Where steel for building contract arrived too late for defendant buyers to accept it, but they were induced by seller to purchase it under a new contract, whereby seller was to keep the steel in its yards until called for, the performance of this duty to keep the property safely was a condition precedent to seller's right to recover the price.

2. Sales 🔑181(11)—Evidence held to show seller negligent in keeping goods.

Where steel for building contract arrived too late for defendant buyers to accept it, but they were induced by seller to purchase it under a new contract, whereby seller was to keep the steel in its yards until called for, evidence that the steel was stolen by the seller's superintendent, who was known to the seller's officers to be an ex-convict, and carted away by the purchaser from the superintendent during business hours, *held* to show that seller failed to exercise the degree of care required under its bailment.

3. Sales 🔑365—Finding that buyer suffered no damage held not to invalidate judgment.

Where steel for building contract arrived too late for defendant buyers to accept it, but they were induced by seller to purchase it under a new contract, whereby seller was to keep the steel in its yards until called for, and the steel was stolen from the seller's yards through its gross carelessness, a finding by the court, in rendering judgment for defendant buyers, in action for the price of the goods stolen, that buyers had suffered no damage, *held* not to invalidate the judgment; being immaterial so far as plaintiff was concerned.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by T. H. Reed against P. A. Palmer and another, copartners, doing business under the firm name and style of Palmer & Petersen. From judgment for defendants, plaintiff appeals. Affirmed.

Haven, Athearn, Chandler & Farmer, of San Francisco, for appellant.

Hartley F. Peart and Chas. V. Barfield, both of San Francisco, for respondents.

TYLER, P. J. Action to recover the sum of $2,219.88 alleged to be the balance of the purchase price of certain steel sold by plaintiff's assignor to defendants.

Concerning the facts there is little or no controversy. It appears therefrom that defendants were, on or about May 25, 1917, constructing a certain building for the United States government. In connection therewith they required certain structural steel, and they entered into a contract with the Concrete Engineering Company, plaintiff's assignor, to supply them with this material. The steel consisted of about 85 tons of reenforcing bars, for which defendants agreed to pay $4.40 per hundredweight, amounting in all to the sum of $4,719.88. Delivery was to be made upon a certain date, but the steel did not arrive according to schedule, and defendants thereupon notified plaintiff's assignor of this fact, informing it at the same time that they would be compelled to obtain the material elsewhere, and could not therefore accept delivery of the same as contracted for. The steel subsequently arrived, but too late to be used in the construction of the building for which defendants had purchased it. Efforts were then made to induce the defendants to receive it, notwithstanding the fact of its tardy arrival. These efforts proved successful, and a new arrangement was during December, 1917, thereupon entered into between the parties, by which defendants purchased and the vendor sold the steel originally contracted for, to be used in other work. The vendor continued in possession of the material and agreed to keep the same for defendants at its yard in San Francisco until called for. One of the conditions of the new arrangement was that defendants should pay the entire purchase price originally agreed upon within 90 days after December 14, 1917. Upon the completion of this agreement, the steel was switched from the railroad to the yards of plaintiff's assignor, and there unloaded.

Thereafter defendants called for and received delivery of a portion of the steel, amounting to some 20 or 25 tons, for which they gave their check in payment. Subsequently defendants asked for delivery of the remaining portion thereof, but it was then discovered that the steel had been stolen and sold as junk by the superintendent of plaintiff's assignor. Notwithstanding this fact, payment for the same was demanded by the concrete company. Defendants refused to comply with this demand, and the present suit resulted. The case was tried by the court without a jury, and judgment was rendered in favor of defendants for their costs, and this is an appeal from such judgment.

It is conceded that the transaction had between the parties amounted to a completed sale, and that the title to the steel had passed thereunder to defendants prior to the theft. This being so, it is the claim of the appellant that the loss followed the title, and defendants became liable for the contract price. The answer of the defendants, however, set up the defense that at the time the new arrangement was entered into, and in consideration thereof, the concrete company agreed to safely store and keep the steel at its storage yard, and that under such agreement it became a depositary for hire, both by reason of its contract, and by the express provisions of section 1748 of the Civil Code, and that the purchase price was not due therefor until the vendor had fulfilled this trust under the bailment and delivered the property to respondents.

[1] There can be no question that where a duty is imposed upon a vendor to safely keep property which is the subject of a sale the performance of such duty is a condition precedent to his right of recovery. The trial court found that there was a negligent bailment of the goods; the finding being that the concrete company wholly failed and neglected to safely store and keep the materials, and that the same was stolen through the gross carelessness and negligence of the company and sold to other parties.

[2] It is claimed by the appellant that this finding is not supported by the evidence. In this connection it is argued that a warehouseman is not liable for goods stolen by his servants unless his negligence has contributed to the theft. It is true a bailee is not an insurer; but there is ample evidence in the record to show that no care whatsoever was taken of the goods. The president and general manager of the company so testified. There is also testimony to show that the steel was stolen by the superintendent of the company and was carted away by the purchaser during business hours. The superintendent was an ex-convict, and was known by the officers of the company to be such long prior to the time the transaction in question took place. These facts, taken together, show the company failed to exercise the degree of care required under its bailment, and they fully support the finding of the trial court upon the subject.

The final contention is made that, as the court found that defendant had suffered no damage, the judgment must for this reason be reversed.

[3] In concluding its findings, the court did recite that defendants had not been damaged in any sum. There was evidence in the record to show that the price of steel had advanced subsequent to the date of the contract and at the time of its theft. The finding was evidently made to conclude defendants upon any right they might have by reason of this fact; or it may have been inserted by the trial court upon the theory that as defendants had failed to pay for the steel they had therefore suffered no damage, for which reason a finding to this effect was necessary to do complete justice between the parties. Whatever the purpose, its mere presence does not require a reversal of the judgment upon the ground that it is against the evidence. The title to the steel having passed by reason of the sale, defendants were liable for its value unless their defense of a negligent bailment was sound. The court, under sufficient evidence, found it to be so, and that finding rightfully concludes the substantial rights of the parties. Findings should

be reconciled and harmonized where possible, and should not be declared contradictory except when absolutely necessary. They should be given such a construction as will support the judgment, if this may be reasonably done, rather than one which will defeat it. So construed, it plainly appears therefrom that, plaintiff's assignor having been negligent in the care of the property, defendants were relieved from liability for the cost of the material. The presence or absence of the finding objected to, so far as appellant is concerned, is of no consequence to him.

For the reasons given the judgment is affirmed.

We concur: ST. SURE, J.; RICHARDS, J.

(62 Cal. App. 213)

PEOPLE v. SHELEST. (Cr. 939.)

(District Court of Appeal, Second District, Division 2, California. May 15, 1923. Hearing Denied by Supreme Court July 12, 1923.)

1. Criminal law 🔑407(2)—Statement taken from others in accused's presence inculpating him held admissible.

Statement taken in accused's presence by officers from two others, which directly connected accused with a murder, was admissible, together with evidence that accused was silent during the taking of the statement, such conduct being relevant as admission of guilt, and the admissibility of the evidence was not affected by the fact that accused was under arrest when the statement was made.

2. Criminal law 🔑409, 741(3)—Implied admission has weight, but evidentiary value for jury.

An implied admission may have as much weight as one made in express terms; what evidentiary value shall be given to either being for the jury.

3. Homicide 🔑253(1)—Evidence held to show first degree murder.

Conviction of murder in the first degree *held* warranted by the evidence.

4. Criminal law 🔑1172(2)—Instruction on confession of conspirator held not harmful to accused.

Where accused and two others were jointly indicted for murder, and no confession was introduced except that of his codefendants, an instruction as to corroboration of proof of confession by admissions and declarations made to a coconspirator by the confessing one, was not harmful to accused, especially where the court expressly limited the testimony concerning the confessions of the codefendants to the people's case against one of the codefendants.

5. Criminal law 🔑423(2)—Acts and declarations of other conspirators admissible against accused, although not made in his presence.

The acts and declarations of other conspirators in furtherance of the conspiracy *held* admissible against accused, although not made in his presence or affirmed by him.

6. Criminal law 🔑938(3)—Newly discovered evidence held not to require new trial.

Where accused and two others were jointly indicted for murder, affidavit by one of the codefendants, subsequent to the trial, that accused was not present at the time of the homicide, *held* not to require new trial, where such codefendant had not been asked by accused to take the stand during the trial, although in the courtroom.

Appeal from Superior Court, Los Angeles County; Franklin J. Cole, Judge.

John Shelest was convicted of murder in the first degree, with life imprisonment, and appeals from the judgment of conviction and order denying new trial. Judgment and order affirmed.

Ford & Bodkin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CRAIG, J. John Shelest was indicted jointly with Adam Blaszyk and Valentine Radecki for the crime of murder. After a trial Shelest was convicted. The penalty was fixed at life imprisonment, and from the judgment duly pronounced by the court and an order denying him a new trial he appeals. The general ground relied upon for a reversal is that the evidence is insufficient to sustain the verdict, in that it does not connect him with the commission of the crime except through a certain statement which it is claimed was improperly received.

It appears that Nancy Wheelock, the proprietress of a lodging house in Los Angeles, was murdered through strangulation on the afternoon of April 29, 1922. The evidence intended to connect Shelest with the commission of the crime, other than the statement to which reference has been made, was as follows: Evelyn Shellhouse, who lived in the rooming house, testified that Blaszyk and Radecki and herself occupied an apartment together, that Shelest did not live at the house, but called to see Blaszyk and Radecki several times, but that the robbery of Mrs. Wheelock was not discussed when he was present. Shelest was arrested about midnight on April 30, 1922, and denied that he knew either of his codefendants, or Mrs. Shellhouse, or that he had ever been at their apartment. Officer Bean, a witness called by the people, testified that Shelest told him that he saw Blaszyk and Radecki hit Mrs. Wheelock. Shelest lived in a house conducted by Mrs. Saragosa. Officer Cline testified that when arrested Shelest stated that on April 29th he came down town about 1:30 in the afternoon and went to the office of the Motor Transit Company and returned to his home at 3:30 p. m.; that he remained there all of that afternoon; that he had dinner about 6 o'clock, and, being accompanied by Mrs. Saragosa, went down town and attended a show, after which he returned to his home and remained there the rest of the night. Mrs. Saragosa testified that Shelest was at her residence on the afternoon of the 29th up to 2:30 p. m.; that he left at that time and did not return until 8 o'clock that evening. Mrs. Stewart, who is Mrs. Saragosa's mother, corroborated this evidence. When arrested and at the time Shelest said he did not know his codefendant, Officer Cline took a piece of paper from the person of the appellant upon which appeared the name of Adam Ward, an alias used by Radecki, and asked him if he wrote the name and if he did not know Radecki and Blaszyk, to which Cline testified appellant would make no answer. Soon after Blaszyk and Radecki were brought into the room where Shelest was, and he refused to say anything.

On May 2, 1922, a statement was taken in the presence and within the hearing of Shelest and made by Blaszyk and Radecki which they, later, signed. It appears that the officers addressed themselves to Blaszyk and Radecki exclusively, and did not ask Shelest whether what his codefendants said was true or false. Previous to the taking of this statement, Officer Bean had said to Shelest, while the latter was under arrest, "We know you. Boy, you are not telling the truth." The statement which was signed by Blaszyk and Radecki admittedly connected Shelest directly with the murder. It is unnecessary to quote it in full, but the essentials of it were Blaszyk and Radecki doing the talking, that Radecki knocked on Mrs. Wheelock's door and told her to read the gas meter; that she then came into their room, where Blaszyk, alias Ward, was waiting with a towel, which Radecki took and put over the woman's face, and Blaszyk grabbed her person. At this time Shelest knocked at the door and said, "Open the door." He was let in, and he asked, "What is the matter?" Blaszyk answered: "We pretty near killed the old lady," and Shelest replied: "All right, all right." Shelest suggested to Blaszyk that "he tie the handkerchief," which Blaszyk did, around her neck. Shelest searched Mrs. Wheelock's trunk. Blaszyk and Radecki took her to her own room and laid her on a couch. They secured a few cents in silver from her pocketbook and took some jewelry. They then, just before half past three in the afternoon, left Mrs. Wheelock's place and checked a suitcase at a checking station, Shelest accompanying the other two. Blaszyk and Shelest went to a toilet, looked over some books they had taken, and threw a check and nearly everything they had secured away. Shelest threw some of the stuff on top. They then secured a room; Shelest taking part in the negotiations in the rooming house. Later he left the others. Shelest took a ring that had been taken from Mrs. Wheelock.

In the course of this statement Shelest's codefendants said that prior to the murder he had suggested that they rob somebody, and had discussed robbing Mrs. Wheelock. Appellant contends that this statement made by Blaszyk and Radecki was erroneously admitted in evidence because the statement of one conspirator cannot be used as against his coconspirators, when it is made after the conspiracy has been carried out, or unless its making is in some way in furtherance of the conspiracy; also it is insisted that no conspiracy was shown to exist in this instance except by the statements of Blaszyk and Radecki.

[1] The evidence objected to was clearly admissible, not as a statement of a coconspirator, but because the conduct of the defendant was relevant as an admission of guilt when accused of sharing in the crime. The jury might well believe that no innocent man would remain silent when accused of participation in such atrocious conduct. Silence under these circumstances may always be proved. People v. Amaya, 134 Cal. 531, 66 Pac. 794; People v. Philbon, 138 Cal. 530, 71 Pac. 650; People v. Bradley, 23 Cal. App. 44, 136 Pac. 955; People v. Ayhens, 16 Cal. App. 618, 117 Pac. 789. Of course, the statements made by Radecki and Blaszyk could not be received except to explain and aid the jury in construing the defendant's conduct. The fact that the defendant was under arrest when the statement was made does not render it any less admissible. People v. Amaya, supra; People v. Schoon, 177 Cal. 678, 171 Pac. 680; People v. Byrne, 160 Cal. 217, 116 Pac. 521; People v. McCrea, 32 Cal. 98; People v. Estrado, 49 Cal. 171; People v. Ah Yute, 53 Cal. 613.

[2-4] An implied admission may have as much weight as one made in express terms, and what evidentiary value shall be given to either in any case is a matter for the jury to determine. We think the entire evidence warranted the verdict of guilty which was rendered. The following instruction was given by the court, and appellant contends this constituted prejudicial error:

> "A conspirator having confessed, it is competent to prove admissions and declarations made by him to a coconspirator, as tending to corroborate the proof of confession and establish the fact confessed."

Inasmuch as no confession was introduced except those of Blaszyk and Radecki, it cannot be assumed that the jury regarded this instruction as having any application to Shelest. No witness testified to a confession by him, and, as it was received, the trial court expressly limited the testimony concerning the confessions of Blaszyk and Radecki to the people's case against Blaszyk. Under the circumstances it is not conceivable that Shelest could have been injured by it.

[5] Appellant insists that the court committed error in refusing to give the following instruction requested by him:

> "You are instructed that no acts or declarations of the defendants Adam Blaszyk and Valentine Radecki, not made in the presence of the defendant John Shelest and not affirmed by him, are to be considered as evidence against the defendant John Shelest."

This instruction was properly refused. If a conspiracy was shown to exist between Blaszyk and Radecki and Shelest to take the life of Mrs. Wheelock, acts and declarations of Blaszyk or Radecki in furtherance of the conspiracy would be evidence against Shelest. The instruction would exclude all acts and declarations of the other conspirators, unless made in the presence of Shelest or affirmed by him. This is not the law.

[6] It is urged that the motion for a new trial should have been granted and that its denial was reversible error. This motion was founded upon alleged newly discovered evidence. The basis of this claim is that Shelest's codefendant Blaszyk, subsequent to the trial, made an affidavit to the effect that it is not true that Shelest told him to tie the handkerchief around Mrs. Wheelock's neck, nor was he present when this was done, and that Radecki had told Blaszyk that Shelest had told him (Blaszyk) to tie the handkerchief. Blaszyk was present in court at the time of the trial. No formal attempt was made to have him testify. Blaszyk and Shelest were represented by different counsel, and it is claimed that Blaszyk's attorney informed appellant's counsel that the latter would not testify. However, no subpœna was issued for Blaszyk, nor was he asked to take the stand during the trial, although continually in the courtroom. Under these circumstances, we think the trial court properly denied the motion for a new trial.

The judgment and order are affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

---

62 Cal. App. 170

BRYSON et al. v. BRYSON et al.
(Civ. 4169.)

(District Court of Appeal, Second District, Division 1, California. May 9, 1923. Hearing Denied by Supreme Court July 7, 1923.)

1. Corporations 🔑282—Director must be stockholder.

Under Civ. Code, § 305, director of corporation, at least as between him and the corporation, must be a stockholder therein.

2. Corporations 🔑114 — Stockholder could make valid transfer as between him and transferee, though certificate in trustee's possession.

Certificate of stock is only evidence of ownership, and, though holder of one share had delivered certificate to trust company under terms of a trust, he could make valid transfer of the stock as between him and the transferee.

3. Corporations 🔑282—Stockholder, who, as officer, issued new certificate to transferee of his stock, held to render himself ineligible as director.

Where holder of share of stock, the certificate for which had been delivered to trust company, under terms of a trust, as vice president, issued new certificate to transferee of his stock, he divested himself of title and rendered himself ineligible to election as director, though original certificate was not surrendered and canceled.

4. Trusts 🔑172—Trustee must strictly follow directions contained in trust agreement in absence of discretionary powers.

Directions contained in trust agreement are sole guide to conduct of trustee, and to it alone he must look for his orders and must strictly follow them in absence of conferred discretionary powers.

5. Corporations 🔑198—Trustee of corporate stock bound to follow directions of trust agreement that stock be voted for directors then in office.

Where stock was transferred to trust company in trust to vote it at stockholders' meetings for election, as directors, of persons then in office, it was bound to comply with such restrictions and had no authority to vote for one who had ceased to be stockholder and had theretofore resigned as director.

6. Evidence 🔑450(1)—No ambiguity in trust declaration and acceptance admitting evidence of trustor's declarations, and they were inadmissible.

Though declaration of trust purported to cover all corporate stock except seven shares held by directors, while trustee's acceptance purported to include the seven shares, where it required trustee to vote the stock at stockholders' meetings for re-election of directors then in office, there was no ambiguity so far as concerned the questions whether one, who had transferred his stock and ceased to be director, was eligible to election, and whether trustee had authority to elect him, and trustor's declarations before acceptance of the trust were inadmissible under Civ. Code, § 2254.

Appeal from Superior Court, Los Angeles County; Bertin A. Weyl, Judge.

Action by James F. Bryson and others against Isaac H. Bryson and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

John F. Keogh, C. C. Mishler, E. W. Sargent, E. J. Vaughn, and George B. Colby, all of Los Angeles, for appellants.

Newby & Palmer and O. L. Anderson, all of Los Angeles, for respondents.

HOUSER, J. This is an appeal from a judgment in favor of plaintiffs in an action brought under section 315 of the Civil Code to declare illegal and void the election of Isaac H. Bryson and Joseph S. Bryson as directors of the Bryson Estate Company.

Considering the fact that Joseph S. Bryson is one of the plaintiffs in the action and is a respondent herein, the appeal need be considered only with reference to the election of Isaac H. Bryson.

In the month of May, 1907, the Bryson Estate Company was organized as a corporation with a capital stock of $600,000, divided 'nto 60,000 shares of the par value of $10 per share. One share each was subscribed by and issued to Isaac H. Bryson and six other persons, and those seven persons composed the board of directors for the first year of the life of the corporation. By-laws for the corporation were adopted which, among other things, provided that directors of the corporation should be elected by ballot at the annual meeting of the stockholders, and that they were to serve for one year and until their successors were elected. The by-laws also provided that shares of stock of the corporation might be transferred by the holder thereof by indorsement of the certificate of stock, but that no transfer should be valid until the certificate was surrendered and acknowledgment of such transfer entered on the books of the corporation.

Contemporaneously with the organization of the Bryson Estate Company, John Bryson, Sr., and Evaline Bryson, his wife, being the owners of a piece of property known as the Bryson Block, located in the city of Los Angeles, executed a declaration of trust wherein they agreed to grant to the Bryson Estate Company the real property upon which the Bryson Block was located. Among other things, the declaration of trust further provided that all the stock of the Bryson Estate Company, to wit, 60,000 shares, less 7 shares held by the board of directors, should be issued in the name of the Title Guarantee & Trust Company as trustee, to be held by it in trust for several purposes, including "(2) to vote said stock as a unit at all stockholders' meetings held during the existence of this trust for the election of directors of said corporation for the persons in office as directors at the time such meeting or meetings are held."

By an instrument of date May 21, 1907, the Title Guarantee & Trust Company acknowledged receipt of the entire stock of the Bryson Estate Company, including the 7 shares issued to its directors, and in said instrument declared that the stock was to be held by it "in trust in accordance with that certain document (the declaration of trust) dated the 20th day of May, 1907."

The minutes of the first meeting of the directors of the Bryson Estate Company, held on May 20, 1907, being the same day on which the declaration of trust was executed, among other things, contained the following:

> "And thereupon it was announced by each of the directors present that each of them was willing to join in said trust and deposit with the trustee hereinafter named their and each of their certificates of one share each in the capital stock of this corporation, and which was issued to them at the time of the incorporation of this company, the same to be held in trust according to the terms of said instrument. The said trust company above referred to is known as the Title Guarantee & Trust Company of Los Angeles, California."

All the directors of the Bryson Estate Company, with the exception of Isaac H. Bryson, were present at said meeting of the board of directors.

Following the organization of the Bryson Estate Company the trustee was present, either by authorized representative or "by consent," at all annual stockholders' meetings of that corporation, and (with the exception of the meeting of which complaint is here made) cast its ballot for directors in accordance with the requirement of the declaration of trust; that is, "for the persons in office as directors at the time such meetings were held." Up to the time the eight certificates of stock representing the entire capital stock of the corporation were assigned to the trustee, there had been a total of ten certificates issued, but one of them having been originally issued to John Bryson for 29,996½ shares and another certificate to Evaline Bryson for a like number of shares, these two certificates were surrendered and canceled, and in lieu thereof a new certificate for 59,993 shares was issued directly to the trustee. After that time, on account of resignations of various directors and the election of other directors in the places of those resigned, seven other certificates were issued by the corporation. In each case as a new certificate was issued to an incoming director, he assigned and delivered his certificate of stock to the trustee. Upon receiving the new certificate the trustee canceled the old certificate and surrendered it to the corporation—that is, the trustee followed such course as to three of the new certificates, but did not either cancel or surrender as to four of such certificates.

The ultimate questions to be decided are:

(1) Was Isaac H. Bryson eligible to be elected a director of the Bryson Estate Company on July 11, 1921?

(2) Was the trustee authorized to vote for the election of Isaac H. Bryson at the stockholders' meeting on July 11, 1921?

[1] It is settled law in this state, by reason of the statute, as well as by adjudications by the court of last resort, that a director of a corporation, at least as between him

and the corporation, must be a stockholder therein. Civ. Code, § 305; Rozecrans Mining Co. v. Morey, 111 Cal. 114, 43 Pac. 585; Seal of Gold Mining Co. v. Slater, 161 Cal. 621, 120 Pac. 15.

Isaac H. Bryson was one of the incorporators of the Bryson Estate Company and was among those directors who assigned their stock to and deposited it with the trustee to be held in trust in accordance with the terms of the trust agreement. At a special directors' meeting, held on April 18, 1918, Mr. Bryson, after having acted as a director and as vice president of the corporation for many years, resigned as such director and officer, which resignation was accepted by the corporation to take effect as of date May 1, 1918. On the same day on which Isaac H. Bryson tendered his resignation as vice president of the corporation and as a director therein, he issued a new certificate of stock to Jeneva L. Levy in lieu of the certificate of stock which had theretofore been issued to him and which was on deposit in trust with the trustee herein. On the stub of the new certificate it was stated that the new certificate was in lieu of the certificate formerly held by Isaac H. Bryson. This new certificate was assigned in blank and delivered to the trustee, but the original certificate issued to Isaac H. Bryson was one of the original four certificates for which new certificates were issued and which original certificates were retained by the trustee in its possession, together with the new certificates issued to replace them. Jeneva L. Levy was thereupon elected by the board of directors to fill the vacancy on the board caused by the retirement of Isaac H. Bryson, who thereafter neither performed nor assumed to perform any duties either as a director or as an officer of said corporation, but his place on the board was filled by Jeneva L. Levy, who thereafter continuously performed the duties of a director thereon from the date of her said election up to, including, and after the 11th day of July, 1921, being the date on which the trustee attempted to reinstate Mr. Bryson as a director on the board of the corporation. Beginning with May 1, 1918, and including July 11, 1921, there was no change in the personnel of the board of directors. At the adjourned annual meeting of the stockholders, held on July 11, 1921, the trustee was present and voted the 59,993 shares of stock for a board of directors, including Isaac H. Bryson and Jeneva L. Levy; Mr. Bryson being at that time not a member of the board of directors, and Jeneva L. Levy, being a member thereof, having theretofore on the 18th day of April, 1918, acquired from Mr. Bryson her qualifying share of stock in the corporation, as hereinbefore stated.

[2, 3] A certificate of stock is only evidence of ownership, and notwithstanding the fact that the physical possession of the certificate of the Bryson stock was in the trustee, Bryson was none the less the owner of the stock itself. Whether he had possession or not of the certificate did not prevent him from making a valid transfer of the stock as between him and the transferee. In issuing a new certificate he clearly indicated, both as an individual owner and as an officer of the corporation, that a transfer was intended, and by such transfer he clearly divested himself of all title to the stock. The fact that as vice president of the corporation, acting as the executive officer thereof in issuing a new certificate before the original certificate (in lieu of which the new certificate was issued) was surrendered to the corporation and properly canceled, is of no materiality as affecting the question of transfer of title as between Bryson as an individual and the transferee of the stock. There is nothing in the record to show that Bryson ever acquired title to any other stock of the corporation, and hence it must be concluded that on July 11, 1921, he was not a stockholder and consequently was ineligible to be elected to office as director of the corporation.

The trust agreement provides that the stock delivered to the trustee shall be voted "as a unit at all stockholders' meetings of the Bryson Estate Company that are held during the existence of the trust for the election of directors of said corporation for the persons in office as directors at the time such meeting or meetings are held."

[4] It is a principle in the law of trusts that the directions contained within the trust agreement are the sole guide to the conduct of the trustee. It is to the trust agreement and to that only to which he must look for his orders and which orders, in the absence of conferred discretionary powers, he must strictly follow without question or hesitation. Pomeroy, Eq. Jurisp. § 1062.

In 26 Ruling Case Law, p. 1372, it is said that—

> "It is an elementary principle in the law of trusts that in the execution of a trust, the trustee is bound to comply strictly with the directions contained in the trust instrument, defining the extent and limits of his authority, and the nature of his powers and duties."

And in the case of Murphy v. Delano (1901) 95 Me. 229, 49 Atl. 1053, 55 L. R. A. 727, the following language appears in the opinion of the court:

> "It is an elementary principle in the law of trusts that: 'Under the general obligations of carrying the trust into execution, trustees are bound, in the first place, to conform strictly to the directions of the trust. * * * The trust itself, whatever it be, constitutes the charter of the trustee's powers and duties. From it he derives the rule of his conduct. It prescribes the extent and limits of his authority. It furnishes the measure of his obligation.'"

[5] More specifically, in a case of this kind in which the duty of casting a ballot at the stockholders' meeting is cast upon a trustee, he is bound to comply with the restrictions

contained within the trust instrument creating the trust. Fletcher, Cyclopedia Corporations, p. 2804; Byington v. Piazza, 131 App. Div. 895, 115 N. Y. Supp. 918; Elger v. Boyle, 69 Misc. Rep. 273, 126 N. Y. Supp. 946.

Irrespective of the question as to who were members of the board of directors of the Bryson Estate Company on July 11, 1921, it is certain that Isaac H. Bryson was not a member thereof at that time, and under the directions of the trust (which the trustee was bound to follow), to the effect that the trustee should vote for the persons then in office as directors of the company, the election of Bryson by the trustee was an act not in conformity with the terms of the trust and was outside the authority of the trustee.

[6] Appellants contend that the court erred in rejecting the proposed testimony of a witness which would have had the effect of explaining the inconsistency between the declaration of the trustors and the acceptance by the trustee and "give the court light as to what was the intention of the trustors," in that by the declaration of trust the seven qualifying shares of the directors of the corporation were reserved from the operation of the trust, while by the acceptance the receipt of those seven shares is acknowledged, with the statement that the entire capital stock is to be held in trust in accordance "with the said document" (the declaration of trust of date May 20, 1907).

Assuming, without deciding, that an ambiguity exists, the law probably favors appellants' contention. However, the situation of those seven shares of stock, whether within or without the trust, is of no materiality so far as a decision of the points involved in the action before the trial court was concerned. Its only interest was in determining, first, whether Isaac H. Bryson was a stockholder of the corporation at the time of the election in question; and, secondly, as to whether the trustee at that time voted the stock in accordance with the terms of the trust agreement. There was neither an ambiguity nor a contradiction of provisions in the trust agreement with reference to either of the matters before the court, and in their absence, at least in the circumstances of this case, the rule is that the declarations of the trustor to his trustee in relation of the trust, made before the trust has been accepted, are to be deemed as a part of the declaration of trust, except that when a declaration of trust is made in writing, all previous declarations by the same trustor are merged therein. Civ. Code, § 2254.

Other matters discussed in the respective briefs of counsel are incidental to the questions here considered.

No prejudicial error appearing in the record, the judgment is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

---

62 Cal. App. 147

PEOPLE v. THURMAN. (Cr. 953.)

(District Court of Appeal, Second District, Division 2, California. May 8, 1923.)

1. Insurrection and sedition ⚷2—Information held insufficient to charge accused with printing and publishing documents to promote criminal syndicalism.

An information charging criminal syndicalism, in that accused printed, published, edited, circulated, and displayed certain documents containing and carrying written and printed advocacy, teaching, and aid and abetment of criminal syndicalism, and also charging that these documents were so printed, published, edited, circulated, and displayed "in order to organize and assist in organizing and inducing to become members of" the I. W. W., *held* only to charge accused with assisting in organizing in violation of Criminal Syndicalism Act, § 2, subd. 4, and not to charge a violation of subsection 3, relating to the publication of such documents.

2. Insurrection and sedition ⚷2—Withdrawing charge that accused was member of I. W. W. from jury held not error.

Where accused was charged with having become a member of the I. W. W., but where there was no evidence that he became a member in the county in which he was tried, and in which the crime was alleged to have been committed, or that he became a member within three years prior to the filing of the information, *held*, that the court properly withdrew such charge from the jury.

3. Insurrection and sedition ⚷2 — Evidence held insufficient to sustain conviction for criminal syndicalism; "assist;" "organize."

In a prosecution for criminal syndicalism, under Criminal Syndicalism Act, § 2, subd. 4, in that accused assisted in organizing the I. W. W., evidence of printing and publication of documents *held* insufficient to sustain conviction, the term "assisting," as ordinarily used, importing a contribution of effort in the complete accomplishment of an ultimate purpose intended to be effected by those engaged, the word "organize" meaning to form with suitable organs and qualify for the exercise of its appropriate functions.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assist; Organize.]

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Roscoe Thurman was convicted of criminal syndicalism, and he appeals. Reversed.

R. W. Henderson, of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. Defendant was found guilty of criminal syndicalism under subdivision 4 of section 2 of the Criminal Syndicalism Act of 1919 (Stats. 1919, p. 281), and now appeals from the judgment of conviction. His sole point is that the evidence is insufficient to justify the verdict.

Subdivision 4 of section 2 of the Criminal Syndicalism Act provides that a person is guilty of the crime denounced thereby if he "organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism"; and by section 1 criminal syndicalism is defined as "any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or affecting any political change."

The information charges that on May 30, 1921, in the county of Imperial, defendant assisted in organizing and became a member of an organization, group, and assemblage of persons known as the Industrial Workers of the World, sometimes known as the "I. W. W.," which, it is alleged, was organized for the purpose of advocating, teaching, aiding, abetting, committing, and attempting to commit, criminal syndicalism, sabotage, violence, and unlawful methods of terrorism as a means of accomplishing a change in industrial ownership and effecting political changes.

The information, which, as drafted, is an exceedingly inartificial pleading, contains allegations which at first blush might lead to the supposition that the district attorney intended also to charge defendant with a violation of subdivision 3 of section 2 of the act; for it is alleged that defendant printed, published, edited, circulated, and publicly displayed certain documents (copies of which are set forth in the information) containing and carrying written and printed advocacy, teaching, and aid and abetment of criminal syndicalism. But in this connection the information also charges that these documents were so printed, published, edited, circulated, and publicly displayed "in order to organize and assist in organizing and inducing persons to become members of said organization"—the Industrial Workers of the World.

[1] If the district attorney did intend to charge defendant with the violation, not only of subdivision 4, but also of subdivision 3, his attempt at such double charge was so abortive that the learned judge of the trial court very properly, as we think, took from the jury any consideration of the charge of violating subdivision 3 by instructing them that:

> "The offense with which the defendant is charged is, omitting those matters which in the opinion of the court are immaterial or not well stated, that the defendant did willfully and unlawfully *assist in organizing* [italics ours] a society, organization or group of persons known as the Industrial Workers of the World, by circulating and distributing certain literature set out in the information."

[2] Though defendant was charged with having become a member of the organization known as the Industrial Workers of the World, there was no evidence that he became a member in Imperial county—the county in which he was tried, and in which the crime is alleged to have been committed—or that he became a member within three years prior to the filing of the information. The court therefore instructed the jury that there "is no evidence that the defendant became a member of said organization in this county, or within three years prior to the filing of the information, and that particular element of the charge as contained in the information therefore fails."

The net result of the foregoing is this: The information adequately charges defendant with two and only two separate and distinct criminal acts, namely: (1) The act of becoming a member of an organization or society organized to advocate and teach "criminal syndicalism," as those words are defined in section 1 of the statute; and (2) the act of assisting in organizing such organization or society. Each of these acts is a crime under subdivision 4 of section 2 of the statute. Because there was a failure to prove that defendant became a member of the organization, as charged in the information, that part of the charge was withdrawn from the jury. Therefore the only crime of which defendant was convicted is that of *assisting* in organizing an organization or society, known as the Industrial Workers of the World, organized to advocate and teach "criminal syndicalism."

[3] The sole questions presented by this appeal are therefore these: (1) Is there evidence to support the implied finding that the defendant *assisted* in organizing the Industrial Workers of the World? (2) Did the prosecution adduce sufficient evidence to support the implied finding that the Industrial Workers of the World is an organization or society organized to advocate, teach, or aid and abet any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage, or unlawful acts of force and violence, or unlawful methods of terrorism, as a means of accomplishing a change in industrial ownership or control, or effecting a political change? It will not be necessary to consider the second question, for we are satisfied that the evidence is wholly insufficient to show that the defendant assisted in organizing the Industrial Workers of the World, or any local branch thereof.

The only evidence to which our attention has been called which was relied upon by the prosecution to prove that appellant assisted in organizing the Industrial Workers of the World, or any local thereof, is testimony to the effect that he published and distributed the printed documents, copies of which are set forth in the information. This literature was of the nature of propaganda, and doubtless was published and distributed for the purpose of inducing its readers to join the Industrial Workers of the World. There is nothing to show that any reader was induced thereby to become a member, or to apply for membership. Indeed there is nothing to show that the propaganda was read by any one other than the town marshal of Brawley. Had the information, or a separate count thereof, properly charged defendant with a violation of subdivision 3 of section 2 of the act it is possible that proof, beyond a reasonable doubt, that defendant did so publish and distribute this printed propaganda would alone have sufficed to justify a conviction. But, as we have seen, if an attempt was made to charge defendant with violating subdivison 3, the district attorney's effort in that direction so far miscarried that the learned trial judge was prompted to advise the jury that defendant was charged with assisting in organizing the Industrial Workers of the World by circulating and distributing the literature set out in the information—thus, in effect, taking from the jury the right to consider whether subdivision 3 of section 2 of the act had been violated. The defendant, therefore, was improperly convicted if the evidence fails to sustain the only charge which the court submitted to the consideration of the jury, namely, the charge that defendant "assisted in organizing" a society, group, or assemblage of persons alleged to be within the purview of the condemnatory provisions of the statute.

Respondent's contention that the evidence is sufficient to sustain the charge that appellant assisted in organizing the Industrial Workers of the World raises the question of the proper interpretation of the words "assists in organizing," as those words are used in subdivision 4 of section 2 of the act. The word "organize," as used in common parlance, has no doubtful or ambiguous meaning. Warren v. Barber Asphalt Pav. Co., 115 Mo. 572, 22 S. W. 490. To organize means "to form with suitable organs." Webster; Am. & Eng. Ency. of Law (2d Ed.) vol. 21, p. 1008. An organ is defined to be "an instrument or medium by which an action is performed or an object accomplished." Com. v. Wm. Mann Co., 150 Pa. 64, 24 Atl. 601. An entity, an assemblage of persons, for example, is "organized" when it is furnished with organs—when it is "endowed with capacity for the functions of life" (Webster)—"qualified for the exercise of its appropriate functions." Com. v. Wm. Mann Co., supra. "The very term 'organization' implies a recognition of order, and an obedience to duly constituted authority." In re Redmond, 5 Misc. Rep. 374, 25 N. Y. Supp. 384. " 'Organization' is defined as 'an arrangement of parties' (sic); 'the act of organizing,' as 'the organization of a government, or of flocks, or of a railroad or other corporation'; 'the connection of parts in and for a whole, so that each part is, at once, end and means.' " In re Sanders, 53 Kan. 191, 36 Pac. 348, 23 L. R. A. 603. To organize is a very different thing from extending the limits of the organization or adding to or increasing its size. "To organize a certain territory into a municipal corporation," says the court in Warren v. Barber Asphalt Pav. Co., supra, "is a very different thing from that of extending the limits of an organized city over new territory."

The words "assist" and "aid" are synonymous, and each imports a contribution of effort supplementing the efforts of another. State v. Flynn, 76 N. J. Law, 473, 72 Atl. 296; State v. Tally, 102 Ala. 25, 15 South. 722; People v. Bond, 13 Cal. App. 185, 109 Pac. 150. There is a wide difference between *assisting* in the commission of an act and *attempting* to commit the act. "An attempt to commit a crime is an endeavor to accomplish it, carried beyond mere preparation, but falling short of the execution of the ultimate purpose in any part of it." 1 Bouvier, Law Dictionary, p. 190. In the absence of such a permissive statutory provision as that which is contained in section 663 of our Penal Code, it has been held that where a defendant is charged with an *attempt* to commit a crime he cannot be convicted if the evidence shows that he actually consummated the crime. Graham v. People, 181 Ill. 477, 55 N. E. 179, 47 L. R. A. 731. While the word "attempt" implies that the accused fell short of a consummation of his purpose to commit the crime, the word "assist," on the other hand, as ordinarily used, imports a contribution of effort by the accused in the complete accomplishment of the ultimate purpose intended to be effected by him and by those whose efforts his work supplemented. It was said in Hurst v. State, 79 Ala. 55, that:

> "The clause 'assists such prisoner to escape,' in its ordinary import, means that the prisoner does effect his escape, and that he has assistance in accomplishing it."

So, here, the words "assists in organizing," in their ordinary import, imply that organization has been effected, and that the accused assisted in accomplishing it. The statute does not say that it shall be an offense to assist in *attempting* to organize the kind of organizations, societies and assemblages denounced by the act, but that it shall be a crime to assist in *organizing* such proscribed organizations, societies, or assemblages.

The evidence before us, if tested by the foregoing definitions, must be held to be insufficient to support the implied finding that appellant assisted in organizing the Industrial Workers of the World, or any local thereof. Even if the publication and distribution of the printed propaganda had resulted in adding one or more members, such increment of membership would not have amounted to "organizing" the Industrial Workers of the World. Such increase of membership would not alone have sufficed to furnish the body of men known as the Industrial Workers of the World with organs—a president, secretary, treasurer, etc.—whereby it would be endowed with the capacity to function, particularly if it were already endowed with such functioning organ or media through which its purposes might be accomplished and its acts performed. But there is no evidence that the printed propaganda resulted in adding a single recruit to the cause for which appellant labored. Therefore, even if it were conceded that to succeed in inducing another actually to join the Industrial Workers of the World would alone be tantamount to "organizing" such an assemblage of men as the statute proscribes, still the mere distribution by an accused of literature or printed propaganda designed to induce others to join the organization, but which failed of its purpose, unaccompanied by any organizing efforts on the part of others, would not rise to the dignity of *assisting* in organizing the Industrial Workers of the World, or any local thereof. It might possibly amount to an *attempt* to organize; but one who merely publishes or distributes propaganda, there being no showing that his efforts have supplemented the organizing labors of others, does not thereby assist in actually effecting the organization of a body of men.

The judgment is reversed.

We concur: WORKS, J.; CRAIG, J.

---

62 Cal. App. 137

JOHNSON v. QUINBY. (Civ. 4064.)

(District Court of Appeal, Second District, Division 1, California. May 7, 1923.)

Guaranty 🔑53(3) — Guarantor exonerated from liability because financial burden of principal was increased with creditor's consent.

Where the obligation of a lessee, which guarantor undertook to protect, covered the performance by lessee of the terms of a lease and payment of rents thereon, and a collateral agreement made to limit guarantor's liability and to afford a method of extinguishing his obligation was entered into on the understanding that lessee, in addition to obligations of her lease, was only undertaking to carry an indebtedness amounting not to exceed $10,000 for furnishing the house when lessor, without consent of the guarantor, consented to lessee's increasing the financial burden beyond the contemplated amount, guarantor was thereby exonerated.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by G. Rupert Johnson against E. C. Quinby. From judgment for the defendant, plaintiff appeals. Affirmed.

Taylor & Forgy, of Los Angeles, for appellant.

Eugene D. Williams, of Los Angeles, for respondent.

CONREY, P. J. This action involves the plaintiff's right to recover from defendant upon his written guaranty that Mrs. Church, as lessee of an apartment house owned by the plaintiff, would pay the rental reserved in the lease. The case was here on a former appeal from a judgment rendered in favor of the defendant. On that appeal the judgment was reversed. Johnson v. Quinby, 44 Cal. App. 699, 187 Pac. 172. After the former judgment in favor of the defendant had been reversed, the case was tried a second time, and judgment again rendered in favor of the defendant. From this judgment the plaintiff now appeals.

Since the former decision here the plaintiff filed an "amended supplemental complaint" showing the accrual of further rentals and a balance due to the plaintiff larger than the amount of the original demand. The defendant then filed a "second amended answer to the complaint and answer to amended supplemental complaint." On these pleadings the case was tried a second time.

In connection with the lease and guaranty a collateral agreement was made between the plaintiff, the defendant, and Mrs. Church, which recited that, whereas there was a contemplated purchase by the lessee from Barker Bros. of necessary furniture to furnish the leased apartment house, at a total price not to exceed $10,000, it was agreed that of this total purchase price one-half thereof, not to exceed $5,000, was to be advanced and paid by the lessor, for and on behalf of the lessee, who was to pay the remaining half of the purchase price to Barker Bros. in accordance with the terms of the agreement of purchase when made. It was further agreed that, when Barker Bros. were fully paid, the lessee should then commence the making of payments to the lessor in liquidation of the "other half" so advanced by him in payment for the furniture, and at the same time execute to the lessor a chattel mortgage thereon as security for the payment of such advancement, and also as security for the lessee's covenants in the lease, and that thereupon the defendant, as to any rents which might thereafter accrue, should be released from liability as guarantor.

In the former decision of this court it was held that the court erred in overruling the plaintiff's demurrer to the answer of the defendant: it being the opinion of the judges that those portions of the answer which were there considered and discussed did not state any valid defense to the plaintiff's cause of action. Those parts of the complaint were designated as the fourth defense and the third defense. The said fourth defense has become the third defense of the second amended answer. It is conceded by counsel for respondent that the changes which have been made in the allegations of this defense as stated in the answer are not sufficient to relieve it from the effect of the former decision. Respondent now relies solely upon the second defense of his second amended answer, which is an amended statement with some additional facts of the matters which were discussed as "the third defense" in said former decision of this court. In that decision the court said:

> "By the third defense, after setting forth the guaranty and collateral agreement, it is alleged that, after the execution thereof, 'the said lessee purchased furniture at a price greatly in excess of the sum of $10,000, to wit, at a price of about $13,700, which said purchase was made without the knowledge or consent of defendant; that thereafter, within a period of some three or four months, the plaintiff, well knowing that the total purchase price of said furniture had exceeded by a large amount the sum of $10,000, to which it was limited in the agreement heretofore set forth, and consenting thereto, paid to Barker Bros. on account of the purchase price of said furniture, the sum of $5,000.' That the effect of such acts on the part of plaintiff was detrimental to defendant in this, 'that it became necessary for said lessee to pay to Barker Brothers the sum of about $8,700, instead of the sum of $5,000, which the agreement provided, before the defendant could be released from his obligation as guarantor under the said guaranty.' A general demurrer was likewise interposed to this defense and by the court overruled. Section 2819 of the Civil Code provides that 'A guarantor is exonerated, * * * if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect.' And in County of Glenn v. Jones, 146 Cal. 518 (2 Ann. Cas. 764, 80 Pac. 695), it is said: 'The contract of suretyship imports entire good faith and confidence between the parties as to the whole transaction. The creditor is bound to observe good faith with the surety. He must withhold nothing, conceal nothing, release nothing which will possibly benefit the surety. He must not do any act injurious to the surety or inconsistent with his rights.' Conceding that the lessee's act in buying furniture at a price in excess of that authorized by the agreement was a violation of its terms, nevertheless we are at a loss to perceive how plaintiff's act, in compliance with the terms of the agreement on his part, was detrimental to the interest of the defendant. There is no allegation that plaintiff aided, assisted, advised, or participated in the alleged wrongful act of the lessee. Assuming for the purpose of this case only that the recitals, 'well knowing,' and 'consenting,' are equivalent to direct allegations, the allegation is that such knowledge was not acquired and such consent given until three or four months after the purchase was made. Moreover, it is not alleged the lessee failed to pay Barker Bros. the sum of five thousand dollars, which under the terms of the agreement she was to pay before the execution of the mortgage provided therein as a release of defendant's liability. Indeed, for aught that appears to the contrary, she may have paid the entire balance of $8,700. While a guarantor's contract must be construed strictly as against the creditor, and any agreement made by him with the principal debtor, the effect of which is to alter or change the contract, will exonerate the surety, nevertheless, in the absence of facts showing that the lessee, due to some act of plaintiff, was in default to Barker Bros., the pleading is not sufficient to constitute a defense, in that it fails to show any act of plaintiff changing or altering the contract.

For the purpose of restating this defense so as to avoid the defects pointed out in the foregoing paragraph hereof, the defendant in his second amended answer alleged that, after the execution of the "agreement collateral to lease and guaranty," and prior to the accrual of any of the rents mentioned in the complaint or amended supplemental complaint, the plaintiff and Mrs. Church made an agreement with Barker Bros. whereby it was agreed that Barker Bros. should sell to Mrs. Church furniture for the said apartments, and that the purchase price thereof should be in excess of $10,000 to wit, that the same might exceed the said sum of $10,000 to the extent of $2,000, and that the plaintiff would pay to Barker Bros. on account of the purchase price thereof the sum of $5,000, and no more; that the balance of said purchase price should be represented by a chattel mortgage upon the said furniture, and should be paid by Mrs. Church; that thereafter, and prior to the accrual of any of said rents, the lessee purchased from Barker Bros. furniture for said apartment house at a price of approximately $13,700, and that the said purchase was made with the full knowledge and consent of the plaintiff, who aided, assisted, and advised Mrs. Church in making the said purchase for the said sum, and participated therein; that the defendant had no knowledge of the making of said agreement between the plaintiff and Mrs. Church and Barker Bros. whereby it was agreed that the purchase price of said furniture should exceed the sum of $10,000, and defendant had no knowledge of the purchase of said furniture for a price in excess of $10,000, and did not consent to said agreement or to said purchase at said price; that, after the purchase of said furniture, and within a period of three or four months, the plaintiff, who then and there knew that the total purchase of said furniture had exceeded by a large amount the sum of $10,000 to which it was limited in the agreement hereinbefore referred to, and who had participated in the purchase thereof at a price in excess of $10,000, did pay to Barker Bros. on account of the purchase price of said furniture the sum of $5,000, and that Mrs. Church has not paid to Barker Bros. on account of the purchase price of said furniture any sum in addition to the sum so paid by the plaintiff except the sum of $4,000.

The findings of the court affirm that the foregoing allegations are true. The court affirmed, and determined that, by reason of said acts of the lessor and lessee, which were done without the knowledge or consent of the defendant, the defendant's liability under said lease was extended beyond the amount and beyond the time to which it was limited by said guaranty and collateral agreement in this, that it became necessary for the lessee to pay to Barker Bros. the sum of $8,700, instead of the sum of $5,000, which the agreement provided, before the defendant could be released from his obligation as guarantor.

Appellant contends that these findings are not sustained by the evidence. We think that he has only shown that there was a conflict in the evidence, but that there is evidence sufficient to sustain the findings. According to the testimony of Mrs. Church, the representative of Barker Bros., when they were negotiating for the furniture, expressed the opinion that the amount to be used in furnishing the house ought to be $12,000. Thereupon she asked the lessor if that would be all right, to which he replied, "Well, I would try not to make it more than $12,000—to keep within the $12,000 if I could." The evidence clearly shows that the lessor took part in the negotiations for the purchase of the furniture, and that the purchase was consummated with his co-operation and consent as a party thereto for the furnishing of the house at a cost of $12,000, if not more, and that it was on that contract of purchase that the lessor agreed to pay and did pay the sum of $5,000 as an advancement thereon for the benefit of the lessee. It was by reason of his consent that the lessee was able to purchase furniture in excess of $10,000.

It only remains to determine whether by reason of these acts of the creditor (the lessor) which were without the consent of the guarantor the obligation of the principal (the lessee) to the creditor, as contemplated in the contract of guaranty, was altered in any respect. If it was so altered, then the guarantor is exonerated. The obligation of the lessee which the guarantor undertook to protect covered the performance by the lessee of all of the terms, conditions, and covenants of the lessee on her part to be performed, and particularly the full payment when due of all rents provided for in said lease. The collateral agreement made for the purpose of limiting the liability of the guarantor and affording a method of extinguishing his obligation was made contemporaneously with the guaranty, and as a part of the same transaction. It was entered into upon the stated understanding that the lessee, in addition to the obligations of her lease, was only undertaking to carry a burden of indebtedness amounting to not exceeding $10,000 for furnishing the house. If the lessor advanced and paid on account of the so limited purchase price "one-half thereof, not exceeding $5,000," then the lessee would have to pay not more than $5,000 to Barker Bros. in order to obtain title to the furniture, and thereby become able to execute her chattel mortgage to the lessor; whereupon it was agreed that the guarantor would be released from further liability. But the acts of the lessor and the lessee increased the financial burden of the lessee substantially beyond that contemplated in the agreements to which the guarantor was a party, and beyond the limitations of liability upon which it clearly appears that he relied. Unquestionably, by the modified arrangement agreed to between the lessee and the lessor, the time within which she would be able to acquire title to the furniture and execute her chattel mortgage to the lessor would be extended unless her financial resources had enabled her, at the time of making the purchase, to pay all of the purchase price of the furniture over and above the said limit of $10,000. Instead of that, it appears that, even at the time of the second trial of this action, her payments on the furniture account amounted to only $4,000. We are therefore of the opinion that the guarantor is exonerated from his liability.

The judgment is affirmed.

We concur: HOUSER, J.; CURTIS, J.

---

62 Cal. App. 105

PEOPLE v. HANSEN. (Cr. 963.)

(District Court of Appeal, Second District, Division 2, California. May 4, 1923. Hearing Denied by Supreme Court July 3, 1923.)

1. Criminal law 🔑398(2)—Where record owner testified he had not alienated land since acquiring record title, such title could be proved from county records.

In a prosecution for forging a deed with intent to defraud one K., ownership of the land by K. could be proved by the county records without the original deeds, where K. testified that he had not alienated the land since the record showed he acquired it.

2. Criminal law 🔑370, 371(5)—Proof of later forgery held admissible.

The intent to defraud and knowledge that the instrument was forged being necessary to conviction of forgery of deed, in addition to the mere proof of commission of the act, evidence of a defendant's later similar forgery is admissible.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Samuel Hansen was convicted of forgery, and he appeals from the judgment of conviction and from order denying his motion for new trial. Affirmed.

Cooper, Collings & Shreve, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., for the People.

CRAIG, J. This is an appeal from a judgment and an order denying defendant's motion for a new trial. The defendant was charged with the crime of forgery by an information containing two counts. The first count alleges that the defendant did make, utter, forge, and counterfeit a deed dated September 18, 1919, to a certain piece of land in Orange county, with intent to defraud one T. R. Kinmounth. By the second count the same charge is made, except that the deed said to have been forged is dated October 15, 1919.

On the trial T. R. Kinmounth was called as a witness and testified that he was the owner of the property described in the deeds set up in the information, having received title thereto from the estate of one Murphy in 1890, and that he had paid all taxes ever since that date; that he was a nonresident of California and had not been in this state for more than 30 years; that he had never signed a deed of this property to Samuel Hansen and did not know the latter; that he was a married man, although both of the deeds recited the fact that he was single. It was shown that the purported deeds as set out in the information from Kinmounth to Hansen appeared to be acknowledged before a notary public named Cora E. Moore; that they were recorded in the office of the county recorder of Orange county, and this fact was established by the introduction of the records. It was further proved that there never had been such a notary public as C. E. Moore holding a license from the state of California for Orange county; that after said deeds were recorded the defendant conveyed the property to one McDuffie.

[1] On behalf of the defendant several witnesses testified that a person named Kinmounth had executed deeds of the land in question to the defendant. It is claimed by appellant that the court erred in permitting proof of ownership by the county records without a foundation, and that the best and only competent evidence would have been the original deeds. To support this contention we are referred to People v. Strassman, 112 Cal. 687, 45 Pac. 3. In that case a record title was shown in the complaining witness, but there was no evidence to prove that between the date thereof and the filing of the information title had not passed to some one else. The intervening period was about a year. The court there held that the presumption of the continuance of title in the person in whom it was shown to exist by the record at the date of recordation must give way to the presumption of innocence. In the instant case the prosecution has not relied upon the presumption of the continuance of title in Kinmounth since the record shows that he acquired the same. Kinmounth himself testified that he had not alienated it. This evidence was competent. Section 1951, Code Civ. Proc.

[2] Appellant contends that error was committed in the reception of evidence in another particular. The prosecution introduced evidence to show that about eight months after the alleged commission of the offenses charged in the information, the defendant committed a similar offense in that he made, executed, and delivered a forged deed of real property purporting to be from a nonresident named Walters, and the acknowledgment to which was also represented as being before a notary public who was shown to have been fictitious.

The instant case is of the type where proof of other offenses may appropriately be admitted. One of the elements of the crime of forgery necessary to be established is the intent to defraud, prejudice, and damage some person. Another is knowledge of the defendant that the instrument in question was forged. The nature of the transaction is not such that proof of the commission of the acts necessarily involves a conclusive implication of guilty knowledge or intent. The defendant might have been honestly mistaken and in good faith have received a deed from some person calling himself Kinmounth and have innocently recorded it and subsequently alienated the land to another. If this were true, there could have been no intent to defraud the real owner of the property. But proof of the fact that the defendant passed or uttered another forged deed under similar conditions establishes a logical inference that guilty knowledge and intent to defraud accompanied the criminal acts otherwise shown which constitute the body of the offense.

We conclude, therefore, that the court did not err in the particular specified by appellant in receiving evidence. From an examination of the transcript and considering the facts before stated as established, we are satisfied that the evidence is sufficient to warrant the verdict of guilty returned by the jury.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

62 Cal. App. 222

PEOPLE v. ANDERSON. (Cr. 907.)

(District Court of Appeal, Second District, Division 2, California. May 16, 1923.)

1. Bribery 🔑3—Defendant in bribery prosecution held not to be in position to dispute fact of indictment against person arrested by him.

In a prosecution for bribery, where evidence showed that defendant as a detective in the employ of a county, with another, assumed the existence of an indictment in a foreign state against one arrested by them, and under that pretense secured $10,000 from the wife of the one arrested to influence their official action, defendant cannot dispute the fact that the indictment had been returned and was pending.

2. Bribery 🔑11—Inference held warranted that defendant regarded himself as acting deputy sheriff and his acts as official.

In a prosecution for bribery, inference *held* warranted from evidence that defendant intended his acts, in accompanying another detective and assisting him in arrest of one indicted in a foreign state, to be regarded as official, and that defendant considered that throughout the transaction he was acting as deputy sheriff.

3. Bribery 🔑11—Evidence connected defendant with offense and justified conclusion that he acted knowingly.

In a prosecution for bribery, evidence of trips taken by defendant and another detective in negotiating with wife of one indicted in a foreign state for bribe money and securing it *held* sufficient to connect defendant with the offense.

4. Bribery 🔑11—That criminal intent of defendant was connected with offense by more indirect evidence than that of coindictee held immaterial.

In a prosecution for bribery, where two detectives employed by a county accepted a bribe for permitting the escape of one arrested by them charged with crime in a foreign state, it was immaterial that the element of criminal intent of defendant was established by more indirect evidence than was that of his coindictee.

5. Bribery 🔑1(2)—Arrest of victim held a "matter then pending," regardless of indictment.

Where defendant and another detective employed by a county arrested one indicted for grand larceny in Texas and then permitted him to escape on payment of $10,000 made by their victim's wife, for the purpose of prosecution the matter of their victim's arrest was a "matter then pending," regardless of the actual existence of an indictment against him in Texas.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

W. J. Anderson was convicted of bribery, and he appeals. Affirmed.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Lorrin Andrews, of Los Angeles, for the People.

CRAIG, J. Appellant was indicted, together with one Lips, for the crimes of bribery and extortion. The count charging extortion was dismissed, and after trial the defendant was found guilty by a jury of the crime of bribery. From the judgment pronounced upon this conviction and a denial of the defendant's motion for a new trial this appeal was taken. Anderson and Lips were detectives in the employ of the county of Los Angeles. The indictment charged that one L. M. Furay had been indicted for grand larceny in the state of Texas; that Lips and Anderson arrested him in Los Angeles county and then allowed him to escape in consideration of a payment of $10,000 made to the officers by Mrs. Furay. The testimony admitted was amply sufficient to sustain these allegations. Upon similar evidence introduced in the case of People v. Lips it was held in the decision upon appeal (Cal. App.) 211 Pac. 22, that the record established a case of bribery under the provisions of section 68 of the Penal Code, which denounces agreements by an officer to receive a bribe "upon any agreement * * * that his vote, opinion, or action upon any matter then pending" before him shall be influenced thereby.

[1] In the instant case the principal reason urged for a reversal is that the trial court permitted the prosecution to place in evidence a purported copy of an indictment against Furay in the county of Tarrant, Texas, charging him with the crime of grand larceny. It is insisted that a proper foundation was not laid for the introduction of this document. Section 1905 of the Code of Civil Procedure provides that—

> A judicial record of a sister state may be proved "by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate, that the attestation is in due form."

The foundation laid by the prosecuting attorney for the introduction of this indictment failed to set forth that the attestation thereto was in due form.

We are of the opinion that the defendant is in no position to dispute the fact that the indictment had been returned and was pending. The evidence shows that he, together with Lips, assumed the existence of an indictment against Furay, and under that pretension secured $10,000 from Mrs. Furay to influence their official action. The Court of Appeals of Texas in deciding a similar case said:

"It is insisted by counsel for defendant that the arrest and custody of John Gable by the defendant was without authority of law, and that, therefore, it was no offense for the defendant to accept a bribe to release him. We do not so understand the law. It was by virtue of his official authority that the defendant arrested and held John Gable. It matters not whether the arrest and custody were legal or illegal; the said Gable was a prisoner in the custody of the defendant, a peace officer, and was permitted by the defendant to escape, in consideration of money paid him to effect such escape. We are of the opinion that, in a prosecution for this offense, it is not permissible for the defendant to question the legality of his custody of the prisoner." Moseley v. State, 25 Tex. App. 515, 8 S. W. 652.

While the point presented by appellant was not expressly decided in its companion case (People v. Lips), one of similar import was passed upon. It was there held that the fact that Lips and Anderson had no actual authority to arrest Furay was unimportant. No warrant of arrest was placed in their hands or was issued. It was there indicated that the following quotation from 4 Ruling Case Law, 183, par. 13, is a substantial statement of the law:

> "The giving or receiving of money * * * for the purpose of influencing official conduct is not deprived of its criminal character by the fact that the action contemplated is not within the officer's jurisdiction. If he acts in his official capacity—and by this term is meant the doing of such acts as properly belong to the office and are intended by the officer to be official—the offense is complete."

And, further, the opinion reads:

> "So it is here. Appellant had been instructed by his superior to locate and apprehend Furay, and without doubt he believed that he was acting officially as a deputy sheriff in all that pertained to his activities under the directions of that superior. His action in agreeing to release Furay was corrupt in the last degree, and we find no difficulty under the law in determining that his illicit conduct related to a matter 'pending before him' in his official capacity."

[2] Appellant calls attention to evidence indicating that he was never directly instructed by his superior officer to apprehend Furay. Regardless of this, the inference was amply warranted that he intended his acts in accompanying Lips and assisting him to be regarded as official and that he himself considered that throughout the transaction he was acting as a deputy sheriff.

[3] If it be intended, in referring to Anderson's testimony to the effect that he did not know of the reasons for the trips that were taken in negotiating with Mrs. Furay for the money and securing it, and the other evidence which might indicate that he had no official part in the matter, to maintain that the evidence is insufficient to connect him with the offense, we must disagree with appellant's counsel. Mrs. Furay testified that she stated to Anderson that she thought it was awful "to take that money away from the boy, because it meant everything to him," and he replied, "Yes; but it is the best way to fix it." From this evidence and the appellant's conduct in assisting Lips throughout, the jury were justified in concluding that Anderson acted knowingly. If so, the facts in the instant case did not differ in any material respect from those presented against Lips.

[4] It is immaterial that the element of criminal intent on the part of Anderson was established by more indirect evidence than was that of Lips. Anderson's connection with this offense of bribery was established. He was shown to have agreed, for a corrupt consideration, to allow Furay to escape from the custody of the state whose authority he and Lips purported to represent.

[5] We think that for the the purpose of this prosecution the matter of Furay's arrest was a "matter then pending," regardless of the actual existence of an indictment against him in Texas.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

(62 Cal. App. 219)

PEOPLE v. NORMAN et al. (Cr. 950.)

(District Court of Appeal, Second District, Division 2, California. May 16, 1923.)

Criminal law ⟹1167(3)—Error in not formally granting motion to set aside information held without prejudice.

Since the effect of an order directing transmittal of papers to the committing magistrate directing that he legally commit defendants charged with operating an automobile on the public highway without the owner's consent was the same as though the information had been set aside and the matter resubmitted to the magistrate, error in not formally granting motion to set aside the first information did not result prejudicially to defendant.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Aubrey Norman and another were convicted of operating an automobile without the owner's consent, and they appeal. Affirmed.

Edward J. Kelly, of San Diego, for appellants.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Lorrin Andrews, of Los Angeles, for the People.

CRAIG, J. The defendants were convicted of operating an automobile upon the public highways without the owner's consent, a felony. The court denied their motion for a new trial and pronounced judgment, from which this appeal was taken. The ground urged for reversal is that the defendants were not legally committed by a magistrate.

The proceedings upon which they rely are as follows: The prosecution was begun in the usual manner and after a preliminary examination before a magistrate the defendants were held to answer for "driving an automobile without the owner's consent." An information was filed by the district attorney charging the defendants with a felony, to wit, operating an automobile upon the public highways without the owner's consent. Defendants were arraigned in the superior court and moved to set aside the information on the ground that they were not legally committed by a magistrate. The court denied the motion, expressing an opinion that the magistrate should amend the commitment, and thereafter made an order directing the clerk to transmit the papers in the case to the committing magistrate, and that the justice be directed to correct the commitment and recertify it to the superior court. Thereupon the committing magistrate signed a new commitment, holding the defendants to answer for operating an automobile upon the public highways without the owner's consent. In due time the defendants were again arraigned and moved to set the information aside upon the same grounds as before. This motion was denied. A plea of not guilty was entered and after a trial the defendants were convicted.

It is urged that under the first commitment the defendants were held to answer for a misdemeanor. Our attention is called to section 499 b of the Penal Code, which makes it a misdemeanor for a person "without the permission of the owner" to "take any automobile * * * for the purpose of temporarily using or operating the same." Section 28 of the Motor Vehicle Law (St. 1915, p. 397), as amended in 1917 by section 21 thereof, provides that "it shall be unlawful for any person to drive or operate * * * upon the public highway any motor vehicle not his own, whether with or without intent to steal the same, in the absence of the owner thereof and without such owner's consent," and makes a violation of this provision a felony. Appellant argues that since the words "public highways" were omitted from the first commitment, the defendants were thereby held to answer only for the misdemeanor denounced in section 499 b of the Penal Code; further, that all that followed in the superior court and the subsequent commitment by the justice of the peace were without jurisdiction.

It cannot be said that the first commitment held the defendants to answer under section 499 b. That provision does not denounce the driving of an automobile on the public highways or elsewhere. It makes only the taking of an automobile under the circumstances therein described an offense; it is obvious that to take a vehicle is quite different from driving or operating it.

On the other hand, this commitment did not completely and regularly state the offense named in the Motor Vehicle Act, since, as pointed out by the appellants, it did not allege that they drove the automobile in question upon the public highways. However, it is quite evident that the magistrate attempted to commit the defendants for a violation of section 21 of that act, and the superior court so construed the commitment. It is true that the order made was that the motion to set aside the information be denied. Nevertheless, the court further directed that the commitment be sent back and that the magistrate make out another. This was done and a new or amended information filed. The original commitment charged no offense. This resulted from the technical omission of the words "upon the public highways." The superior court had full authority to set aside the first information. It also could have returned the commitment to the magistrate for recommitment, and this it did. Sec. 997, Pen. Code; Ex parte Fowler, 5 Cal. App. 549, at page 554, 90 Pac. 958. The effect of the entire procedure in that court was the same as though the order upon the first motion to set aside the information had been that the same be set aside and that the matter be resubmitted to the magistrate. Had this order been made the omission in the original commitment which produced the irregularity could have been cured by the magistrate merely making out a new one, as was done, without a second examination and again taking testimony. Ex parte Fowler, supra. In that case it is said that the omission of the words "with malice aforethought," necessary to a complete description of the crime of assault with a deadly weapon with intent to commit murder, amounts to a mere irregularity and one which the magistrate could correct upon being ordered to do so by the superior court.

We have examined the entire transcript and are satisfied therefrom that the appellants were clearly shown to have been guilty of the offenses for which they were sentenced. In view of the entire proceedings, the error of the superior court in not formally granting the motion to set aside the first information could not have resulted prejudicially to the rights of the defendants, nor has the judgment appealed from produced a miscarriage of justice.

Under such circumstances the judgment should be affirmed (article 6, § 4½, Const. of Cal.); and it is so ordered.

We concur: FINLAYSON, P. J.; WORKS, J.

62 Cal. App. 293

BOSSEN v. BEAN. (Civ. 2618.)

(District Court of Appeal, Third District, California. May 24, 1923.)

1. Appeal and error 🔑518(4)—Judgment roll held incomplete in absence of amended answer.

Where demurrer to an answer was sustained and an amended answer filed on which the case was tried, the original answer passed out of the case and could not be considered for any purpose, and where appeal was on the judgment roll alone, in the absence of such amended answer, the judgment roll is not complete.

2. Appeal and error 🔑635(1)—Appeal dismissed for failure to comply with rule as to transcript.

Where the record contains no copy of the pleadings upon which findings were made and the judgment entered, it cannot be said that a transcript has been furnished, and, under rule 2 (176 Pac. vii), the appeal may properly be dismissed.

3. Pleading 🔑418(3)—Filing amended answer and going to trial waived error in sustaining demurrer to original answer.

Any error in sustaining demurrer, or striking out portions of the first amended answer, was waived by the filing of a second amended answer and going to trial on the issue raised thereby.

4. Appeal and error 🔑518(6)—Notice of motion to strike pleadings not considered on appeal on judgment roll alone.

A notice of motion to strike out parts of pleadings, not being a part of the judgment roll, cannot be considered in the absence of a bill of exceptions.

5. Appeal and error 🔑680(2)—Trial court not put in error in sustaining demurrer to pleading where appellate court not apprised of contents thereof.

The trial court cannot be put in error for sustaining demurrer to pleadings when the appellate court is not apprised of its contents.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by William H. Bossen against F. E. Bean. Judgment for plaintiff, and defendant appeals. Affirmed.

Arthur Bundy and W. P. Rich, both of Marysville, for appellant.

J. E. Ebert, of Marysville, for respondent.

BURNETT, J. [1] The appeal is from the judgment and purports to be upon the judgment roll, but the judgment roll is not complete since it does not contain the second amended answer, one of the pleadings upon which the parties went to trial. Indeed, said answer does not appear in the transcript at all, and there has been no suggestion of diminution of the record. The action was brought to recover the possession of a certain number of cattle, or their value in case delivery could not be had. The original answer and the first amended answer are printed in the transcript, from which it appears that defendant admitted the ownership of plaintiff, but claimed the right to the possession of the cattle by virtue of the assignment of a chattel mortgage, of a judgment for a certain amount, and of a claim for pasturage. Plaintiff demurred to each of said answers on various grounds and also moved to strike out certain portions thereof. The motion was granted, and the demurrer in each instance was sustained. Instead of relying upon his first amended answer, appellant chose to file another pleading, and hence this second amended answer and the complaint are the only pleadings that could be considered by this court (Colton Land & Water Co. v. Swartz, 99 Cal. 278, 33 Pac. 878; Bray v. Lowery, 163 Cal. 256, 124 Pac. 1004); but, of course, we cannot consider this second amended answer, because we do not know its character or contents.

[2] Indeed, since the record does not contain a copy of the pleadings upon which the findings were made and the judgment entered, it cannot be said that we have been furnished with a transcript, and, under rule 2 (176 Pac. vii), and the decisions of the Supreme Court it would seem proper to dismiss the appeal. Hart v. Plum, 14 Cal. 148; S. F. & N. P. R. Co. v. Anderson, 77 Cal. 297, 19 Pac. 517.

[3] Moreover, if there was any error in sustaining the demurrer or in striking out portions of the first amended answer, it was waived by the filing of the second amended answer and going to trial upon the issue raised thereby. Ganceart v. Henry, 98 Cal. 281, 33 Pac. 92; Brittan v. Oakland Bk. of Savings, 112 Cal. 1, 44 Pac. 339.

[4] In addition, as to the motion to strike out, it is impossible to determine from the printed record what portions were stricken out, since the notice of motion designated the portions by page and line of the amended answer as filed and not as printed, and there is no bill of exceptions in the case. Besides, the notice of motion is no part of the judgment roll, and we cannot consider it in the absence of a bill of exceptions. Brown v. Canty, 31 Cal. App. 183, 159 Pac. 1056; Overton v. Noyes, 177 Cal. 450, 170 Pac. 1110.

[5] It is incumbent, of course, upon appellant to show prejudicial error to justify a reversal of the judgment, and assuming, for the sake of argument, that the court erred in sustaining the demurrer, we cannot say that it was prejudicial when we are not apprised of the contents of the second amended answer and of the evidence upon which the case was tried. We may add, though, that

an examination of said first amended answer and the demurrer thereto convinces us that the trial court was right in the ruling.

No motion has been made to dismiss the appeal upon the ground that the transcript is imperfect; but, at any rate, since no error has been shown, the judgment must be affirmed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

(62 Cal. App. 108)

GULART v. AZEVEDO. (Civ. 2600.)

(District Court of Appeal, Third District, California. May 4, 1923. Rehearing Denied June 2, 1923. Hearing Denied by Supreme Court July 3, 1923.)

1. Brokers 🔑54—Subsequent expression of willingness by purchaser does not entitle broker to commission.

Where the listing agreement entitled a broker to his commission only if he negotiated a binding contract for the sale, and the contract negotiated by him, through his mistake, was not binding, an expression of willingness by the purchaser to abide by the contract under the conditions as they actually existed, which was not made or communicated to the owner until after the expiration of the period during which the broker had the right to make the sale, did not entitle him to his commission.

2. Brokers 🔑49(1)—Listing contract held to require brokers to procure binding contract.

A listing contract giving a broker the sole and exclusive agency of the property, and authorizing him to sell and convey and contract with the purchaser for the conveyance of the title, appointed the broker defendant's agent to execute a binding contract of the sale, rather than merely to find a purchaser with whom defendant might so contract, and therefore did not entitle the broker to his commission upon his producing a purchaser ready and willing and able to buy on the specified terms, unless he actually procured an enforceable contract.

3. Brokers 🔑49(3) — Contract to purchase subject to mortgage does not bind purchaser to take under executory contract of sale.

A contract negotiated by a broker whereby the purchaser agreed to take the property subject to a mortgage for $17,000 does not bind the purchaser to take the property when it appeared the title was held under an executory contract of sale on which there was a balance due of $17,000, since the rights of a mortgagor and those of a purchaser, under a contract of purchase, are essentially different.

4. Evidence 🔑265(14)—Admissions based on incorrect information are of no weight.

Admissions made by an owner that he owed a broker's commission, which were based upon misinformation by the broker that he had sold the property in accordance with the terms of the listing contract, are of no weight when it appears that the contract negotiated by the broker was not in accordance with those terms.

5. Brokers 🔑63(1)—Stating ground of refusal does not waive other grounds then unknown.

The fact that the owner, when he refused to execute the conveyance to the purchaser procured by the broker, gave as his sole ground for such refusal the refusal of his wife to join in the conveyance did not waive his right to object later that the terms of the contract were not in accordance with the listing contract where he did not have knowledge of that fact at the time he refused to execute the conveyance.

On Petition for Rehearing.

6. Brokers 🔑49(3)—Broker held not entitled to claim that he understood that "incumbrance" referred to in listing contract was mortgage.

A broker cannot claim that the word "incumbrance" as used in the listing contract was understood to mean a mortgage, and that he was led so to believe by the owner's statement at the time the contract was executed, where plaintiff alleged and the court found on sufficient evidence that at the time the listing contract was executed the legal title was vested in others subject to an agreement by the owner to purchase, and that at the time of the execution of the listing it was the understanding of the parties that the purchaser should assume the incumbrance owed by defendant on the land under the contract.

7. Principal and agent 🔑103(10)—Power of attorney held not to authorize change in terms given to exclusive agent to sell.

Where a landowner before leaving the country listed his property with plaintiff as an exclusive agent to contract for the sale thereof on specified terms, a power of attorney executed by him to another giving the other authority to convey real property and to execute all necessary and proper conveyances, and to receive payment therefor, did not authorize the attorney to bind the owner to an acceptance of terms different from those stated in the listing contract.

8. Pleading 🔑129(2)—Answer held sufficiently to deny broker procured agreement.

In an action for a broker's commission, an answer denying that the purchaser procured by the broker offered to purchase the premises as alleged in the complaint, and alleging that plaintiff did not procure a purchaser ready and willing and able to purchase the real estate upon the terms therein described, did not admit that the purchaser procured was ready, willing, and able to buy.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by John Gulart against Joaquin B. Azevedo, to recover a commission for sale of real property. Judgment for plaintiff, and defendant appeals. Reversed.

Hawkins & Hawkins and L. E. Jones, all of Modesto, and Rose, Silverstein & Collier, of Oakland, for appellant.

Whitehurst & Logan, of Patterson, for respondent.

FINCH, P. J. The plaintiff was given judgment for $3,500, with interest thereon, alleged to be due as commissions for the sale of defendant's land. The defendant's motion for a new trial was denied, and this appeal is from the judgment.

The court found that on the 24th day of May, 1919, the defendant executed and delivered to plaintiff a writing containing the following provisions:

> "I have this day placed with John Gulart for sale the property described on the reverse side of this card, of which I am the owner. The said John Gulart shall have the sole and exclusive agency of the property for nine months from date hereof, and I authorize him to sell and convey, and contract with the purchaser for the sale and conveyance by good and sufficient title to said property, according to the prices and terms of payment herein specified. * * * Price of property to be $30,000 net. If the said property be sold or disposed of during the period above stated * * * I agree to pay John Gulart a commission as follows: All over and above $30,000 when sale is complete. * * * Terms: All cash, or $13,000 cash and balance to be incumbrance paid in 8 years from date of sale. Notes to bear interest at 6 per cent."

After the execution of the contract and before any purchaser was found by plaintiff the defendant went to the Azores Islands, where he remained until after this action was commenced. Before so departing, the defendant duly appointed F. P. Gomez, Jr., his attorney in fact, "with full power and authority to convey real property and interests therein * * * and to accept and receive payment therefor," and informed plaintiff that Gomez "was going to attend to his business" during his absence.

On the 15th day of November, 1919, plaintiff, in the name of and as the agent of defendant, entered into an agreement with Mike and George Sequeria for the sale of the land to them, and containing, among other terms, the following:

> "Whereas, there is a mortgage lien standing of record against said property in the sum of $17,000, * * * the party of the first part agrees to sell said 60-acre ranch above mentioned to the parties of the second part for the sum of $16,500 cash, and the assuming of said mortgage by said parties of the second part, and the parties of the second part agree to buy said property and pay $16,500.00 cash therefor, and to assume and pay when due said mortgage of $17,000.00, and said Mike Sequeria has this day paid to said John Gulart, agent as aforesaid, the sum of $1,000.00, which sum shall be held by said agent, and at the time of consummating said transfer said sum shall be applied on the cash purchase price."

The sum of $1,000 was paid to plaintiff in accordance with the terms of the agreement.

Immediately after the execution of the agreement with the Sequerias plaintiff exhibited the same, together with the listing contract, to Gomez, and told him that he "had got the Sequerias as purchasers, and that they were willing to buy the place according to the contract with Azevedo," although neither the plaintiff nor the Sequerias then knew the nature of defendant's title. Plaintiff asked Gomez at that time to execute a deed, as defendant's attorney in fact, conveying the land to the Sequerias upon their compliance with the terms of their agreement. Gomez "said it was all right," but declined to make a conveyance on the ground that "he would like to take it up with Mr. Azevedo first." but stated that he would cable defendant regarding the matter, and "ask him if it was satisfactory." Plaintiff later cabled the defendant as follows:

> "I sold your ranch per contract. Approve sale by cablegram at once at my expense."

Having received no reply to the cablegram, the plaintiff, on January 17, 1920, wrote defendants, saying:

> "I have sold your ranch on the following terms per your contract; $13,000.00 cash to you and purchasers will assume contract,"

and inclosing draft of a quitclaim deed to be executed by defendant and his wife and then forward it to a local bank, with instructions to deliver the same upon receipt of $13,000. Under date of February 14, 1920, defendant wrote plaintiff as follows:

> "We have been visiting for a few months in Terciara. When we returned we found the papers and telegram waiting us at the post office. I am sending you the paper back as my wife does not want to sign; without her signing nothing else can be done."

Plaintiff testified that it takes a letter 15 days or more to reach here from the Azores, and it follows that he could not have received defendant's letter prior to the expiration of his agency.

[1] Shortly after the execution of the agreement with the Sequerias the plaintiff discovered that there was not a mortgage on the land, but that defendant held the property under a contract of purchase from F. T. and V. T. Freitas, in whom the legal title was vested, and that there remained unpaid on the contract price the sum of $17,000, bearing interest at 6 per cent. per annum, the indebtedness being payable in full in about 8 years after the date of the listing contract. Plaintiff immediately informed the Sequerias of these facts, but no change was made in the agreement, and the evidence does not show that they offered or agreed, during the life of the listing contract, to purchase the property on the terms therein stated, or on any terms other than those contained

in their written agreement, or that, during said time, they ever expressed to plaintiff, or to any other person, a willingness, even, to take the property and assume payment of defendant's indebtedness to Freitas brothers. One of the Sequerias testified that they were in fact willing to so take the property, but he did not say that such willingness was made known to any one. Of course, an undisclosed mental attitude can never constitute the basis of a contractual obligation. After the expiration of the period during which plaintiff was authorized to sell the property, the Sequerias offered to purchase the same and assume payment of the indebtedness to Freitas brothers, and indorsed on their written agreement an extension of defendant's time to make the transfer; but defendant had nothing to do with securing such extension, nor did he do anything which would make him a party thereto. No offer by the Sequerias or agreement between them and plaintiff, made after the expiration of the latter's authorization to sell, was binding upon defendant. As stated, plaintiff wrote defendant that the Sequerias had agreed to purchase the land and pay the balance due Freitas brothers. The latter part of the statement, however, was contrary to the fact. From what has been said it is apparent that plaintiff was not entitled to judgment on the theory that he had procured a purchaser who was ready, willing, and able to buy on the authorized terms, even if it be conceded that, under the listing contract, he would have earned a commission by merely finding such a purchaser and introducing him to defendant, and his right to a judgment, if any, must be founded on his written agreement with the Sequerias.

The complaint alleges, and the court finds, that, at the time the listing contract was executed, it was the understanding of the parties that, if the purchase price was not all paid in cash, the purchaser should assume and pay the balance owing from defendant to Freitas brothers. Plaintiff did not himself so understand, but one of his employees, who procured the contract from defendant, understood the meaning thereof to be as alleged and found, and he so testified at the trial. Appellant contends that this finding is not supported by the evidence. In view of the conclusion reached on other questions, the point so made need not be decided.

[2] The listing contract was not a mere authorization to procure a purchaser ready, able, and willing to buy, but the plaintiff was employed to "contract with the purchaser for the sale and conveyance" of the land. The plaintiff was appointed defendant's agent to execute a binding contract for the sale of the property, rather than to find a purchaser with whom the defendant might so contract. The fact that the defendant was about to depart on an extended trip abroad, during which it would be impracticable for him to negotiate directly with a prospective purchaser, and the fact that plaintiff attempted to make a binding contract of sale, throw light upon the intention of the parties.

> "A broker employed to sell real estate may be authorized and required by the terms of his undertaking, not only to find a purchaser, but even to conclude an actual transfer, or at least to procure from the purchaser a valid written agreement binding him to purchase upon the terms specified; and where this is his undertaking the broker has not earned his commission until he has performed it or the principal has accepted a less complete performance." Mechem on Agency (2d Ed.) § 2428.

In Cunningham v. Friendly, 70 Or. 222, 139 Pac. 928, opinion on rehearing 140 Pac. 989, the contract under consideration provided:

> "We hereby appoint you exclusive agent to make sale of the real property herein described. * * * And you are hereby authorized to accept a deposit to be applied on the purchase price, and to execute a binding contract for sale on our behalf."

The court said:

> "The plaintiff was not employed to find a purchaser for the lots and to bring the purchaser and seller together. * * * Plaintiff relies upon the fact that he brought Rocky and Friendly together, but that does not bring plaintiff within his contract to sell."

See, also, Bacon v. Davis, 9 Cal. App. 83 98 Pac. 71; Pfanz v. Humburg, 82 Ohio St. 1, 91 N. E. 863, 29 L. R. A. [N. S.] 533; Wiggins v. Wilson, 55 Fla. 346, 45 South. 1011; Elliot v. Gamble, 77 Fla. 798, 82 South. 253; Kerfoot v. Steele, 113 Ill. 610; Burnett v. Potts, 143 Ill. App. 160; Ormsby v. Graham, 123 Iowa, 202, 98 N. W. 724.

[3] Plaintiff's right of recovery depends upon whether his agreement with the Sequerias bound them to purchase the land under the terms of the listing contract. The rights of a mortgagor and those of a vendee under a contract of purchase are essentially different. If a mortgagor fails in his payments and the mortgage is foreclosed, he is allowed the statutory period for redemption. No such statutory right is given a vendee under an executory contract of sale. Such contracts frequently provide for the forfeiture of the vendee's rights thereunder on his failure to make payment at the precise time specified. The terms of the contract between defendant and Freitas brothers are not shown by the evidence. If plaintiff relies on their being the same as those of a mortgage, it devolved upon him to establish that fact. It is very clear that the Sequerias were not bound to purchase the property on the terms provided by the listing contract.

[4] In two letters written by defendant prior to his return to this country he made statements which might be construed as admissions of plaintiff's right to the alleged commissions. These letters were written after plaintiff had informed defendant that the property had been sold in accordance with the terms of the listing contract, and that the purchasers would assume payment of defendant's indebtedness to Freitas brothers. An admission based on incorrect information given by the plaintiff is of no weight in his favor. The defendant was not informed of the terms of plaintiff's agreement with the Sequerias during the life of the listing contract, and therefore it cannot be held that he assented thereto or waived any objections he may have had to the same. Gomez saw the agreement, but it was not shown that he was authorized to sell the property or to change the terms of plaintiff's contract with defendant. It only appears, and that merely by reason of a defective denial in the answer, that Gomez was authorized to convey land and receive payment therefor. Plaintiff himself was given "the sole and exclusive agency" for the sale of the land. In attempting to exercise the authority conferred upon him he made such a mistake that neither the defendant nor the purchasers were bound by the agreement which he executed. After the discovery of such mistake there remained three months during which he might himself have corrected the mistake if, as he alleges, the Sequerias were willing. His failure to earn the alleged commission, if it be finally decided that he has so failed, is due to his own neglect.

[5] Respondent contends that, by refusing to convey the property on the sole ground that his wife would not sign the quitclaim deed sent to him for execution, the defendant waived all other objections that he had an opportunity to make at that time. The simple answer is that defendant did not then have the opportunity to make the objections here relied on, because of plaintiff's incorrect statement that the land had been sold in accordance with the terms of the listing contract. Had that statement been true, the defendant could have made no objection which would have been a defense to this action.

Some of the denials in the answer are so defective in form as to constitute admissions. The foregoing discussion is based upon the effective denials of defendant. The defendant did not take the witness stand or offer any evidence, but submitted the case on the evidence produced by plaintiff. It has been assumed, therefore, that all of plaintiff's witnesses are entitled to the fullest credit.

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

On Petition for Rehearing.

PER CURIAM. [6] In respondent's petition for a rehearing it is urged that "the word 'incumbrance' used in the listing contract * * * was understood by Gulart to mean a mortgage," and that plaintiff was led so to believe by defendant's statements made at the time such contract was executed. It is argued that because the defendant had so misled the plaintiff the latter became entitled to a commission when the Sequerias agreed to purchase the property subject to such mortgage. Counsel, however, overlook the fact that the plaintiff alleged and the court found, on sufficient evidence introduced by plaintiff, that at the time the listing contract was executed—

> "the legal title to said premises was * * * vested in F. T. Freitas and V. T. Freitas, subject to an agreement of purchase and sale whereby said F. T. Freitas and V. T. Freitas agreed to sell said premises to defendant, * * * and that at all times said defendant owed the sum of $17,000 or thereabouts on the purchase price of said premises under said contract, * * * and that at the time of execution of said listing it was the understanding of plaintiff and defendant, * * * that in case said purchase price of $30,000 was not paid in cash, the purchaser, as part of said purchase price, should assume said incumbrance owing by defendant on said land to said F. T. Freitas and V. T. Freitas and pay same when due."

It is contended that the statement in the opinion to the effect that Gulart was employed to make a sale, rather than merely to procure a purchaser to whom the defendant might sell, is in conflict with the rule announced in Merriam v. Wickersham, 141 Cal. 567, 570, 75 Pac. 180. An examination of the transcript in that case discloses that the listing contract there under consideration was unlike the one in this case. By it the owner authorized the agent "exclusively to sell," and "to receive a deposit," and the owner agreed to convey the property "to any purchaser found by" the agent and to pay the agreed commission "if a purchaser is found by or through" the agent. There is no inconsistency between the decision in Merriam v. Wickersham and the opinion herein or the cases cited therein.

[7] It is insisted that the allegation in the complaint, admitted by a defective denial in the answer, to the effect that Gomez was given a "general power of attorney" by defendant, was sufficient to show that Gomez "had power to act for Azevedo in all things just as Azevedo could have done if personally present, and any act, word, or omission of Gomez which would have rendered him liable if he had been the owner will render Azevedo liable." Plaintiff's allegation, however, goes further than stated. It is alleged that—

"Defendant executed and delivered to one F. P. Gomez, Jr., his certain general power of attorney, in writing, duly executed and acknowledged, in which said power of attorney he appointed said F. P. Gomez, Jr., his attorney in fact with full power and authority to convey real property and interests therein, and to execute all necessary and proper transfers and conveyances thereof and to accept and receive payment therefor, and, generally, to do all acts necessary or proper for the transfer of any real property or interests therein owned by defendant."

"Where the authority to perform specific acts is given in the power, and general words are also employed, such words are limited to the particular acts authorized." Billings v. Morrow, 7 Cal. 172, 175 (68 Am. Dec. 235); Moore v. Gould, 151 Cal. 723, 728, 91 Pac. 616.

Authority "to do all acts necessary or proper for the transfer of any real property or interests therein owned by defendant" does not include the power to sell land or to agree upon the terms of sale thereof or to modify terms theretofore fixed by the owner, especially where another person has been given exclusive power to execute a contract of sale upon specified terms. The complaint alleges that the power of attorney was executed after the making of the listing contract and before the departure of defendant from California. From the whole of the surrounding circumstances it is apparent that the power of attorney was executed to enable Gomez to make the formal transfer of the property during the absence of defendant and not to give the former any discretion in fixing terms of sale. Gomez had no duty to perform until plaintiff made a sale in accordance with the terms of the listing contract, and no such sale was made, nor was Gomez ever informed that the Sequerias were willing to purchase the land on any other terms than those stated in their agreement with plaintiff, nor did they express such willingness to any person during the life of the listing contract.

[8] It is contended that the answer admits that the Sequerias were "ready, able and willing to assume the Freitas contract." In paragraph IX defendant positively "denies that Mike Sequeria and George Sequeria agreed or offered to purchase the premises as alleged in the complaint," and in paragraph XII he "alleges that the plaintiff did not at any time procure for the defendant purchaser for the real estate described in the said listing contract ready and willing and able or ready or willing or able to purchase the real estate therein described upon the terms therein described." No objection was made to the sufficiency of such denial and allegation, and the case was tried upon the theory that they were sufficient.

The petition for a rehearing is denied.

62 Cal. App. 87

RING et al. v. UNITED STATES GYPSUM CO. (Civ. 4488.)

(District Court of Appeal, First District, Division 2, California. May 3, 1923. Hearing Denied by Supreme Court July 2, 1923.)

1. Appeal and error 🔑1011(1)—Findings on conflicting evidence not disturbed.

Where the record presents a wide conflict in the testimony, findings based thereon, if supported by any evidence, are not disturbed.

2. Mines and minerals 🔑38(14)—Burden of proving abandonment of mining claim is on party asserting it.

In an action under Code Civ. Proc. § 738, to determine conflicting claims after defendant proves his right to possession, the burden is on plaintiff to show defendant's right had been abandoned or forfeited.

3. Mines and minerals 🔑38(21)—Evidence held to negative abandonment of claims.

Evidence *held* to negative abandonment by failure to sufficiently mine claims.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by A. P. Ring and others against the United States Gypsum Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

F. R. McNamee, of Los Angeles, and Charles L. Allison, of San Bernardino, for appellants.

Gibson, Dunn & Crutcher, of Los Angeles (Lawrence L. Otis, of Los Angeles, of counsel), for respondent.

NOURSE, J. This is an action under section 738 of the Code of Civil Procedure to determine conflicting claims to 10 placer mining locations near Amboy, San Bernardino county. The claims to which plaintiffs assert title are described as craters Nos. 1 to 10, inclusive, and the claims to which the defendant asserts title, and which covered substantially the same ground, were also ten in number and separately named. It was agreed that all locations were in proper form, and that in each case discovery of gypsum was made. The complaint and answer are in the usual form for actions of this nature, and no question arises upon the pleadings. Judgment was rendered in favor of the defendant, from which plaintiffs appeal upon a bill of exceptions. The only attack upon the judgment is that the findings of fact of the trial court were not supported by the evidence.

Briefly, the facts are that a portion of the ground covered by the land in dispute was originally located by Marcus Pluth and others, and that in 1905 he sold his interest therein to defendant's predecessor; that the defendant and his predecessors in interest have occupied the land continuously since

1905, together with some 10 or 12 other adjoining claims, all of which were worked under a general system of group development requiring a large annual expenditure of money, aggregating in the year 1919 the sum of over $18,000 and in the year 1920 the sum of over $141,000. On September 17, 1920, the plaintiffs, acting through the same Marcus Pluth, went upon the land in dispute and posted notices of location for their 10 separate claims. They then commenced this action to quiet title to the property upon the theory that it had been abandoned by the defendant.

The trial was had without a jury, and at its conclusion the trial court made its findings of fact and conclusions of law, wherein it was found:

> "That all and every of defendant's claims comprise the group of said Amboy mining claims, and that all of said group of mining claims, and each of them, were worked, operated, developed and improved in common as an entire group of claims for more than five (5) years prior to the commencement of this action, and that especially and particularly during the years 1919 and 1920 they were so worked, operated, developed and improved as a group of mining claims, and that sums of money amounting in the aggregate to $18,989.76 during the year 1919, and $141,825.29 during the year 1920, were expended for work, labor, and improvements thereon tending directly to the development and benefit of each and all of said claims and to facilitate the extraction of mineral therefrom."

[1-3] The main ground of appeal is that this finding of fact is not supported by the evidence. At the outset it should not be necessary to do more than call attention to the fact that the record presents such a wide conflict in the testimony offered that, if any evidence appears therein which supports the finding of the trial court, that finding should not be disturbed on this appeal. It is the theory of respondent's case that from the period of 1905 until 1920 it had continuously worked these properties under a general system of group development, and that, although during the years 1919 and 1920 work may not have been done on each of the separate ten claims involved in the litigation, sufficient work was done under the system of general development to avoid a forfeiture of the claims under the law. The respondent having shown that it had the right to possession of the property through valid locations, the burden of proof was upon the appellant to show that the respondent's right had been abandoned or forfeited. The respondent offered in evidence its proof of labor duly sworn to and filed as required by law, wherein it was shown that a sum of money sufficient to meet the legal requirements had been expended upon the claims in dispute. In addition to this the testimony of its general superintendent was in part as follows:

> "Q. How much work was done on the western part of the group as and for assessment work, if you know, in 1919? A. Well, I could not say just how much was done in 1919. Q. You mean you cannot segregate it? A. No, I could not say; I don't know. I know that every year we were in operation we worked the south deposit somewhere. A great many times we hauled up with teams and so forth, a great amount of material to run through as a test. In the first place we ran into difficulties of salt in the south deposit in originally starting out, and we hadn't any way to overcome it at the time, which was the cause of our moving our tracks from there to the east deposit. We afterwards put in another system in the mill by which we could clean this gypsum, and we hauled up many tons and run through as tests to see if the system would clean that south deposit. Q. Was that done at various times? A. Done very near every year that I have any recollection. Q. Were you finally able to eliminate the salt? A. To a very large degree; that is less than one-half of 1 per cent. Q. That makes the produce merchantable, usable? A. Yes, sir. Q. Were there any intentions at any time to abandon those claims on the west? A. Never. The real intention was probably to go back to those claims, because the gypsum was cleaner and in greater bodies than these they have got now. Q. Well, in the general working as a group, you included all the claims? A. Yes, sir."

In explanation of this testimony it should be added that the 10 claims in dispute lay directly south of the mill which respondent operated on the "Holdtite" claim, and that they lay partly west and partly south of the second mill which the respondent operated upon the "Enterprise No. 3" claim; that during the latter part of the period in question the greater amount of gypsum was taken from the "Enterprise No. 3," and that when the witness mentioned the south deposit he referred to the deposit upon the claims here in dispute. It was also shown that the deposit of gypsum lay directly beneath the surface, which was a thin coating of mud and silt, the entire territory being the bed of an old lake which had completely dried and disappeared. The method of operations was to plow or scrape the surface from the mineral deposit, and then to load the mineral into trucks by means of scrapers attached to tractors. The mineral deposit was then hauled to the mill, where it was cleaned and dried. It is claimed, with apparent good reason, by the respondent, that this process of cleaning the dirt from the mineral deposit at the mill was a substantial and important part of extracting the mineral from the ground. That is to say, that the gypsum lying in a solid mass did not require any mining operations such as are necessary in the ordinary quartz or placer mining for gold or silver or other similar minerals, but that all that was required was to carefully clean from the mineral deposit the surface layer of dirt. In accordance with this theory it was then shown that numerous roads had been constructed leading from the various claims to the mill operated by the respondent, some of which were made specially for the accommodation of tractors, and that this work was a necessary part of the development of the various claims for the purpose of facilitating the extraction of the mineral therefrom.

Upon this evidence, as we have said, the trial court found that labor expended by the respondent tended directly to the development and benefit of each and all of said claims, and to facilitate the extraction of mineral therefrom. This finding was plainly on a question of fact, which the trial court was required in the first instance to determine. Big Three Mining & Milling Co. v. Hamilton, 157 Cal. 130, 135, 107 Pac. 301, 137 Am. St. Rep. 118; Yreka Mining & Milling Co. v. Knight, 133 Cal. 544, 549, 65 Pac. 1091.

Judgment affirmed.

We concur: LANGDON, P, J.; STURTEVANT, J.

(62 Cal. App. 96)

PEOPLE v. BROWN. (Cr. 941, 2583.)

(District Court of Appeal, Second District, Division 2, California. May 4, 1923. Hearing Denied by Supreme Court July 3, 1923.)

1. Criminal law 🔑406(7)—Homicide 🔑156 (2)—Subsequent declaration of accused held admissible to show express malice.

In a prosecution for homicide, evidence that shortly after the shooting defendant exclaimed he "got one of them and would get the rest," though inadmissible as part of the res gestæ, was competent as an admission of defendant tending to show ill will and relevant to the issue of express malice.

2. Homicide 🔑203(3)—Evidence held to show declaration was made under sense of impending death.

Evidence that the alleged dying declaration was made shortly before the death of deceased, while he had extreme difficulty in getting breath to speak, and after he had given his property to his sister to whom he made the declaration, and had stated he knew he was dying, was sufficient to show the declaration was made under a sense of impending death.

3. Homicide 🔑325—Objection part of dying declaration was conclusion must be especially pointed out by objection or motion to exclude.

The admission in evidence of a dying declaration does not require reversal, though a part of the declaration consisted of a conclusion and not the narration of a fact, where no objection to the declaration on that ground was made below, nor was any motion made to strike any of its objectionable features.

4. Homicide 🔑200—Dying declaration is admissible to negative self-defense.

The fact that defendant admitted killing deceased does not render a dying declaration inadmissible, where it tended to negative defendant's claim of self-defense.

5. Homicide 🔑117—Firing shot which hastened death after apparent necessity had passed is homicide.

Where defendant fired four shots, all of which struck deceased, he was guilty of homicide in firing the last shots after any apparent necessity for self-defense had passed if those shots hastened to a material degree the death of decedent, even though the first shots were fired in self-defense and would probably have resulted in death.

6. Homicide 🔑291—Instruction held to require finding shots fired after apparent necessity had passed were cause of death.

An instruction authorizing a conviction, notwithstanding the plea of self-defense, if the jury found that the shot or shots which killed deceased were fired after all apparent danger had passed, required the jury to find that the shots fired after the danger had passed were the cause of death and not the former shots fired in self-defense.

7. Criminal law 🔑830—Requested instruction properly refused if any part should not have been given.

If any part of a single requested instruction should not have been given, the action of the trial court in rejecting the whole will be affirmed.

Opinion of Supreme Court Denying Hearing.

8. Criminal law 🔑758—Requested instruction as to weight of defendant's testimony held erroneous.

A statement in a requested instruction that when a defendant takes the stand his testimony is not to be distrusted merely because he is the defendant, but is to be weighed in the same light as the testimony of any other witness in the case, was erroneous as an instruction as to the credibility of a witness, contrary to Const. art. 6, § 19, prohibiting judges to charge the jurors with respect to matters of fact.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Robert Brown was convicted of murder in the second degree, and he appeals from the judgment of conviction and from the order denying his motion for a new trial. Affirmed.

S. S. Hahn, of Los Angeles, for appellant.
U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. Defendant was charged with the murder of one William Antior. The jury returned a verdict of guilty of murder in the second degree, and defendant now appeals from the judgment and from the order denying him a new trial. No question is raised as to the sufficiency of the evidence to support the verdict. Appellant, who admitted the killing but claimed that he acted in self-defense, complains of certain rulings and instructions.

Defendant occupied an apartment on the third floor of an apartment house in the city of Los Angeles. On the second floor lived a couple who on the evening of May 20, 1922, were entertaining in their apartment the deceased and a few other guests. These latter seem to have been an uproarious party of merrymakers, for some time after midnight defendant went to their door and complained of the noise they were making, threatening to have them arrested for disturbing his peace. The hostess requested defendant to go away, and threatened, in turn, to have him arrested for disturbing the peace of herself and guests. Thereupon defendant returned to his apartment on the floor above. Shortly thereafter the deceased, who was unarmed, left the apartment where he and others were guests of the couple on the second floor, and walking upstairs to defendant's apartment, invited the latter to come out and fight. Defendant, who was armed with a pistol, fired four shots at the deceased. Each of the four bullets took effect, and Antior died in a hospital 14 hours later. According to the evidence adduced by the prosecution, defendant, while seated on a table in his apartment, fired the shots at the deceased while the latter stood in the hallway about two feet outside and in front of the open door leading into defendant's room. Witnesses for the defendant, on the other hand, testified that when the deceased arrived at the spot in front of the door leading to defendant's apartment the door was closed, and that, after challenging defendant to come out and fight, Antior angrily pushed the door open and entered the room, exclaiming as he did so, "Well, if you don't go out and fight, I will go and get you, you son of a bitch," and that it was then that defendant fired the four shots.

[1] A witness for the prosecution, over defendant's objection that it was not a part of the res gestæ, testified that shortly after the shooting defendant exclaimed, "I got one of them, and I will get the rest." This testimony was properly admitted. People v. Sampo, 17 Cal. App. 135, 149, 118 Pac. 957; People v. Hawes, 98 Cal. 648, 33 Pac. 791. While it was not admissible as a part of the res gestæ, yet as an admission of defendant tending to show ill will toward the decedent immediately after the fatal shots were fired it was relevant to the issue of express malice. State v. Smith, 125 Mo. 2, 28 S. W. 181; Lewis v. State, 29 Tex. App. 201, 15 S. W. 642, 25 Am. St. Rep. 720.

[2] A dying declaration given by the deceased to his sister was admitted in evidence. It is contended that the preliminary proof upon behalf of the people was not sufficient to lay a proper foundation for its admission. The sister was with her dying brother at the hospital for about two hours immediately before he expired. It was during this time and shortly before he breathed his last that he made his dying declaration. A witness who was present when the declaration was made testified that shortly prior thereto the deceased took a ring off his finger, gave it to his sister, and told her to keep it; that he informed his sister that his furniture was paid for, and told her to keep that also; that he told her to keep the sewing machine, upon which he said there remained one or more payments to be made; that he told her to keep everything; that in giving his dying declaration he gave it "between breaths"; and that it "would take him five minutes to get his breath after saying a few words." The sister testified that she asked her brother if he could talk and that he replied that "he knew he was dying." Thereupon he made his dying declaration. Taking all the evidence together and considering all the attending circumstances, it was sufficiently shown that the deceased made the declaration under the sense of impending death, and that there was nothing to show a revived or subsequent hope of recovery. The court did not err in admitting it in evidence.

The declaration was not reduced to writing—the deceased expired before that could be done. The sister testified that it was given in the following words:

> "I asked my brother, I says: 'Billie, tell me the truth. Where were you when you were shot?' He said, 'I was outside of Brown's door with my back to his door.' I said, 'Did you go in Brown's room?' and he said, 'No, he killed me in cold blood.' So I said: 'Now, Billie, tell me the truth. I will ask you again whether you were in Brown's room.' He said, 'No,' which he says, 'I asked Brown to come outside'; and he says, 'After I come in off that little porch my back was to Brown's door, and Brown sat on his table in his bathrobe and shot me from the back.' I said, 'You wasn't in his room?' and he said, 'No.' He said, 'I will make that statement to the detectives if you get them.' And I telephoned twice for the detectives, and they were so long coming that he died about 10 minutes before they got there."

[3, 4] Appellant urges as further objections to the admission of this declaration that parts of it were but conclusions of the deceased, such, for instance, as the statement that "he killed me in cold blood," and that there was no necessity for its introduction, because the killing was admitted. There is no merit in either contention. True, the declaration that the decedent was killed "in cold blood" was not the narration of a fact but was an expression of the mere opinion or belief of the dying man. How-

ever, the declaration was not objected to in the court below upon the ground that any part of it consisted of conclusions or of statements of mere opinion, nor was any motion made to strike out any of its objectionable features. The attention of the lower court not having been called to this possible ground for a motion to strike, appellant cannot now be heard to urge the objection for the first time in this court. There is no merit in the point that because the killing was admitted there was no necessity for introducing the dying declaration. The declaration tended to destroy defendant's claim that he shot in self-defense.

As already stated, each of the four shots took effect in the decedent's body. The trial court, after instructing the jury clearly and fully as to the law of self-defense applicable to the circumstances of the case, told them that if, under all the circumstances as they would appear to a reasonable man situated as defendant was, the firing of one shot or more was all the force appearing necessary to the defendant as a reasonable man to resist the assault upon him, then under such circumstances the firing of any additional shot or shots would not be justifiable by the law of self-defense. The instruction as a whole was substantially the same as that which was commented upon and upheld in People v. Barrett, 22 Cal. App. 780, 786, 136 Pac. 520. It had reference solely to the apparent necessity, or absence thereof, for firing fatal shots in excess of those sufficient to protect the defendant.

[5, 6] As a basis for his argument against the instruction appellant claims that it was the first or second shot which caused the death of Antior, and that therefore he was not amenable to a conviction of homicide by reason of any bullet which was fired into the body of the deceased after the latter had received his mortal wound; that the firing of such subsequent shot or shots might constitute good ground for his conviction of assault—a crime with which he was not charged and for which he was not on trial—but that since it could not afford ground for his conviction of the only crime for which he was on trial, homicide, it was error to give the instruction. There is no merit in the point. All of the wounds were of such a character that the jury would be warranted in finding that any one of the bullets, if not sufficient in itself to produce death, at least contributed to and hastened the demise of Antior. If appellant did not fire the last shot in self-defense, and if the wound inflicted by it contributed to or hastened Antior's death, the jury could properly find appellant guilty of homicide by reason of that shot, even though the first was fired in self-defense and though at the time the last shot was fired the deceased was already so severely wounded that his death would have followed in a very short time. Rogers v. State, 60 Ark. 76, 29 S. W. 894, 31 L. R. A. 465, 46 Am. St. Rep. 154. It is said by Mr. Bishop that—

> "Whenever a blow is inflicted under circumstances that render the party inflicting it clearly responsible, if death follows, he will be deemed guilty of homicide, though the person beaten would have died from other causes, or would not have died from this one had not others operated with it; provided the blow really contributed either mediately or immediately to the death in a degree sufficient for the law's notice." 2 Bish. Cr. Law (New) par. 637.

Moreover, the instruction made it clear to the jurors that they could not convict appellant of homicide by reason of any shot fired after apparent danger had passed unless they found that such subsequent shot killed the deceased. As a part of the instruction complained of the court specifically charged the jury that if they found "that the shot or shots *which killed deceased* * * * were fired by defendant * * * after all apparent danger which would justify a reasonable man in further resistance had passed, *then and in that event* the defendant would not be justified under the law of self-defense." (Italics ours.)

Finally, it is urged that the court erred in refusing to give an instruction requested by appellant. It seems that a witness for the prosecution testified that some time previous to the trial defendant had threatened that if he (the witness) should testify against defendant on the trial, "he [the witness] would eat dust." Defendant voluntarily took the stand in his own behalf and denied that he had made any such threat. This was as far as his testimony went. He did not testify to any fact which constituted a constituent element of the charge in issue—the killing of Antior.

The requested instruction was as follows:

> "You are instructed that the defendant in a criminal action need not take the witness stand to testify in his own behalf, and his failure to take the stand should not influence you against him. When a defendant does take the stand he has a right to testify about *any portion* of his case, and no prejudice should be raised in the jurors' minds against him because he does not testify about all instances concerning his case. When a defendant takes the stand his testimony is not to be distrusted merely because he is the defendant; on the contrary, his testimony is to be weighed by you in the same light as the testimony of any other witness in the case." (Italics ours.)

The instruction was properly refused. It may be that under the circumstances it would have been error had the court refused a requested instruction to the effect that where a defendant in a criminal action testifies only to a collateral matter—a matter not directly related to any fact which is a constituent part of the crime with which he is charged—no inference unfavorable to him can be drawn from his failure to testify to such matters as are directly connected with the charge in issue. But that was not the instruction requested. If the court had given the instruction as requested, its effect would have been to charge the jury that when a defendant takes the stand and testifies concerning "any portion of his case" (such is the language of the requested instruction), no prejudice should be raised against him because he does not testify to all the facts of his case. Such an instruction is too broad. It is not a correct statement of the law. Had it been given, it would have been tantamount to a charge that the defendant in a criminal action can tell half of the story touching the merits of the case and then stop short by omitting to explain incriminating circumstances and events in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it. Such is not the law. A prisoner who takes the stand in his own behalf waives his constitutional privilege of silence; and if he testifies to the merits of the charge but withholds testimony of other facts which form a part of the charge against him and of which he is informed, he must expect to incur the discredit which the jury would naturally visit upon the ordinary witness pursuing a like course. State v. Harrington, 12 Nev. 125; State v. Ulsemer, 24 Wash. 657, 64 Pac. 800; State v. Tatman, 59 Iowa, 471, 13 N. W. 632; Diggs v. United States, 220 Fed. 545, 136 C. C. A. 147, where an elaborate discussion of the authorities may be found; affirmed 242 U. S. 470, 493, 494, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168.

[7] Moreover, the concluding part of the requested instruction, that which says that the testimony of the defendant in a criminal action "is to be weighed by you in the same light as the testimony of any other witness in the case," justified the refusal of the whole instruction. "* * * Any instruction at all as to the credibility of any witness, or the weight to be given to his testimony, is violative of section 19 of article 6 of the Constitution, which provides that 'judges shall not charge jurors with respect to matters of fact.'" People v. Van Ewan, 111 Cal. 149, 43 Pac. 521. Such instructions should not be given, and it is always proper to refuse them. People v. Winters, 125 Cal. 329–330, 57 Pac. 1067; People v. Ross, 134 Cal. 258, 66 Pac. 229. See People v. Hiltel, 131 Cal. 580, 63 Pac. 919. It has been repeatedly held that if any part of a single instruction should not have been given the action of the trial court in rejecting the whole will be affirmed. People v. Davis, 64 Cal. 440, 1 Pac. 889.

The judgment and order are affirmed.

We concur: WORKS, J.; CRAIG, J.

Opinion of the Supreme Court in Banc Denying Hearing.

PER CURIAM. [8] In denying the petition for rehearing, although this point is not urged in the petition, we do not wish to be understood as approving that portion of the opinion dealing with the last instruction set forth in the opinion with reference to the defendant's testimony. It is unnecessary to determine in this case whether the defendant was entitled to an instruction that—

> "When a defendant does take the stand he has a right to testify about any portion of his case, and no prejudice should be raised in the jurors' minds against him because he does not testify about all instances concerning his case."

The instruction was properly refused because it infringes upon the province of the jury in the last clause reading as follows:

> "When a defendant takes the stand his testimony is not to be distrusted merely because he is the defendant, on the contrary, his testimony is to be weighed by you in the same light as the testimony of any other witness in the case." People v. Winters, 125 Cal. 325, 330, 57 Pac. 1067, and other cases cited in the concluding paragraph of the opinion of the District Court of Appeal.

See, also, 8 Cal. Jur. § 394, p. 365, and cases cited.

62 Cal. App. 177

Ex parte HAYWARD. (Cr. 1127.)

(District Court of Appeal, First District, Division 1, California. May 10, 1923.)

1. Habeas corpus 🔑30(2)—Objection that allegations are uncertain not available.

Objection under Pen. Code, § 952, to uncertainty of allegations of criminal complaint in justice's court, of a city, is not open on habeas corpus.

2. Criminal law 🔑90(2)—Justice's court in city held to have jurisdiction of prosecution for violation of ordinance prohibiting sale of liquor.

Under Code Civ. Proc. § 103, and Pen. Code, § 1425, justice's court of city of Berkeley had jurisdiction of prosecution for violation of city ordinance prohibiting sale of liquor and making violations a misdemeanor.

3. Habeas corpus 🔑30(2)—Complaint for selling, though not alleging sale for beverage purposes, held not open to attack.

Complaint in justice's court of Berkeley alleging adoption of ordinance prohibiting sale of intoxicating liquor, but permitting sale for non-beverage purposes, and charging that defendant willfully and in violation thereof sold intoxicating liquor, thereby violating the ordinance and becoming liable to the penalty provided therein, did not wholly fail to state public offense so as to be open to attack by habeas corpus, though not alleging sale was for beverage purposes.

4. Habeas corpus ⚷85(1)—Presumed that arresting officers and magistrate performed their duties.

It is presumed on habeas corpus that police, who arrested petitioner, and magistrate before whom she appeared and was convicted and sentenced, performed their duties properly and with due regard to the law and petitioner's rights.

Original application by Katharyn Hayward for writ of habeas corpus. Writ discharged, and petitioner remanded.

Harry G. McKannay, of San Francisco, and Allen C. Cunha, of Oakland, for petitioner.

Ezra W. Decoto, Dist. Atty., and Frank M. Shay, Asst. Dist. Atty., both of Oakland, for respondent.

ST. SURE, J. Petitioner, Katharyn Hayward, was convicted in the justice's court of the city of Berkeley upon a complaint alleging in part and charging as follows:

> "That heretofore, to wit, on the 14th day of June, 1921, the city council of the city of Berkeley, in pursuance of the power and authority in it vested by the Constitution of the State of California, and in it vested by law, duly passed and adopted a certain ordinance, entitled 'Ordinance No. 724 N. S., prohibiting the sale, manufacture, unlawful possession or transportation of intoxicating liquors, and providing penalties for violation hereof.'
>
> "That said Ordinance No. 724 N. S. now is in full force and effect in the city of Berkeley. That Section 18 of said Ordinance No. 724 N. S. declares any violation of said Ordinance No. 724 N. S. to be a misdemeanor.
>
> "That heretofore, to wit, on the 3d day of October, 1922, in the city of Berkeley, in the county of Alameda, state of California, a certain person, to wit, Katharyn Hayward, did then and there commit the crime of misdemeanor, to wit, the said Katharyn Hayward did then and there willfully, and in violation of said Ordinance No. 724 N. S., and more particularly section 2 thereof, sell intoxicating liquor within the city of Berkeley, thereby violating the provisions thereof, and thereby becoming liable to the penalty provided therein."

Petitioner pleaded guilty and was sentenced to imprisonment in the county jail of the county of Alameda for a period of six months. Thereafter she took an appeal from the judgment of conviction to the superior court of the county. The superior court affirmed the judgment of the justice's court and she was remanded to the custody of the sheriff. Subsequently she applied to this court for a writ of habeas corpus and was released upon bail pending a hearing of this proceeding.

Petitioner's sole contention is that the complaint upon which she was convicted "utterly and wholly fails to state a public offense known to the law," for the reason that it fails to allege that the intoxicating liquor was sold *for beverage purposes*. Section 2 of the ordinance particularly referred to in the complaint, and for violating the provisions of which petitioner was arrested, reads as follows:

> "Sec. 2. No person shall manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor, except as authorized in this ordinance, and all the provisions of this ordinance shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only by a person holding a valid permit from the United States Internal Revenue Department, and only in accordance with the laws of the United States; provided, nothing in this ordinance shall prevent the purchase and sale of warehouse receipts covering distilled spirits on deposit in government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts."

Counsel for petitioner concede that a writ of habeas corpus may not subserve the office of a demurrer (In re Ruef, 150 Cal. 665, 89 Pac. 605), but argue that this rule does not apply to courts of inferior and limited jurisdiction, citing Ex parte Kearny, 55 Cal. 212, and Ex parte Greenall, 153 Cal. 767, 96 Pac. 804. Since the opinion in Ex parte Greenall, supra, was written, in 1908, there has been exhaustive discussion of the rule mentioned. Mr. Justice Hart, in Re Avdalas, 10 Cal. App. 507, 512, 102 Pac. 674, 676, says:

> "It does not definitely appear from the opinion in the Greenall Case, supra, that the court intends to hold that the writ of habeas corpus, as to misdemeanors of which justices' and police courts have jurisdiction, shall serve the purpose of a writ or proceeding for the correction of errors, and, therefore, I agree with the court in the case of Ex parte Williams, 121 Cal. 328, 53 Pac. 706, that the writ is not to be made to serve the office of a demurrer."

Petitioner in Re Turck, 37 Cal. App. 601, 604, 174 Pac. 100, relied upon Ex parte Kearny, supra, and Ex parte Greenall, supra. Mr. Justice Conrey, in the opinion of the court, says:

> "* * * Ex parte Kearny, 55 Cal. 212. The particular application of the rule in that case was that the court determined that the alleged offense stated in the complaint in the police court where the petitioner was convicted did not constitute any crime against the law, and that therefore the petitioner was entitled to be

discharged on habeas corpus. In Ex parte Greenall, 153 Cal. 767, 770 (96 Pac. 804, 806), the court said: 'It has been the uniform practice to consider on habeas corpus the question of the sufficiency of the complaint in such inferior courts, and to discharge the prisoner where such complaint failed to show a public offense under the laws of the state.'

"The courts have been careful, however, not to extend the principles above stated so far as to interfere with the use of the right of appeal as the ordinary remedy of a defendant in a criminal case. 'The writ of habeas corpus is not intended to review the regularity of the proceedings in any case, but rather to restore to his liberty the citizen who is imprisoned without color of law.' In re Kowalsky, 73 Cal. 120, 122, 14 Pac. 399. 'A writ of of habeas corpus cannot be made the vehicle of determining mere errors, where a conviction has been had and the commitment thereon is in due form. If the court below had no jurisdiction of the offense charged, or if it affirmatively appears by the record that the prisoner was tried and sentenced for the commission of an act which, under the law, constitutes no crime, the judgment is void and the prisoner should be discharged.' Ex parte Miranda, 73 Cal. 365, 371, 14 Pac. 888, 891. In Ex parte Turner, 75 Cal. 226, 16 Pac. 898, it appeared that in a police court the petitioner had been convicted of a misdemeanor. The judgment did not recite the date of the offense or state the elements of the crime as fully as they were necessarily stated in the complaint. Nevertheless the petitioner was remanded, the court saying: 'The distinction between a void and a voidable judgment is sometimes very nice, and the judgment will fall under the one class or the other accordingly as it is regarded for different purposes. * * * After trial and conviction the commitment is of a higher dignity than an ordinary commitment holding to answer. This is true with courts, both of special or limited jurisdiction and those of general jurisdiction. The judgment of a court of inferior jurisdiction is, to a great extent, as far beyond the reach of collateral attack by the writ of habeas corpus as the judgments of higher courts are. Church on Habeas Corpus, § 240. * * * The failure of the court to state the elements of the crime in the judgment as fully as they were necessarily stated in the complaint does not render the judgment void. The offense is sufficiently designated in the judgment. To entitle the petitioner to a discharge, we must necessarily assume that the record of conviction fails to show the commission of any offense. To reach this conclusion, we should have to resort to a hypercritical, overnice, and technical examination of the commitment, convert the writ of habeas corpus into a writ of error, and defeat the ends of justice.'"

In Re Reineger, 184 Cal. 97, 193 Pac. 81, also habeas corpus proceeding, the Supreme Court said, at page 104 of 184 Cal., at page 84 of 193 Pac.:

"It may be that the complaint is uncertain because it does not state whether the petitioner is a wholesale dealer or a retail dealer as defined in the act. It does not allege whether the 60 cans sold amounted to one full case or not. Habeas corpus lies in such cases only when the magistrate is without jurisdiction to issue the warrant of arrest. Where a complaint in a court of inferior jurisdiction states facts showing that the defendant has committed a public offense, but is subject to attack by demurrer on the ground that it is uncertain as to the particular offense committed, the inferior court has jurisdiction and the defect will not be ground for his release on habeas corpus. Ex parte McNulty, 77 Cal. 164, 166, 11 Am. St. Rep. 257, 19 Pac. 237. There is nothing in Ex parte Kearney, 55 Cal. 212, or Ex parte Greenall, 156 Cal. 767, 96 Pac. 804, that is contrary to this rule. The complaints there considered failed to show that the defendant had committed any offense whatever."

This opinion was written by Mr. Justice Shaw, and concurred in by the then chief justice (Angellotti), who wrote the opinion in Ex parte Greenall.

In Re Culver, 187 Cal. 437, 202 Pac. 661, Mr. Justice Lennon, writing the opinion for the court, says:

"It is true, as petitioner contends, that it is a settled rule in habeas corpus proceedings that a court may determine whether or not a complaint in a justice's court in a criminal proceeding states facts sufficient to constitute a public offense. Ex parte Kearney, 55 Cal. 212; Ex parte Greenall, 153 Cal. 767, 770, 96 Pac. 804; Matter of Ah Sing, 156 Cal. 349, 104 Pac. 448. However, the rule is also well established that in determining the sufficiency of such a complaint the greatest liberality of construction must be indulged; if the complaint states facts which constitute a crime, it will not be held insufficient because other facts are stated which are irrelevant or immaterial or because the law violated by the alleged acts is inaccurately described therein. Ex parte Williams, 121 Cal. 328, 330, 53 Pac. 706."

In the Matter of Kaster, 52 Cal. App. 454, 198 Pac. 1029, it was said:

"The law is clear that when the complaint wholly fails to state a cause of action the writ of habeas corpus will lie (Ex parte Williams, 121 Cal. 328, 53 Pac. 706; Ex parte Kearny, 55 Cal. 228; Ex parte Sullivan, 17 Cal. App. 278, 119 Pac. 526. But '* * * the proceeding may not be made to subserve the office of a demurrer; and if the facts alleged squint at a substantive statement of the offense, no matter how defectively or inartificially they may be stated, or however confused and beclouded they may be rendered through intermingling them with immaterial or unnecessary averments, the writ will not lie. Ex parte Whitaker, 43 Ala. 323; Matter of Prime, 1 Barb, 340; Ex parte Williams, 121 Cal. 330, 331, 53 Pac. 706.' To same effect, Ex parte Ruef, 150 Cal. 665, 89 Pac. 605; In re Avdalas, 10 Cal. App. 507, 102 Pac. 674."

The Matter of Kaster was heard after decision in the District Court of Appeal by the Supreme Court (185 Cal. 647, 198 Pac. 1031), which said:

"The court [referring to the District Court of Appeal] filed a written opinion. * * * All points available to petitioner on habeas corpus are considered in that opinion, which, to our minds, correctly states the law in regard thereto. The application for a writ is denied. All concur."

The last expression of the Supreme Court upon the subject is to be found in Re Von Perhacs, 212 Pac. 689, decided March 1, 1923, in which the court said:

> "Habeas corpus may not be resorted to in lieu of a demurrer to a complaint in a misdemeanor case upon a ground of uncertainty, etc. The defect, if any, in the complaint in the instant case, for failure to specify the particulars of the offense charged, might have been remedied by demurrer, and if not by demurrer, then by motion in arrest of judgment as provided under section 1452, Penal Code."

Extended reference is made to the discussion of this subject by the appellate courts for the purpose of demonstrating that there is a marked trend in the decisions toward a more liberal application of the rule as stated in Ex parte Kearny, supra, and Ex parte Greenall, supra. Indeed, we feel constrained to say that the rule of those cases has been whittled down by judicial construction until it has become a mere shadow line of authority.

[1] The objection as to the uncertainty of the allegations in the complaint (section 952, Pen. Code) is answered by what was said by the Supreme Court in Re Von Perhacs, above quoted, and also, with more particularity, in Re Reineger, 184 Cal. 97, 193 Pac. 81; Re Avdalas, 10 Cal. App. 507, 102 Pac. 674; and in People v. Bonfanti, 40 Cal. App. 614, 181 Pac. 80.

[2] The justice's court of the city of Berkeley is established under the provisions of section 103 of the Code of Civil Procedure. This section provides that—

> "Justices of the peace of cities and justices' courts of cities shall also have jurisdiction of all proceedings for the violation of any ordinance of any city in which courts are established, both civil and criminal, * * * and generally exercise all powers, duties and jurisdiction civil and criminal, of police judges, judges of police courts, recorder's court or mayor's court, within such city."

The justice's court of the city of Berkeley has jurisdiction of certain public offenses committed in the county of Alameda, including "all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment." Pen. Code, § 1425. It is plain that the offense charged against the defendant comes within these provisions.

Counsel for petitioner calls our attention to the fact that Ordinance No. 724 (New Series) of the city of Berkeley is identical with the Volstead Act, and cites the cases of United States v. Dowling (D. C.) 278 Fed. 630; United States v. Horton (D. C.) 282 Fed. 731, 732; State v. Catalino, 118 Wash. 611, 204 Pac. 179, 180; State v. Bulloch, 151 La. 593, 92 South. 127; and United States v. Boasberg (D. C.) 283 Fed. 305, as authority for the proposition that a complaint under such a law fails to state a public offense unless it charges that the intoxicating liquor was sold for "beverage purposes." An examination of these cases shows that in United States v. Dowling, supra, each defendant filed a demurrer and the demurrer was sustained, the court stating: "If [the indictment] is bad, the remedy is by demurrer or motion in arrest of judgment." In United States v. Horton, supra, the indictment, upon demurrer, was held fatally defective. In State v. Catalino, supra, the concluding paragraph of the court's opinion is:

> "The court should have granted the defendant's motion for arrest of judgment, and for that reason the judgment is reversed."

In State v. Bulloch, supra, the case was decided upon a motion in arrest of judgment. In United States v. Boasberg, supra, the matter was submitted and decided upon demurrers and motions to quash the indictments.

[3, 4] The charging part of the complaint is that—

> "Katharyn Hayward did then and there willfully, and in violation of said Ordinance No. 724 N. S., and more particularly section 2 thereof, sell intoxicating liquor within the city of Berkeley, thereby violating the provisions thereof and thereby becoming liable to the penalty provided therein."

The most that can be said in criticism of the allegation quoted is that it may not be sufficiently specific, and that it is the mere statement of a conclusion. But, surely, it attempts to charge an offense; it, at least, as was said in Ex parte Williams, 121 Cal. 328, 53 Pac. 706, supra, "squints" at an offense. It seems to us that it clearly charges that petitioner sold intoxicating liquor within the city of Berkeley in violation of law. Certainly there is nothing ambiguous about the language used. She was not misled in any way by the charge, and pleaded guilty thereto. The commitment shows that after conviction "defendant Katharyn Hayward being present in court, said defendant was informed by the court of the nature of the complaint filed against her, and of her plea, and of her conviction of said offense, and was asked by the court if she had any legal cause to show why judgment should not be pronounced against her; and no sufficient cause being alleged, or appearing to the court," etc. It is presumed that the police who arrested petitioner, and the magistrate before whom she appeared, was convicted, and sentenced, performed their duties properly and with due regard to the law and the rights of the petitioner. We have no hesitancy in saying, in conclusion, that, in our opinion, the complaint does not wholly fail to state a public offense, and that any defects therein might have been remedied by demurrer or by motion in arrest of judgment.

The writ is discharged, and the petitioner remanded.

We concur: TYLER, P. J.; RICHARDS, J.

62 Cal. App. 259

GLENN v. INOUYE. (Civ. 4132.)

(District Court of Appeal, Second District, Division 1, California. May 22, 1923.)

Landlord and tenant ⟹95—Lessor held entitled to cancel lease upon entering into a contract for "sale" of property.

Where a lease provided that notice of cancellation should only be given in the event that the lessor intended to erect a new building on the premises, "or shall have disposed of said premises by sale or ground lease," notice of cancellation was properly given where lessor had entered into a contract for the sale of the property, title to remain in him until full payment of the purchase price, the word "sale" including either a present sale or an agreement of sale.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sale.]

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by H. R. Glenn against Takara Inouye to cancel a lease. Judgment for plaintiff, and defendant appeals. Affirmed.

Collier & Labarere, of Los Angeles, for appellant.

J. Marion Wright, of Los Angeles, for respondent.

CURTIS, J. This action was brought by H. R. Glenn, respondent, against Takara Inouye, appellant, to recover the possession of certain premises situated in Los Angeles, Cal., and held by appellant under a certain lease from the Alco Realty Company, a corporation, to appellant.

The Alco Realty Company, a corporation, on or about March 21, 1921, leased to Takara Inouye, the appellant herein, by a certain lease in writing, the premises described as "the two upper floors at No. 128 E. First street, Los Angeles, California," for the period of two years and six months from April 1, 1921, at a monthly rental of $250, payable in advance on the first day of each month of said term.

The said lease was accepted by the appellant, who thereupon went into possession of the leased premises, under and by virtue of said lease, and still continues to hold and occupy the same. Appellant has paid the rental provided for in the lease and is not in default in the payment of rental. The said lease contains the following clause:

> "It is expressly stipulated and agreed by and between the parties hereto that one of the provisions for granting this lease is that the lessor may, at any time upon 60 days' written notice to the lessee of its intention so to do, cancel this lease: Provided, however, that the above notice of cancellation shall only be given in the event that the lessor, its successors or assigns, intend to erect a new building on the premises, or shall have disposed of said premises, or shall have disposed of said premises by sale or ground lease."

The Alco Realty Company, on or about February 25, 1922, entered into a contract in writing with H. R. Glenn, the respondent herein, whereby the Alco Realty Company, as seller, agreed to sell to H. R. Glenn, and the said H. R. Glenn, as buyer, agreed to buy, the property involved in this action for the sum of $55,000, payable $15,000 upon the execution of the contract, $5,000 on December 30, 1922, and the balance of $35,000 to be paid in installments of $500 per month with interest, title to remain in the seller until the full amount of the purchase price shall have been paid. The title to the said premises still remains in the Alco Realty Company, the full purchase price as yet not having been paid.

After the execution of said contract between the Alco Realty Company and respondent, the Alco Realty Company, on or about February 27, 1922, caused to be served on the appellant a 60-day notice of its intention to cancel appellant's lease, stating in said notice that "it was selling" the property to H. R. Glenn, the respondent. The appellant continues in possession of the demised premises, claiming the right of possession under his lease.

The court rendered judgment in favor of respondent, declaring the said lease to be terminated, and ordered restitution of the demised premises to the respondent. The sole point involved in this appeal is whether or not the contract of February 25, 1922, between the Alco Realty Company and the respondent, comes within the terms of the clause of the lease above set out, authorizing the lessor to terminate said lease upon 60-days' notice.

The appellant contends that only by a sale of said premises could the lessor acquire the right to cancel the lease by giving the notice, and that by "sale" is meant a contract by which the vendor transfers to the vendee the title to the property; that an agreement for the purchase and sale of the premises does not constitute a "sale" as contemplated by the terms of the lease, nor as defined by the laws of this state.

To again refer to the clause of the lease providing for the cancellation thereof, we find "that the above notice of cancellation shall only be given in the event that the lessor, its successors or assigns, intend to erect a new building on the premises, or shall have disposed of said premises by sale or ground lease." While in this proceeding we are directly concerned with only that portion of said clause wich provides that notice of cancellation shall be given in the event that the lessor shall have disposed of said premises by sale, yet by reference to the whole clause above quoted we are enabled to ascertain the real intention of the parties upon the subject of the cancellation of the lease. Reading the whole clause, we ascertain that the parties with some considerable care provided that the lease might be canceled in case the lessor decided to construct a new building upon the premises, or should dispose of the land by ground lease, or should dispose of it by sale. It was the evident intent of the parties to leave the owner free to sell said premises, or to erect a new building thereon, or to rent the ground upon which the present building stood, unhampered by said lease, but, so long as the premises remained in the condition in which they were at the date of the lease, the lessee should occupy the same under the terms thereof. From the context of the lease, there is nothing that would indicate to us that the parties intended to restrict the lessor's right to cancel the lease to an absolute sale of the same. It is true the word "sale" is used by the parties, but by the use of this term the parties may well have intended an agreement of sale as well as an absolute sale. As was said by the court in the Estate of Goetz, 13 Cal. App. 198, 109 Pac. 145:

> "It is true that in the contract in question the word 'sold' was used, and that Chapman went into possession of the property and wrecked some of the buildings. But it is conceded, as of course it must be, that the word 'sold' does not conclusively show a present conveyance."

Again in Boardman Co. v. Petch, 186 Cal. 476, 199 Pac. 1047, referring to the word "sale," the court says:

> "It is not a word of fixed and invariable meaning. * * * It may be given a narrow or broad meaning as may be indicated by the context or the surrounding circumstances. * * *"

In Walti v. Gaba, 160 Cal. 324, 116 Pac. 963, we find the following language used by the Supreme Court:

> "It is true that the writing states that 'I have this day sold, etc.,' but the use of the word sold or the word bought does not always import a present sale, but such words are frequently used where the parties in fact intend only an agreement to sell. Blackwood v. Cutting Packing Co., 76 Cal. 218, 9 Am. St. Rep. 199, 18 Pac. 248; Anderson v. Read, 106 N. Y. 344, 13 N. E. 292; McLaughlin v. Piatti, 27 Cal. 458; Elgee Cotton Cases, 22 Wall. (U. S.) 180, 22 L. Ed. 863."

From these authorities we are satisfied that by the use of the word "sale" in a contract the parties may intend an absolute sale or an agreement of sale, depending in a great measure upon the context of the instrument in which it is used and the surrounding circumstances of the parties. We are satisfied that in the lease under consideration the parties thereto used the word "sale" to refer either to an absolute sale of the premises or an agreement to sell the same.

We might here call attention to a number of cases brought to recover broker's commissions upon the sale of real property, where the courts have invariably held that the broker has made a sale when he has merely secured an agreement from the purchaser to buy the property. Shainwald v. Cady, 92 Cal. 83, 28 Pac. 101; Gunn v. Bank of California, 99 Cal. 349, 33 Pac. 1105; Jauman v. McCusick, 166 Cal. 517, 137 Pac. 254; U. S. Farm Land Co. v. Darter, 42 Cal. App. 292, 183 Pac. 696.

Appellants rely mainly upon the two cases of Lewis v. Agoure, 8 Cal. App. 146, 96 Pac. 327, and Cross v. Ramdullah (C. C. A.) 274 Fed. 762. From an examination of these two cases we are of the opinion that neither of them can be considered an authority in support of appellant's contention. In the case of Lewis v. Agoure, supra, a lease had been entered into between the predecessors of the plaintiff and the defendant, containing a clause that the lease might be declared null and void at the option of the lessors in the event they should sell the leased property during the existence of the lease. They sold the property to one Wolff, who in turn sold the same to plaintiff. The lessors, Wolff and plaintiff, joined in a notice to the defendant declaring the lease canceled and demanding the possession of the property. The defendant refused to deliver possession of the property, contending that the option to cancel the lease could not be exercised because it was a collateral contract not running with the land, and, the covenantees having conveyed the property without exercising the right, they no longer had any interest in the premises, and could not give the notice provided to be given. The court held that the notice given was sufficient to terminate the lease, and the fact that the lessors no longer held the title was not material, since the option was not to be exercised until a sale was made. The sale under consideration was an absolute sale, and the question as to the right of the lessors to cancel the lease under a mere agreement of sale did not arise in that case.

In Cross v. Ramdullah, supra, there were four leases, executed about the same time. They each contained a clause similar to that in the lease in the present case. After their execution, a contract was entered into between the lessor and a third party named

Obear, whereby the lessor agreed to sell the property to Obear for a consideration, $5,000 of which was to be paid in cash, and the balance of $53,029.40 in deferred payments. The title was to be free and clear of incumbrances, excepting these four leases. In this case the court said:

> "From a careful scrutiny of these agreements, it is obvious that it was not the purpose or intent of the parties to make a present sale of the lands, and, further, that it was neither their design nor purpose at any time to disturb the possession of the lessees, even in the event of a completed sale in pursuance of the agreements. Furthermore, it was problematical whether the agreements would ever terminate in a consummated sale by transfer of the title, but in any event the lessees were not to be disturbed, for they were expressly excepted from the assurance against incumbrances."

From this language it is evident that the court was of the opinion that whether the agreements between the parties contemplated a present sale, or merely an agreement of sale, that it was neither their design nor purpose at any time to disturb the possession of the lessees, and it therefore held that a notice given by the lessors to cancel the lease was ineffectual.

It is true that there can be found language in each of these decisions which would support the contention of appellant, but in our opinion this language was not necessary for the decision of the questions involved in either case, and therefore these cases cannot in our opinion be considered as authority upon the question before us.

We therefore conclude that the word "sale" in said lease, wherein it is provided that notice of cancellation shall only be given in event that the lessor shall dispose of said premises by sale, is used in its broad and general meaning and refers either to a present sale or an agreement of sale, and that the lessor, having entered into such an agreement of sale and given the notice required by said lease for its cancellation, the rights of the defendant in said lease, or in or to the premises described therein, were thereby terminated.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

191 Cal. 494

POMPER v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY, et al. (L. A. 7681.)

(Supreme Court of California. July 9, 1923. Rehearing Denied August 9, 1923.)

1. Certiorari 🔑5(1)—Judgment in action to quiet title declaring title in plaintiff held interlocutory.

In an action to quiet title and to recover the rents and profits, a judgment declaring the legal title to be in plaintiff, but reserving for future determination the amount of rents and profits due from defendant, *held* an interlocutory judgment reviewable on appeal from final judgment under Code Civ. Proc. § 956; and hence an order granting a new trial of such interlocutory judgment, even if erroneous, will not be disturbed on certiorari.

2. Appeal and error 🔑80(4)—Generally decree fixing liability but not amount thereof held not "final decree."

Generally, where a decree fixing the liability and rights of the parties refers the case to a subordinate tribunal for a judicial purpose, such as the statement of an account upon which a further decree is to be entered, the decree is not such a final decree as would be appealable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

In Bank.

Application for Emilia Pomper, also known as Emilia Augusta Pomper, for certiorari to review an order of the Superior Court of the State of California in and for the County of Los Angeles, Charles H. Burnell, Judge, granting a new trial in the action of Pomper v. Behnke. Order affirmed.

John F. Poole, of Los Angeles, and H. E. Gleason, of Madera, for petitioner.

Isaac Pacht and Rudolph & Warne, all of Los Angeles, for respondents.

WILBUR, C. J. This is a proceeding on certiorari to review an order of the respondent court granting a new trial in the action of Pomper v. Behnke. The application is based upon the claim that the judgment rendered in the action, upon which the motion for a new trial was based, was an interlocutory and not a final judgment, and for that reason it is claimed the court had no jurisdiction to grant the motion for a new trial, which is only appropriate, it is claimed, after the entry of the final judgment in the action. The respondent claims that the judgment rendered by the trial court was a final judgment, and that the motion for new trial having been made after due notice and within due time, was within the jurisdiction of the trial court.

[1] It appears from the record certified to this court that the decision in Pomper v. Behnke turned upon the effect of a deed executed by Fritz Pomper to his wife, Emilia Pomper. The difficulty arises from the fact that Fritz Pomper on September 25, 1881, at Chemnitz, Germany, married a woman named Emilia Lenk; on August 26, 1896, at Chicago, Fritz Pomper, with due formalities, married Emilia Lenk, another woman of the same name as his first wife. Thereafter he lived with the second Emilia Lenk, and on September 20, 1915, executed and acknowledged a deed of gift to the property involved in this action "to Emilia Pomper, my wife." In June, 1918, Emilia Pomper of Los Angeles (the second wife) conveyed the property in question to defendant Behnke, who thereafter conveyed it to the defendant Lena Heinze. The action of Pomper v. Behnke was begun September 29, 1920, by the first Emilia Pomper to quiet the plaintiff's title to the land in question and to recover the rents, issues, and profits thereof. The trial court rendered a judgment which was entitled "Interlocutory Judgment and Decree," declaring that the legal title to the property in question was in Emilia Pomper, the first wife, although it was apparent that the deed was delivered to the second Emilia Pomper, who was living with Fritz Pomper upon the property in question, by whom it was occupied for about 18 years as the home of the reputed husband and wife; the first Emilia Pomper having during all this period resided in Germany. The so-called interlocutory judgment expressly reserved for future determination the question of the amount of the rents, issues, and profits to be paid by the respective defendants to the plaintiff therein because of the use and occupation of the premises during the 18 years preceding the commencement of the action, and also from the date of the action to the rendition of the final decree.

While it is true that the so-called interlocutory judgment purported to settle the basic issue involved in the case, it expressly left for future determination the rights of the parties with relation to the rents, issues, and profits, which was one of the issues raised by the complaint, as the plaintiff prayed for judgment for the value thereof.

[2] The general rule is that where a decree is made fixing the liability and rights of the parties which refers the case to a master or subordinate tribunal for a judicial purpose, such, for instance, as the statement of an account, upon which a further decree is to be entered, the decree is not final. 2 Cal. Juris, §§ 19 and 20, p. 142; California National Bank v. Stateler, 171 U. S. 447, 19 Sup. Ct. 6, 43 L. Ed. 233; Clement v. Duncan (Cal. Sup.) 215 Pac. 1025; Doudell v. Shoo, 159 Cal. 448, 453, 114 Pac. 579.

It is clear, then, that the judgment was in fact as well as name an interlocutory judgment and was not appealable, nor do the proceedings upon a motion for new trial laid down in the Code apply to such a judgment.

This, however, is not determinative as to the question involved in this proceeding. The very fact that the judgment in question was interlocutory left the whole case before the court for final adjudication, and even if it be conceded that the order vacating the interlocutory judgment and granting a new trial was erroneous, it was but an order in the exercise of its jurisdiction over the cause and the parties, to be corrected, if need be, upon an appeal from the final judgment in the action. Code Civ. Proc., § 956.

The order is affirmed.

We concur: LAWLOR, J.; MYERS, J.; WASTE, J.; SEAWELL, J.; KERRIGAN, J.; RICHARDS, Justice pro tem.

---

191 Cal. 387

ANGLO-CALIFORNIA TRUST CO. et al. v. OAKLAND RYS. et al. (S. F. 10758.)

(Supreme Court of California. July 6, 1923. Rehearing Denied Aug. 3, 1923.)

Appeal and error 🔑412—Appeal dismissed where attorney signing notice of appeal not attorney of record.

Where the attorney who signed the notice of appeal and prepared the transcript was not the attorney of record and there had been no substitution, a motion to dismiss the appeal will be granted.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the Anglo-California Trust Company and others against the Oakland Railways, a corporation, and others. Judgment for plaintiffs, and defendant named appeals. Appeal dismissed without prejudice.

Werner Olschewski, of San Francisco, for appellant.

J. C. McKinstry, McKinstry, Haber & Firebaugh, Cushing & Cushing, and Garret W. McEnerney, all of San Francisco, for respondents.

PER CURIAM. The motion to dismiss the appeal on the ground that the attorney who signed the notice of appeal and prepared the transcript was not the attorney of record, and that there had been no substitution of attorneys is granted on the authority of Harrigan v. Bolte, 67 Cal. xix, 8 Pac. 184.[1]

(August 2, 1923.)

Application to modify order of dismissal herein by providing that the dismissal is without prejudice to another appeal. Inasmuch as the appeal was dismissed because of lack of authority of attorney to file notice of appeal, therefore, in effect, no notice of appeal whatever has been filed. The order heretofore made is modified to provide that the dismissal is without prejudice.

---

191 Cal. 404

FIDELITY & CASUALTY CO. OF NEW YORK et al. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (L. A. 7477.)

(Supreme Court of California. July 5, 1923. Rehearing Denied Aug. 2, 1923.)

1. Master and servant 🔑347—Accepted interpretation of terms "employee" and "independent contractor" not altered by Constitution.

The accepted interpretation of the terms "employee" and "independent contractor" defined by Workmen's Compensation Act 1917, § 8(b), has not been altered by Const. art. 20, § 21, nor by the amendment of that section in 1918.

2. Master and servant 🔑367—Relation dependent on control of method of work; "employee;" "independent contractor."

The determinative factor in determining whether one is an employee or an independent contractor is usually found in the solution of the question, Who has the power of control, not as to the result of the work only, but as to the means and method by which such result should be accomplished?

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé; Independent Contractor.]

3. Master and servant 🔑367—Motor truck driver furnishing truck under contract with transporter of freight held an independent contractor, and not an employee, within Compensation Act.

Under a contract between a transporter of freight by motor trucks and decedent, providing that the former employed decedent together with a truck described for a specified period, that decedent agreed to furnish the truck, make repairs, pay operating expenses, including driving, and to make one trip between terminal points each day, for which he was to receive not less than a specified rate per hundred pounds, with a guaranty of not less than a specified sum per month, that the transporter agreed to render services in providing the loads, freight, and shipping, in the billing and collecting of charges, and in loading, unloading, distributing, and assembling of the loads for which he was to receive a specified recompense from the decedent, and that the contract was transferable subject to the approval of the transporter, *held*, that decedent was an independent contractor, and not an employee, within Workmen's Compensation Act, § 8 (b).

Lawlor, Lennon, and Seawell, JJ., dissenting.

---

[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in the California Reports.

In Bank.

Proceeding under the Workmen's Compensation Act by Velma D. Edwards and others for the death of Guy W. Edwards, opposed by M. Haydis, employer, and the Fidelity & Casualty Company of New York, insurer. An order of the Industrial Accident Commission awarded compensation, and the insurer and employer bring certiorari. Award annulled.

Rehearing denied; Lawlor and Lennon, JJ., dissenting.

Jennings & Belcher, of Los Angeles, for petitioners.

A. E. Graupner, of San Francisco, for respondents.

MYERS, J. This is a proceeding in certiorari to review an award of compensation for the death of one Guy W. Edwards, who was killed on November 3, 1921, by the overturning of a motor truck which he was driving while in the course of his occupation. The only question presented upon this review is whether decedent was an employee of the petitioner Haydis, or whether he was an independent contractor.

Haydis carried on the business of transporting freight by motor trucks between Los Angeles and San Diego. In September, 1921, decedent bought a truck, and on October 22, 1921, entered into a written contract with Haydis to carry freight for him between San Diego and Los Angeles. By its terms Haydis, the party of the first part, "hereby engages and employs the exclusive services of the party of the second part [decedent] together with and to operate and run" the motor truck and trailer therein described for the purpose of transporting freight for the party of the first part for a specified period of 14 months. Decedent agreed to furnish the truck and trailer, keep them in repair, pay all operating expenses, including the driving, and to make one trip between Los Angeles and San Diego, or between San Diego and Los Angeles, each 24 hours, unless detained by breakdowns, wrecks, or causes that could not reasonably be guarded against. He was to receive not less than 40 cents per hundred pounds for freight carried, Haydis guaranteeing him an average of not less than $700 a month. At the end of each month a balance between the receipts and the guaranteed compensation was to be struck. Haydis was to provide the loads of freight shipped, to furnish warehouses, and assume all responsibility of the billing and collecting of charges, for which he was to be paid by decedent 15 per cent. of his gross receipts. At the option of decedent (which he exercised) Haydis was to assume and perform all services in connection with the loading, unloading, distributing, and assembling of the loads, and was to have the use of the truck for that purpose, and was to be paid $50 per month by decedent for those services. It was provided that when "trip prices" were received the weight of the load should have no bearing on the amount decedent was to receive for it, that payment for the "services rendered herein" by decedent should be made between the 1st and 10th of each month, and that Haydis should furnish decedent with duplicate trip sheets showing the amount of all shipments. The contract was transferable to a third party, subject to the approval of Haydis, and provided that it was "understood at this time that there are no other agreements, either written or verbal, between the parties hereto." It was agreed upon the hearing that the services rendered were governed exclusively by the contract, and it appeared in evidence that the decedent had operated exclusively thereunder from the time of the making of the contract to the time of his death, and that he had not been engaged in the trucking business except during the few weeks intervening between the purchase of this truck and the making of the contract.

[1] The distinction between an employee and an independent contractor under the Workmen's Compensation Act has been considered by this court on numerous occasions. It is settled that the accepted interpretation of those terms has not been altered by the addition of section 21, art. 20, of the Constitution, nor by the amendment of that section in 1918. Pacific G. & E. Co. v. Industrial Acc. Comm., 180 Cal. 497, 181 Pac. 788; Flickenger v. Industrial Acc. Comm., 181 Cal. 425, 184 Pac. 851, 19 A. L. R. 1150; Employers' Liability Assurance Corp. v. Industrial Acc. Comm., 187 Cal. 615, 618, 203 Pac. 95. The Workmen's Compensation Act defines an independent contractor as one "who renders service, other than manual labor, for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." Stats. 1917, p. 831, § 8 (b). The Legislature in including the phrase "other than manual labor" in this definition attempted to place an unconstitutional restriction upon the accepted and settled meaning of the terms, and the definition is therefore to be considered for the purpose hereof as if it read: "One who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only, and not as to the means by which such result is accomplished." Flickenger v. Industrial Acc. Comm., supra.

[2] In determining in any given case whether a person was an employee or an independent contractor there are usually present various circumstances which are persuasive to one conclusion and other circumstances persuasive to the opposite conclusion. But an analysis of the cases makes it

plain that the determinative factor is usually found in the solution of the question: Who has the power of control, not as to the result of the work only, but as to the means and method by which such result is accomplished? In Luckie v. Diamond Coal Co., 41 Cal. App. at page 480, 183 Pac. at page 183, after an extensive review of the cases, the court said:

> "The accepted doctrine is that, where the essential object of the employment is the performance of work, the relation of master and servant does not exist unless the employer retains the right to direct the mode and manner in which the job shall be done; or, in other words, not only what shall be done, but how it shall be done. Labatt on Master and Servant, § 64; Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 Pac. 721. 'The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for.' Green v. Soule, 145 Cal. 96, 99, 78 Pac. 337, 339. He is deemed to be the master who has the supreme choice, control, and direction of the servant, and whose will the servant represents, not merely in the ultimate results of the work, but in all the details. The legal test for the determination of the question is stated by Thompson as follows: 'An independent contractor, within the meaning of this rule, is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished.' * * * 1 Thompson on Negligence, §§ 621, 622."

See, also, Barton v. Studebaker Corp., 46 Cal. App. 707, 717, 189 Pac. 1025, and cases there cited; Flickenger v. Industrial Acc. Comm., supra; Pryor v. Industrial Acc. Comm., 186 Cal. 169, 198 Pac. 1045.

[3] Respondents contend that the instant case comes within the rules applied in Eng-Skell Co. v. Industrial Accident Comm., 44 Cal. App. 210, 186 Pac. 163, and Press Publishing Co. v. Industrial Accident Comm., and General Accident, etc., Corp. v. Industrial Accident Comm. (Cal. Sup.) 210 Pac. 820, in each of which cases the applicant was held to be an employee, and not an independent contractor. The former of those cases is radically different from the case at bar. In that case the injured man was employed, together with the use of his truck, not to make certain trips designated in the contract, nor to transport certain specified freight between specified terminals for a compensation dependent upon the results accomplished by him, as in the instant case, but was employed to furnish the services of himself and his truck each day from 8 a. m. until 6 p. m., and to do within those hours whatever he should be directed by his employer to do. Under his contract, if he presented himself and his truck for work from 8 until 6 he was entitled to his pay, regardless of whether he was given any work to do on that day or not. In the instant case it was immaterial whether the decedent worked 5 hours or 15 hours during the 24. If he got through with a load of freight he was entitled to be paid. If he did not get through with it from one terminal to the other he was entitled to no pay, even though he may have been working at that job the whole 24 hours. The determinative factor in the Eng-Skell Case was "that in the performance of such service and the use of said truck Rogers [the applicant] was at all times under the control and direction of the Eng-Skell Company." The two cases of Press Publishing Co. and General Accident, etc., Corp., more nearly approach in their facts the case at bar. In each of those cases the applicant was employed and paid not for the rendition of services during specified hours, but rather for the accomplishment of certain specified results. The decision of this court in each of those cases holding that the applicant was an employee rather than an independent contractor was grounded upon the circumstance that it was an admitted fact in each case that the employer had the power to discharge him at any time, and therefore had the power to control him, not only with respect to the results to be accomplished, but also with respect to the manner and method of their accomplishment. This court said with respect to one of those employers:

> "This power of the employer to terminate the employment at any time is a strong circumstance tending to show the subserviency of the employee, since it is incompatible with the full control of the work usually enjoyed by an independent contractor. Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so."

With respect to the other employer it said:

> "The circumstances attending the hiring of Benefiel [the applicant] warrant the inference that he was subject to the direction and control of the Press Publishing Company in the performance of his work. The most significant fact in this regard, and one which points towards the relation of employee rather than to the status of an independent contractor, is the fact that Benefiel was hired on the same terms as the other carriers, and the Press Publishing Company had the right to exercise the same direction and control over Benefiel as it did over the other carrier boys, concededly employees. * * * One of the means of ascertaining whether or not this right to control exists is the determination of whether or not, if instructions were given, they would have to be obeyed."

Applying this test to the case at bar, let us suppose that Haydis had said to the decedent, "You must start each trip not later than 7 a. m., and must not drive at a greater rate than 10 miles per hour during any part of the trip." If the decedent had been an employee it would have been his plain duty to obey those instructions. But it is clear that under his contract he was under no obligation so to do. Or suppose Haydis had said, "You must start not earlier than 10 a. m., and must complete your trip within 8 hours thereafter." If decedent had been an employee it would have been his duty to obey this instruction. But such was not his duty under the contract herein. If Haydis had directed decedent to follow a certain route in making these trips, and decedent had perferred a different route, can any one doubt that under their contract the right and power to select the route was vested in decedent? Under the contract decedent was responsible to Haydis only as to the result of the work to be accomplished, namely, the transportation of one load of freight between the two terminals specified during each 24 hours. The contract herein was for the definite term of 14 months, and no right was reserved therein to Haydis to terminate it prior to that time for any cause whatsoever. It has been suggested that, if the decedent had violated his contract, Haydis could then have terminated it, from which it is argued that Haydis had the power of coercion and control over decedent; but it is equally true that, if Haydis had violated his part of the contract, decedent would have had an equal right to terminate it, and it could just as well be argued, so far as this aspect of the contract is concerned, that decedent had the power of control over Haydis.

The circumstance that under the contract decedent was to render nondelegable personal services may be persuasive, but it is in no sense conclusive or determinative. Contracts for the rendition of nondelegable personal services are of common occurrence, which do not constitute the contractor an employee; for example, the ordinary contracts between attorney and client. The same may be said of the use of the phrase "engages and employs."

In Shearman and Redfield on Negligence it is said:

> "The true test of a 'contractor' would seem to be that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." 6th Ed. § 164.

Respondents emphasize the phrase "in the course of an independent occupation," and argue that the decedent was not pursuing an independent occupation because he was not doing hauling for any one else, and was not permitted so to do under the provisions of his contract for the term thereof. This is a non sequitur. The question whether or not one is pursuing an independent occupation does not depend upon whether he is serving one person or many persons, but whether in the pursuit of his occupation he is acting upon his own behalf or as the servant of another. This is pointed out by the authors last quoted from in the same section:

> "If he never serves more than one person there is usually a presumption that he has no independent occupation; but this presumption is not conclusive. A single large railroad company, for example, might find work enough for a contractor to occupy his whole lifetime, yet leave him to work in perfect independence, accepting the results of his labor without ever interfering with his choice of the mode and instruments of working. On the other hand, one may have many employers within a short space of time, yet be a mere servant to each of them in turn. * * * The one indispensable element of his character as an independent contractor is that he must have contracted to do a specified work and have the right to control the mode and manner of doing it."

Decedent had been working with his truck a little over a month before making this contract.

The question of the burden of proof is wholly immaterial herein, for the reason that the facts are all in evidence, and the evidence is without conflict. It was stipulated at the hearing that the services rendered were governed exclusively by the written contract which is in evidence. The question whether the decedent was an employee or an independent contractor is thus a pure question of law, to be resolved from the terms of the contract itself, considered in the light of the situation of the parties. But if we go further, and consider what was done by them in carrying it out, there is no evidence that Haydis ever exercised any control over the truck while it was being operated by decedent. Mrs. Edwards testified that it was understood that decedent should not carry any one else upon the truck. But she immediately explained this statement by saying:

> "I mean—as I understood it no insurance would be good in any way if there was any one outside, or any one else driving."

There is no evidence that Haydis ever demanded, or even suggested, that decedent should not carry any one else upon the truck. Neither is there any evidence that Haydis ever made any demand or request or suggestion with respect to the mode of operation of the truck by decedent.

By the contract herein Haydis also agreed to render services in providing the loads, freight, and shipping, in the billing and collecting of charges, and in the loading, unloading, distributing, and assembling of the loads, for which he was to receive a specified recompense from decedent. It might therefore be argued with almost equal justice that under this contract Haydis was the employee and decedent was the employer. But taking the contract herein by its four corners, and considering it in the light of the situation of the parties, and in the light of what was done by each of them in its performance, our conclusion is that the decedent was "under the control of his principal as to the result of his work only, and not as to the means by which such result is accomplished," and was therefore an independent contractor.

The award is annulled.

We concur: WILBUR, C. J.; KERRIGAN, J.; WASTE, J.

LAWLOR, J. (dissenting). Upon the hearing before the Industrial Accident Commission respondent Mrs. Edwards, decedent's widow, testified: That from the time he made the contract decedent operated exclusively under it. That he did not solicit or convey goods of any sort from any terminal other than that of Haydis and the Truck Owners & Shippers, Inc. That the money for the freight decedent hauled was collected through Haydis' office, and that from time to time decedent was paid money by Haydis. That decedent did not have any one drive the truck for him after he entered into the agreement. That he drove to Los Angeles and back alone. That she did not remember of any representative of Haydis ever going with him. That "It was understood that he was not to carry any one else; no one else was to go with him. I mean—as I understood it, no insurance would be good in any way if there was any one outside, or any one else driving. That is one reason he never took me to Los Angeles." That before decedent bought the truck he was not in the trucking business, but worked for a dairy. It was agreed upon the hearing that the services rendered were governed exclusively by the contract.

Petitioners emphasize the circumstances that decedent owned his own truck, took care of it himself and paid for its upkeep; that Haydis exercised no control over the manner or method of hauling the freight; that decedent traveled alone, and was his own master in operating the truck. Three cases are cited and especially relied upon as determining that under the facts shown decedent was an independent contractor. In Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 Pac. 721, one Stevens was engaged in "teaming and grading," and furnished teams, wagons, and drivers for hauling material, at the rate of $6 a day for a team, wagon, and driver. His agreement with the hirer in question did not cover any definite period of time, nor designate the number of loads to be hauled, but it was agreed each wagon should work 8 hours a day. The hirer's foreman gave directions in the matter of what materials should be hauled. Stevens drove one wagon himself, and the money for all the drivers was paid to him, he in turn paying the others. It was held that, as the contract was not for Stevens' personal services, but for teams, wagons, and drivers, and as the hirer only had a limited control over the work, Stevens was an independent contractor.

In Flickenger v. Industrial Accident Commission, 181 Cal. 425, 184 Pac. 851, 19 A. L. R. 1150, the decedent for whose death compensation was claimed was engaged in the "truck business," taking calls from the public at large. He was engaged to haul a quantity of hay for Flickenger. There was no definite agreement as to the time within which the work should be done or as to the price. The decedent suited his own convenience as to the manner and time of loading his truck, being expected merely to do a full day's work each day. He was held to be an independent contractor. In Hull v. Industrial Accident Commission (Cal. App.) 206 Pac. 1014, the petitioner had a dairy in Lankershim, and contracted with the injured party, Ramgren, who was engaged in the trucking business, to carry a quantity of milk to Los Angeles each day at a specified rate. This service did not prevent Ramgren from using any time not occupied in transporting the milk to do hauling for other persons. He paid for the upkeep of the truck, and if anything happened to it he was required to secure other means of transportation. The petitioner had no control over the route taken or the manner of operation of the truck. The court held Ramgren to be an independent contractor.

As stated in the main opinion, respondents contend the case presents a closer analogy to Eng-Skell Co. v. Industrial Accident Commission, 44 Cal. App. 210, 186 Pac. 163, and the late cases of Press Publishing Co. v. Industrial Accident Commission and General Accident, etc., Corp. v. Industrial Accident Commission (Cal. Sup.) 210 Pac. 820, wherein a single opinion was rendered. In the former case, in which a petition for a hearing in this court was denied, the Eng-Skell Company entered into an agreement in writing with one Rogers, who owned a truck, whereby the truck and driver were to be supplied to petitioner for the purposes of its business daily between the hours of 8 a. m. and 6 p. m., for a period of six months, for the sum of $1,050 for the entire term, payable in semimonthly amounts of $87.50. Rogers was held to be an employee upon the grounds that the real arrangement between the parties was such that Rogers was himself to be the driver, and was to give his personal services to the Eng-Skell Company; that in the course of such personal service he was not only to be the driver of the truck, but was to attend to all of the details incident to the delivery of the goods; that the service precluded the pursuit of any independent calling by him, and that in the use of the truck he was at all times under the control of the Eng-Skell Company. The relationship was held not to be affected by his use of his own automobile and his payment of its upkeep.

In the two latter cases the injured party was jointly engaged by a creamery and a newspaper, combining the work of going to a ranch in the country after cream and delivering papers along the way. The court held in both instances he was an employee, the control over his movements being found to exist potentially in the facts that in each case his duties were required to be finished by a certain time, and that each hirer had the right to discharge him at any time. It was further held that he did not become an independent contractor because he owned and paid the upkeep of the motorcycle he used in the performance of his duties, nor because he incidentally carried packages for persons along his route, which in no way interfered with his regular work, and was entirely subordinate to it.

This case is distinguishable in certain respects from the cases cited by petitioners. In each of those cases the injured party was engaged in an independent hauling business, and the work he was doing when injured was done in the course of that occupation. Although all his time might temporarily be devoted to one job, he was allowed to engage in other enterprises, and his service was not to be rendered exclusively to one party. In Western Indemnity Co. v. Pillsbury, supra, the agreement was not even one for personal services. Here decedent conducted no general trucking business. He secured his truck in September, and on the following October 2 entered into the contract, having before that time worked for a dairy. Under the contract he was to render nondelegable personal services exclusively to Haydis, being thus precluded from following an independent calling. The time during which the contract should extend was limited, and a definite sum was guaranteed decedent, which was equivalent to no more than a promise of wages. Except for the provision that Haydis was to perform certain duties, decedent was required to attend to all the incidents of the transportation of the goods. In these particulars this case is almost identical with Eng-Skell Co. v. Industrial Accident Commission, supra.

The fact that the parties provided for the contingency of an assignment of the contract by decedent might be claimed to indicate that they did not intend to establish the relation of employer and employee. But when the nature of the provision is considered, it is apparent it does not have that effect, for it is merely an agreement for an assignment with the consent of the hirer, such as would be implied by law even in the absence of any clause to that effect. It is well settled that, when an agent assigns a contract without the consent of the principal, the assignee takes merely an opportunity to offer himself to the principal as a substitute for the assignor (Boehm v. Spreckels, 183 Cal. 252, 191 Pac. 5), but also that the burden of any contract may be assigned with the assent of the party entitled to the benefit. Civ. Code, § 1457; Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574, 25 Pac. 52, 10 L. R. A. 369, 21 Am. St. Rep. 63. I do not think the inclusion of this clause is determinative of the nature of the engagement.

The question of Haydis' control over decedent's conduct of the work remains to be considered. In Press Publishing Co. v. Industrial Accident Commission, supra, it was declared:

> "In the absence of any express terms affirming or negating the power of control and direction its existence must be determined from the reasonable inferences to be drawn from all the circumstances surrounding and attending the making and execution of the contract, considered in conjunction with the nature of the contract and the duties ordinarily to be performed thereunder."

As already pointed out, the employers in that case were held to have control of the employee, because the work was required to be finished by a definite time, and because they retained the power to discharge him at any time. In Eng-Skell Co. v. Industrial Accident Commission, supra, it was found the employer did actually control the movements of the employee. In this case Haydis engaged and employed decedent's services exclusively. The word "employ" has a definite legal meaning, and one of the elements involved in an employment is the employer's control over the employee. While it is not "the name parties may give to their contract which determines its character" (Mebius & Drescher Co. v. Mills, 150 Cal. 229, 88 Pac. 917), "legal terms are to be given their legal meaning unless obviously used in a different sense" (Weinreich Estate Co. v. A. J. Johnston Co., 28 Cal. App. 144, 151 Pac. 667).

As the contract in question contained no express reference to the subject of control, it might well be held that by the very use of the term "employs" it was intended Haydis should have control over the movements of decedent, and that decedent was in fact to be his employee. Such a holding would settle the entire matter. But I am of the opinion it also appears from other facts that sufficient control was reserved to Haydis to constitute him an employer by the contract. Decedent was required to make a trip one way each 24 hours. He could not substitute another driver or another truck, and thus could not use his own discretion as to the time or means of transportation. He had no discretion concerning the loading of the truck or the shipping; Haydis was to provide for this without regard to decedent. It was also provided that trip prices might be received, necessarily at Haydis' discretion, for he was to furnish the loads, and that in such an event the weight of the load should not affect the amount received by decedent.

The only matters over which Haydis apparently did not retain express control were as to what roads decedent should travel upon, and in what manner he should perform the acts required in operating the truck. What directions would a driver need more than were given to this one? That some control was actually exercised over the truck while it was being operated by decedent is shown by the testimony of respondent Mrs. Edwards that, because no insurance would be good if anyone rode with decedent, it was understood he should not carry any one else upon the truck. The control actually having been exercised, it is evident it was vested in Haydis; and, the other elements of an employment being present, I am satisfied the finding that decedent was his employee is supported by the evidence, and that the award should be affirmed.

I concur: LENNON, J.

SEAWELL, J. (dissenting). I agree with the conclusion reached by the minority opinion. The question whether decedent, Edwards, was an employee of petitioner Haydis or an independent contractor, as held by the majority opinion, is a question not free from doubt. Elements tending to constitute either relationship are somewhat intermingled in the transaction. The burden of proof rested upon petitioners to prove affirmatively that decedent was an independent contractor. Section 19 (d), Workmen's Compensation, Insurance, and Safety Act, provides as follows:

> "The burden of proof lies upon the party holding the affirmative of the issue. The following are affirmative defenses and the burden of proof shall rest upon the employer to establish them:
>
> "(1) That an injured person claiming to be an employee is an independent contractor or otherwise excluded from the protection of this act where there is proof that such injured person was at the time of his injury actually performing service for the alleged employer."

There being room for substantial doubt as to whether petitioners have sufficiently overcome the burden cast upon them by a showing that decedent was an independent contractor within the purview and meaning of the Workmen's Compensation, Insurance, and Safety Act, the award, in my judgment, should be affirmed.

(191 Cal. 341)

SCARBOROUGH v. URGO et al.

(L. A. 7258.)

(Supreme Court of California. June 28, 1923.)

1. Appeal and error 🔑1170(9)—Refusal to instruct as to burden of proof in collision case held prejudicial error; "miscarriage of justice."

In passenger's action against a motorbus line and the owner of a motortruck, which collided with the bus, refusal to instruct that it was incumbent on plaintiff to prove by a preponderance of the evidence that the accident was caused by omission or neglect of the bus company, and to find for defendant if the evidence was equally balanced, was prejudicial error, resulting in a "miscarriage of justice," within Const. art. 6, § 4½; the instruction being proper under Code Civ. Proc. § 2061, subd. 5, and it appearing that several instructions as to the burden of proof had been given on behalf of the owner of the truck, but none on behalf of the bus line, particularly in view of evidence as to the manner in which the collision occurred.

2. Carriers 🔑280(1)—Carriers of passengers for reward must exercise utmost care and diligence of very cautious persons.

Carriers of passengers for reward bind themselves to carry safely those whom they undertake to convey as far as human care and foresight will go; that is, with the utmost care and diligence of very cautious persons, and they are responsible for any, even the slightest, negligence.

3. Carriers 🔑316(4)—Burden of proof in passenger's action for injuries stated.

In actions for injuries sustained by passengers as the result of collision, a prima facie case of negligence is made by proving that the passenger was injured while being carried as such, and, this being done, the carrier is called on to rebut the presumption of negligence following from the mere fact of injury, by showing that it exercised a proper degree of care; such presumption, while being evidence, in no degree changing the rule as to burden of proof.

4. Trial 🔑258(1) — All applicable rules of law need not be embodied in requested instruction.

A party cannot be justly required, in requesting an instruction to embody therein all the rules of law applicable to the case, nor even all the rules applicable to the issue of fact or to the principle of law involved in the instruction.

5. Trial 🔑296(7)—Refusal to instruct as to burden of proof in passenger's action for injuries held not cured by another instruction given.

In a passenger's action for injuries sustained in a collision between the motorbus wherein he was riding and a motor truck operated by a codefendant, refusal to instruct, at the request of the bus company, that the burden was on plaintiff to prove by a preponderance of the evidence that the accident was caused by defendant's negligence, *held* not cured by an instruction in substance telling the jury that, if defendant was without fault, no verdict could be rendered against it.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Sanford C. Scarborough against M. Urgo and the Motor Transit Company.

Judgment for plaintiff, and defendant last named appeals. Reversed.

Haas & Dunnigan and H. L. Dunnigan, all of Los Angeles, for appellant Motor Transit Co.

Miguel Estudillo, of Riverside, and Lloyd Wright, of Los Angeles, for respondent.

Jennings & Belcher, of Los Angeles, for Urgo.

SEAWELL, J. On October 4, 1920, appellant, Motor Transit Company, a corporation, a carrier of passengers for reward, was operating a motorbus line upon the public highway connecting the city of Riverside and the city of Los Angeles. Respondent, Sanford C. Scarborough, having paid his fare, took passage on one of appellant's busses at Riverside, westerly bound for Los Angeles. M. Urgo, defendant, was, on said day, operating, as owner a motortruck traveling on said highway in an easterly direction. On a section of said highway known as Valley boulevard, at a point near Walnut, while rounding a curve in the highway, said bus and motortruck collided, inflicting upon respondent injuries of rather a serious nature.

Uncertain as to which was at fault, respondent made both owners of the motor vehicles defendants in an action in the court below, alleging joint negligence. Each answered separately. By the verdict the jury exculpated defendant Urgo, and found against appellant. This appeal is taken by appellant, Motor Transit Company, because of the court's refusal to give the following instruction, or its equivalent, in any part of its charge to the jury:

> "* * * It is incumbent upon the plaintiff to prove by a preponderance of the evidence that such accident was caused by some act of omission or neglect on the part of the Motor Transit Company, and if the evidence is equally balanced in your minds as to the act or neglect of the defendant, Motor Transit Company, then you must find a verdict for the defendant, for otherwise you would not be finding in accordance with the preponderance of the evidence."

It is a fact that the jury was not at any time, so far as appellant's liability was concerned, instructed that the burden of proof was upon the plaintiff, or that plaintiff was required to prove his case by a preponderance of the evidence, or, if the evidence in the minds of the jurors appeared to be "evenly balanced," the verdict must be for appellant. As to defendant Urgo, the jury was fully and repeatedly instructed on at least one of the elementary principles of law, to wit, burden of proof, upon which the Code requires that:

> "They are * * * to be instructed *by the court on all proper occasions.*" Code Civ. Proc. § 2061. (Italics ours.)

Certainly it is demonstrated by the record that this case furnished the proper occasion for the giving of the requested instruction. Seven groups of rules of evidence are specifically enumerated in section 2061, Code of Civil Procedure, the fifth of which is:

> "5. That in civil cases the affirmative of the issue must be proved, and when the evidence is *contradictory* the decision must be made according to the *preponderance of evidence;* that in criminal cases guilt must be established beyond a reasonable doubt." (Italics ours.)

Respondent does not claim that the portion of the instruction above quoted was an improper instruction to have been given to the jury, but claims that its omission does not constitute ground for reversal on the theory that a miscarriage of justice could not have resulted therefrom. Const. art. 6, § 4½.

[1] We have made a careful examination of all the evidence in the case and also of the entire record and we are fully convinced that this claim cannot be sustained. We would refuse to reverse the case merely because of the refusal or omission of the trial court to instruct the jury as to its duty in case of an "equal balancing" of the evidence provided an examination of the entire cause, including the evidence, satisfied us that the evidence so greatly preponderated in favor of the judgment that had the refused instruction been given the verdict would have been and should have been the same.

The paved portion of the highway upon which the collision took place is of a width of 21 feet. The motortruck which is known as a dual-tire truck, was following closely behind another truck of the same general type which was drawing a trailer. Both motortrucks were well loaded with empty fruit boxes extending 10 or 12 feet above the floors or beds of said trucks. The driver of appellant's bus testified that, when he first observed defendant's motortruck, it was 400 feet distant from him and beyond the curve. Defendant Urgo admitted that he did not see the bus until within 20 or 30 feet of it, while several passengers, including plaintiff, stated that they did not see the motortruck until it was practically in collision with the bus. Urgo further stated that he was following about 15 feet behind the first truck, and when it turned to the center of the road to avoid a space in the highway which he described as being near its center and estimated to be 40 to 50 feet long by 3 to 4 feet wide, and which had recently been repaired with a material different in color from the pavement, but which was practically level with the macadam surface, and over which vehicles passed, he turned to the left and the collision occurred. He had not recently traveled this particular road. He admits that he did not observe the repaired space until he was very near it. His movements were guided by the actions of the driver of the truck he was trailing rather than by the exercise of his own sense of observation. While he charged at the outset of his examination that the driver of the bus had turned from his proper position on the road to avoid a rough spot in the highway, he destroyed the force of this testimony during the final moments he occupied the witness stand. We quote from his testimony:

> "The Court: How near was the motor bus to the center of the road at the time of the collision? A. Well, his front end was over towards the road, the center of the road, more than his rear end.
>
> "The Court: I know, but where was the front end, then, with reference to the center of the road? A. I wouldn't say for sure. It was over the center of the road and I wouldn't say for sure it wasn't. Q. Where was yours? Was yours over the center of the road? A. No, sir. Q. What? A. No, sir. Q. Are you sure of that? A. I am sure of it. Q. But you are not sure whether it was or not? A. No; I won't say for sure. Q. How did you get together? A. I don't know. We just hit together, that is all. * * *
>
> "Mr. Estudillo: The bus didn't hit you, did it? A. Well, I don't know whether it hit me or whether I hit him."

The above and other portions of his testimony not given here practically amount to an admission that he was at fault. The driver of the bus testified that he was at all times on the side of the road assigned him by law, and that Urgo suddenly swerved from the side of the road he should have held, crossed the center line, and struck the bus immediately back of the driver's seat, with resultant injury. He claimed that both right wheels of the bus were off the pavement and on the dirt portion of the roadway to his right as far as the physical conditions of the road would permit. His testimony to the effect that he was well on the side of the road he should have traveled is corroborated by three or four persons who were passengers on the bus, and this testimony is not disputed by a single witness except defendant, Urgo, who finally admitted that he did not know how the collision occurred. Respondent, Scarborough, did not seem to be very clear as to the exact position of the truck at the moment of collision, but placed it near the center of the road, or as he stated later, the left wheels were near the center of the road at the moment of impact. The rate of speed at which the bus was traveling was estimated by respondent at 35 miles an hour, and by the other witness from 32 to a rate less than 30 miles an hour. The motortruck was traveling at a rate of speed of about 15 miles per hour. It is not claimed, however, that the rate of speed traveled by either vehicle was a contributing factor to the collision.

[2, 3] The rule is that carriers of passengers for reward bind themselves to carry safely those whom they undertake to convey or carry as far as human care and foresight will go; that is, with the utmost care and diligence of very cautious persons, and, of course, they are responsible for any, even the slightest, negligence. Kline v. Santa Barbara Ry. Co., 150 Cal. 741, 90 Pac. 125. In this class of cases a prima facie case of negligence is made out by proving that the passenger was injured while being carried as such, and, this being done, the carrier is called upon to rebut or overcome a presumption of negligence that follows from the mere fact of injury, by showing, if it can, the exercise of that degree of care which will excuse it under the rule of law above stated. Such a presumption is evidence in the case, but it has no greater or different effect than the testimony of witnesses, and in no degree changes the rule as to the burden of proof, viz. the burden of producing a preponderance of evidence. That burden does not shift from side to side on the trial of a case, but constantly remains with the party having the affirmative of the issue, who, in this case, is the plaintiff. All that is required of the defendant is to produce evidence sufficient to offset the effect of a plaintiff's showing. He is not required to offset it by a preponderance of the evidence. Valente v. Sierra Ry. Co., 151 Cal. 534, 91 Pac. 481. As is said in Sweeney v. Erving, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 905 (see, also, Rose's U. S. Notes), the doctrine of "res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in the question for the jury is whether the preponderance is with the plaintiff." See, also, Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 341, 73 Pac. 164; Cody v. Market St. Ry. Co., 148 Cal. 90, 82 Pac. 666; Patterson v. San Francisco Co., 147 Cal. 178, 81 Pac. 531; Morgan v. So. Pac. Co., 45 Cal. App. 229, 187 Pac. 74; Onell v. Chappell, 38 Cal. App. 375, 176 Pac. 370; Bonneau v. North Shore Railroad Co., 152 Cal. 406, 93 Pac. 106, 125 Am. St. Rep. 68.

[4] It is expressly conceded by counsel for respondent, and it must, we think, be conceded by us, that the refused instruction correctly states the law in so far as it purports to state it. It properly informs the jury in effect that the burden is upon the plaintiff to prove the negligence complained of by a preponderance of the evidence, and that this burden still remains upon him, even though he has shown that he was injured by a collision between two vehicles while being carried as a passenger in one of them. This is the law. The objections to the refused instructions, upon analysis, resolve themselves into two criticisms: (1) That it ignores the doctrine of res ipsa loquitur; (2) that it is misleading. The first objection is not, we think, a valid ground for the refusal of the instruction. A party cannot be justly required, in requesting an instruction, to embody therein all the rules of law applicable

to the case, nor even all the rules applicable to the issue of fact, or to the principle of law involved in the instruction. 38 Cyc. 1598. If the requested instruction is a correct statement of the law of the case, in so far as it purports to cover the same, and there is evidence to which it is properly applicable, it should be given, unless it is covered by other instructions given, or unless it is so worded as to be likely to mislead the jurors. This precise point was determined in Stein v. United Railroad, 159 Cal. 368, 372, 113 Pac. 663. There defendant, appealing from a judgment in favor of plaintiff, complained of the refusal of the trial court to give certain instructions requested by it upon the law of contributory negligence. This refusal was sought to be justified on the ground that the requested instruction ignored the "last clear chance" rule. This court determined that the last clear chance rule was properly applicable to the evidence in that case, but said:

> "It is no sufficient answer to appellant's objection to the court's refusal to give the requested instructions that they ignored the doctrine of the 'last clear chance.' To announce such a rule would be to hold that each instruction must express all the law on the subject considered. The jurors were elsewhere in the charge of the court fully informed regarding the doctrine of 'last clear chance.' * * *"

Substituting the words "res ipsa loquitur" in place of the words "last clear chance," the quoted statement applies with precision in its entirety to the question here under consideration. It is true that the "last clear chance" rule is not, strictly speaking, a modification of the contributory negligence rule; but neither is the res ipsa loquitur rule, strictly speaking, a modification of the rule as to the burden of proof. Can it be fairly said that this instruction was likely to mislead the jurors, if it had been given? It did not tell them that it was incumbent upon the plaintiff to prove the particular act or omission of this defendant which was relied upon by him, but merely that it was incumbent upon him to prove "that such accident was caused by some act or omission of neglect." In other words, it told the jurors that, in order to return a verdict against this defendant, they must find from a preponderance of the evidence (which was elsewhere correctly defined in the instructions) that this defendant had been guilty of some negligent act or omission. In Kahn v. Triest-Rosenberg Cap Co., supra, the defendant appealed from a judgment against him for damages for injuries to plaintiff's goods caused by water escaping from a boiler maintained by defendant upon an upper floor in the same building. The court instructed the jury that the mere fact of the overflow of the water from the boiler under the circumstances of the case was prima facie evidence of negligence. It also instructed them that:

> "Unless they, the plaintiffs, have shown that the boiler and apparatus which was used by the defendant were improper appliances to be used, or that they were maintained or used by it in a careless or negligent manner, and unless they have so shown to your satisfaction and by a preponderance of the evidence, you are instructed that you must find for the defendant."

This presents a situation which would have been substantially identical in principle with the situation in the instant case if the trial court had given the instructions which it here refused. It was urged in that case that the two instructions were conflicting, which is the essence of the claim here made in behalf of the respondent. This court said:

> "There was no conflict in the instructions given by the court. * * * It still remained the law that, upon the whole evidence, the plaintiff must have the preponderance in order to succeed."

Each of the following cases also holds, either expressly or by necessary implication, that where the court gives an instruction embodying the doctrine of res ipsa loquitur, it should also give one to the effect that the burden of proving his case by a preponderance of the evidence rests upon the plaintiff. Cody v. Market St. Ry. Co., supra; Valente v. Sierra Ry. Co., 151 Cal. 534, 537, 91 Pac. 481; Patterson v. San Francisco, etc., Co., supra; Bonneau v. North Shore R. R. Co., supra; Wyatt v. Pac. Elec. Ry. Co., 156 Cal. 170, 175, 103 Pac. 892; Diller v. Northern Cal. Ry. Co., 162 Cal. 531, 537, 123 Pac. 359, Ann. Cas. 1913D, 908; Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 328, 147 Pac. 90; Weaver v. Carter, 28 Cal. App. 241, 247, 152 Pac. 323.

As to the question of miscarriage of justice. An examination of the instructions given by the trial court makes it apparent that the error in refusing the requested instruction was of much greater consequence than has thus far been made to appear. The jurors were told no less than four different times that before they could return a verdict against the defendant Urgo they must find that the plaintiff has proved his case by a preponderance of evidence. But nowhere in the instructions is there a hint or suggestion that he was required to produce such a preponderance as against the defendant transit company. They were told that:

> "If from the evidence you believe the accident was such as in the ordinary course of things does not happen, had the driver of the motor or passenger bus then used proper care in its management or operation, that affords prima facie evidence, in the absence of explanation, that the accident arose from a want of care on the part of the Motor Bus Company."

And again:

> "If you find that, while the plaintiff was being carried as a passenger by the defendant, the Motor Transit Company, the bus upon which he was a passenger collided with a truck operated by the other defendant, M. Urgo, and that he was injured, then a presumption of negligence arises which throws the burden upon the defendant the Motor Transit Company of showing that the injury was sustained without any negligence on its part, and in the absence of such evidence your verdict should be in favor of the plaintiff. * * *"

(Although counsel have not complained on this ground, it may be noted that the instruction last quoted was open to the objection that it suggested to the jurors that there was an absence of evidence showing that the injury was sustained without any negligence on the part of the transit company, whereas there was in fact a great deal of such evidence in the case.)

The jurors were told no less than four different times, in effect, that the defendant transit company owed to the plaintiff the duty to use the utmost care and diligence of a very cautious person, and that it was bound to carry him safely, as far as human care and human foresight would go. And in immediate juxtaposition thereto they were told that:

> "On the other hand, the defendant Urgo was only required to use ordinary care in driving the automobile."

It is not intended to suggest that these instructions were erroneous or in any way incorrect. But the emphasis which was given to the rules of law embodied in them by their repetition was such as to make the omission of this defendant's requested instruction all the more significant. It should be kept in mind also that at the very outset of the instructions the court said to the jury that:

> "During the instructions *you will be told* that certain facts must be proved by a preponderance of evidence. That means such evidence as, *when weighed with that opposed to it, has more convincing force*, and from which it results that the greater probability is in favor of the party [plaintiff in this case] upon whom the burden rests." (Italics ours.)

The jury, naturally, would have understood from this assurance that the burden of proof and its application would be fully covered as to each of the defendants, and if nothing was said by the court as to the burden of proof being with respondent in making his case against appellant, as well as against Urgo, his codefendant, it was for the reason that the burden did not rest upon respondent so far as the appellant was concerned. This was a limitation of appellant's right of defense not warranted by law. Moreover, the rules of the road were stated in the instructions more favorably to the defendant Urgo than is warranted by the law. To be sure, the defendant transit company is not entitled in law to complain of the fact that its codefendant unjustly escaped liability, if such be the fact; but it is, we think, entitled to complain of an incorrect instruction as to the rules of the road applicable to its codefendant because of the circumstance that in determining whether or not the bus driver was negligent, it should have been determined in the light of the fact that he was entitled to assume that the truck driver would obey the rules of the road, and was entitled to act in reliance upon that assumption until something should occur to give him notice to the contrary.

The question whether or not there has been a miscarriage of justice is to be considered not solely with respect to its relationship to the plaintiff but also with respect to the rights of the appealing defendant. It is conceded that under the circumstances disclosed by the evidence herein one or both of the defendants must have been negligent, but it does not follow therefrom that, unless the jurors found against the truck driver, they were obliged to find against the carrier. Plaintiff is not entitled to recover against appellant because of the weakness of his case against his codefendant Urgo, or vice versa. If he recovers at all, it must be upon the strength of the case he is able to make out against either. To entitle him to succeed against appellant, he is held to the law's requirement that the burden of proving his case rests upon him; but it cannot be justly said that the jurors herein found that defendant Urgo was not negligent. The most that can be said in this behalf is that the jurors found that the plaintiff had failed to prove negligence of this defendant by a preponderance of the evidence. The burden was at all times upon the plaintiff to prove his case by such preponderance, and if he failed to do so it was the duty of the jurors to return a verdict for the defendant. If the jurors found that the evidence was evenly balanced as to the negligence of the defendant Urgo, it was their duty to return a verdict in his favor, and if at the same time they found that the evidence was evenly balanced as to the negligence of defendant transit company, it was their duty to return a verdict in its favor.

[5] Respondent insists that the refusal to give the requested instruction was cured by the giving of another, in which it was stated that, although it was true that appellant as a carrier of passengers for reward owed to the plaintiff a greater degree of care than ordinarily obtains between persons having no such contractual relationship as between themselves, or as between one of them and the public, and if the jury found from the evidence that the plaintiff's injuries were approximately caused solely by the negligence of some other person, or if at the time of the collision appellant was operating its bus in a lawful manner, the jury would not be justified in finding a verdict against it. The instruction offered as a substitute did not

cure the omission complained of. In substance, it does no more than to tell the jury, what it doubtless knew, that if appellant was without fault no verdict could be rendered against it. Stein v. United Railroads, 159 Cal. 368, 113 Pac. 663. It falls far short of instructing the jury on the matter of law requested.

A thorough investigation of the record has convinced us that a preponderance of the evidence was not on the side of the plaintiff as against the defendant transit company. Neither this court nor the law is responsible for the situation that confronts the parties to the action by reason of the conclusion reached by us. Plaintiff and respondent could and should have protected himself from any ground of complaint he may feel that he now has by reason of the elimination of any party to the action by taking an appeal from the judgment in Urgo's favor. Upon the face of the record he should have done so. It was no part of appellant's duty to protect his rights, and, of course, he could not expect he would. By the record which respondent helped to make in the court below, the precise result here announced should have been reasonably anticipated. It is true that plaintiff was injured by the negligence of one of the defendants. But this unfortunate circumstance did not give him a cause of action against an innocent person. The axiom that one must not be permitted to take from another that which he is not entitled to receive is sound, both in law and morals.

Upon a full consideration of all the testimony, as well as the physical facts described by the witnesses, and upon an examination of the entire record, we are of the opinion that appellant was deprived of a substantial right, which in effect amounted to a miscarriage of justice, by the denial of the right, under the significant circumstances of the case, to have the jury instructed that it was incumbent upon plaintiff to prove his case by a preponderance of the evidence against appellant as well as against defendant Urgo.

The judgment is reversed.

We concur: LAWLOR, J.; LENNON, J.; MYERS, J.; WASTE, J.

---

191 Cal. 312

SNOW MOUNTAIN WATER & POWER CO. v. KRANER. (S. F. 10221.)

(Supreme Court of California. June 19, 1923. Rehearing Denied July 19, 1923.)

1. Appeal and error 🔑1075—Error in findings not considered where expressly waived.

The suggestion that the findings are contradictory will not be considered, where appellant states in his opening brief that no reversal is sought on that ground.

2. Work and labor 🔑14(2)—Order to complete dam on angle held not breach of contract for construction on straight line axis.

A contract to construct a dam on a straight line axis between defined lines, subject to reasonable alterations, additions, etc., for which additional compensation was provided, *held* not terminated by an order to complete the dam on a 44-degree angle, which the evidence showed and the court found was a reasonable alteration, so as to constitute a breach entitling the contractor to abandon the contract and recover the reasonable value of the work done.

3. Work and labor 🔑30(2)—Whether change in construction of dam from straight line axis to 44-degree angle was unreasonable and terminated contract held for trial court.

Whether an order to change the construction of a dam from a straight line axis to a 44-degree angle was unreasonable and so radically material as to terminate the contract and give the contractor the right to recover in quantum meruit for the value of the work done *held* a question of fact for the trial court.

4. Contracts 🔑303(1)—Mere difficulty or unusual or unexpected expense caused by natural obstacles no excuse for nonperformance of construction contract.

A construction contractor is not absolved from his obligation by natural obstacles intervening, unless they render performance practically impossible; mere difficulties or unusual or unexpected expense not excusing him.

5. Work and labor 🔑14(2)—Contractor held estopped from denying obligation to continue work under oral order changing plans.

A contractor suggesting and accepting an oral order changing the construction of a dam from a straight line axis to a 44-degree angle, beginning exploratory work to locate the new foundations, agreeing to wait for a written order required by the contract until the Railroad Commission consented to the change, and stating, when asked if he would proceed if such order was given, that he would not continue work under the contract at all, waived the written order, the provision for which was for his benefit, and could not assert that the oral order terminated the contract and entitled him to recover the value of the work done; the law not requiring an idle act (Civ. Code, § 3532).

6. Appeal and error 🔑882(17)—Appellant estopped from challenging finding made at his request.

Appellant is estopped from challenging a finding made at his request.

7. Contracts 🔑296—Whether application of compensation clause to extra work would have ruined or benefited contractor held immaterial.

Whether compensation clauses of a contract for the construction of a dam would have ruined the contractor, if applied to extra work necessitated by a change in plans, or whether he would have been benefited by such change *held* immaterial, where the court found on sufficient testimony that the change was reasonable.

8. Work and labor ⚷14(2)—Contractor held estopped from claiming that contract was in force when order restraining him from continuing work was issued.

A contractor constantly claiming that his contract for the construction of a dam on a straight line axis was terminated by an order to complete it on a 44-degree angle, demanding payment for the extra work on a different basis than that provided in the contract in case of alterations, additions, etc., and finally notifying his foreman to take steps to shut down the work, could not claim that the other party's election to take over the equipment and complete the work, as authorized by the contract in case of the contractor's abandonment thereof, and institution of a suit to restrain him from continuing the work, constituted a breach of an existing contract, so as to entitle him to recover the reasonable value of the work done, though he continued to maintain a small force of men at the dam, especially where he made no effort to show that the restraining order was improvidently granted or to resist the granting of a temporary injunction against removing his equipment and supplies.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the Snow Mountain Water & Power Company against W. A. Kraner. Judgment for plaintiff, and defendant appeals. Affirmed.

E. C. Chapman and R. P. Henshall, both of San Francisco, for appellant.

Pillsbury, Madison & Sutro, Max Thelen, and Oscar Sutro, all of San Francisco, for respondent.

WASTE, J. The defendant was engaged in the work of constructing a large cement dam for the plaintiff under a contract by the terms of which, in the event of abandonment of the work by the contractor, plaintiff might take over all tools, equipment, and supplies of the contractor and proceed to complete the structure. Alleging that the defendant had notified it that he declined further to proceed with the performance of his contract and was about to remove the equipment from the work, plaintiff brought this suit to restrain such threatened action. A restraining order was granted, and by stipulation was continued as a temporary injunction. Defendant took the position that the contract had been terminated by an act of the plaintiff. He filed counterclaims and a cross-complaint for the recovery of $873,625, alleged to be the balance due for the reasonable market value of all of the work done at the dam, after crediting plaintiff with the sum of $1,600,825 paid, computing said balance on the basis of the cost of all the work done plus 10 per cent. The trial court found that the defendant had in fact abandoned the contract. Judgment was rendered against the defendant on his counterclaims and cross-complaint, and plaintiff was awarded its costs. No order was made for the continuance of the injunction, since plaintiff had completed the construction of the dam before the determination of the action. This appeal by the defendant followed.

On December 15, 1919, the plaintiff entered into a contract with the defendant for the construction by the latter of a concrete dam across the South Eel river, on a site mentioned in the contract, at the lower end of Gravelly Valley, in Lake county. According to the plans and specifications, the work was to be done within certain delineated and designated lines extending from the north to the south bank of the stream. Prior to entering into the contract, defendant, with his engineers, made a thorough investigation of the dam site, and, in the contract, he agreed to take the ground as he found it. The agreed price for the work called for by the plans and specifications was $1,122,350, with adequate provision for prices and payment for all kinds of additional work which might arise in view of the nature of the construction. It was contemplated by the parties that occasion might arise for a departure from the work designated in such plans and specifications, and the contract provides:

> "The company shall have the right to make, but only by orders in writing, such reasonable alterations, omissions, additions or substitutions in said plans and specifications as the company may deem necessary. The contractor agrees to accede to and carry into effect all such alterations, omissions, additions or substitutions as though they were originally provided for in this contract.
>
> "In the event of such alterations, omissions, additions or substitutions increasing or decreasing the cost of constructing the said dam there shall be added to, or subtracted from, the amount which the company has agreed hereby to pay to the contractor for the entire work, a sum equal to the difference between the actual cost of the materials and labor entering into such alterations, omissions, additions or substitutions, but not including any portion of the time of the superintendent or office employees, or overhead expenses, except industrial insurance, plus twelve and one-half per cent. as the contractor's profit, and the same cost estimated in the same way of the work or construction which would have been done under the plans and specifications made a part of this contract, had there been no such alterations, omissions, additions or substitutions."

It was stipulated in the contract that the defendant should begin work not later than January 1, 1920, and should have all concrete poured and the dam ready for use in storing water on or before December 1, 1920, and all additional work done and the dam entirely completed on or before February 1, 1921. Immediately upon the execution of the original agreement the defendant commenced the work of constructing the dam. The State Railroad Commission exercised jurisdiction over the work, paying particular attention to the exposure of satisfactory foundations for the construction of the dam before any concrete should be placed thereon. On May 25 defendant was ordered by the consulting engineer of plaintiff in charge of the work to, and he did, change the axis of the dam as shown on the plans and specifications by moving the northerly end thereof westerly 25 feet, for the purpose of avoiding unsatisfactory material. Shortly thereafter, and for several months, defendant was in continual need of financial assistance. On various occasions he applied to the plaintiff, and was furnished by it with sufficient funds with which to proceed with the work. In June, at defendant's request, plaintiff extended the time within which the defendant was to have all concrete poured and the dam ready for use in storing water, to October 1, 1921, and the time within which all additional work should be done and the dam entirely completed, to December 1, 1921.

Defendant's original plan of work was to build the dam from both banks of the river toward the center, but work was prosecuted more diligently on the north end of the structure than on the southerly side. The trial court found that the delay in completing the work at the southerly end of the dam was not caused by any acts of the plaintiff. The real reason for the concentration of work on the northerly end of the structure seems to have been that work at that point was done more easily, and that the pouring of cement could progress more rapidly. The defendant testified that he expected the progress payments at $5 a cubic yard for concrete poured to carry the expense of the work. When defendant finally began work of excavation for the foundation on the south side of the river, difficulty of construction was experienced by reason of the nature of the ground. On October 28, 1920, the axis of the dam was accordingly changed, so that from a point about 590 feet from the northerly end of the structure it would be constructed at an angle of 32 degrees from such point to a large boulder 75 feet high lying on the south side of the river. Defendant was directed to make this change, and to construct a ring of cement and a cut-off wall under the boulder and into the hard rock beyond. This change was considered a more economical and quicker way of building the dam than by completing it on the straight line axis, because of the nature of the ground and the material to be moved. Defendant accepted, and was working under these changed conditions in November, 1920, when torrential rains caused a heavy flood which washed away a large part of the material remaining to be excavated at the south end of the dam and undermined and moved the large boulder referred to some 35 feet out of position. This condition of affairs caused a change of plans which would not have been necessary had the boulder been imbedded in concrete, as was contemplated, or had the full force of the flood not been directed against the south bank by the completed portion of the dam in such manner as to undercut the rock. Engineers testified on the trial that proper methods of construction would have required that the sides of the foundation of the dam should have been excavated first, and the dam built from both ends toward the center, leaving an opening or low point which would have permitted the floods to pass through without damage.

In view of the changed conditions created by the floods, plaintiff verbally ordered the defendant to complete the dam on an angle of approximately 30 degrees. He proceeded with work under said verbal order, and, amongst other matters, constructed a rock wall as part of said work, all under the contract of December 15, 1919. In the latter part of December, owing to the lateness of the season, work was practically shut down until February, 1921, when the defendant notified plaintiff that he would proceed with the construction of the dam under the order of October 28, 1920, unless otherwise ordered. In the meantime, the Railroad Commission approved a plan to return to the straight line axis, and the defendant was ordered in writing to carry out the work on that line. He agreed to do so if work "beyond the lines called for by the original contract" should be paid for under the clause in the original contract providing for alterations, omissions, additions, or substitutions in the work. The plaintiff answered that it stood upon the terms of the contract. Meanwhile a controversy arose between the contractor and the company as to the most feasible manner and best method of completing the dam. The plaintiff advocated and had ordered completion on a straight line axis. The defendant had agreed to go ahead, but insisted that the work be completed on an angle of approximately 44 degrees to avoid the slide caused by the flood, and to run to a buttress rock west of the straight line axis. His opinion prevailed, and on May 21, 1921, he was verbally directed by plaintiff to cease work on the straight line axis and complete the dam on the 44-degree angle. The trial court found that completion of the work on the straight line axis was possible, but not practicable, by reason of the excessive cost which would have been incurred if that course had been followed. By the time the parties agreed to this change in plan of construction, all the material required to be moved by excavation at the south end of the dam upon the straight line axis, as specified on the plans, had been removed. It was now agreed that the exact line of such new angle could not be determined until the foundations upon which the dam would be constructed were exposed, at which time application would be made to the Railroad Commission for authority to proceed along the new lines, and written order given defendant to proceed. Defendant consented and agreed to all these matters. Thereupon he was directed to do certain exploratory work for the purpose of determining the exact location of the new foundation line. In the meantime, defendant's financial backers had become interested in the matter. They questioned whether or not such exploratory work fell within the terms of the contract. The defendant asserted that it did not. Although he had done, and had been paid under the contract for, similar work, he consented to sink certain test pits, but refused to concede that such work came under any of the contract provisions. His attorney advanced the further contention that the unexpected flood had terminated the contract, and declared that it was useless to look to it for any purpose whatever. He wrote to the plaintiff: "The work will have to be done under a new contract." The defendant would, he added, finish the work under the orders of the company at cost plus 12½ per cent. The plaintiff all the while took the position that the contract was still in force, and that all work came under its provisions.

Much correspondence passed between the contractor and the company relating to the work and the manner in which it would be paid for. The defendant was constantly demanding from plaintiff an interpretation of the contract as to method of payment, if he proceed with construction on the 44-degree angle. The plaintiff steadfastly stood upon the terms of the agreement. It notified defendant that a refusal or neglect to perform work thereunder would be taken as a repudiation and breach of the contract entitling it to proceed as it might choose. On June 8 defendant again insisted upon a construction of the contract as to how he was to be compensated for such excavation as might "be necessary to be done in the event the dam is to be completed on a straight line axis," while admitting in the same letter of his attorney that orders had already been issued to him to stop work on the straight line axis and to continue the work on the angle of 44 degrees. He took the position that the contract, if it did still exist, did not require him to proceed on a straight line axis, and declined to admit that such work was called for by the contract, or that it was extra or additional work arising under the contract, or had anything to do with the contract. Under the circumstances, he said, he declined to proceed further upon the dam, and would remove his equipment forthwith and shut down the work. Instructions were forwarded by him to his superintendent at the dam to take such steps. The controversy between the parties was continued. The defendant offered several propositions looking to a settlement of his claims for payment. The plaintiff rejected all of them upon the ground that they were not based upon or measured by the terms of compensation contained in the contract. Defendant, having in the meantime notified plaintiff "in order that there might be no misunderstanding" that he would "not perform work on the angle of the dam under the unit price provision of the contract, or under the provision relating to omissions, alterations, additions or substitutions," on the ground that the character of the work was different from that pertaining to any other portion of the dam, was exceedingly difficult, and not within the contemplation of the parties to the contract when it was entered into, on June 30 served on the plaintiff a demand for the payment of $754,633. This amount he stated he was willing to accept in full for all work done on the Scott dam under the contract of December 15, 1919, and for work done outside of and extraneous to the contract to May 1, 1921. He rendered a separate bill for the month of May. These bills were computed on the cost plus basis for all work done by defendant and were demanded as an additional payment over and above the sums which had already been paid to him by plaintiff under the terms of the agreement. In short, it was another declaration on the part of defendant that he regarded the contract as breached by plaintiff, and that he was entitled to recover the reasonable value of all work done. Immediately after service of this demand, plaintiff instituted this action and procured the restraining order. It took over the equipment at the dam, and finished the work, at a cost of $694,450 over what it had already expended.

[1] The large sums of money involved in this action, and its consequent importance to the parties, led to a minute and comprehensive presentation of the case in the lower court. The trial judge visited and inspected the dam and the premises involved in the action. The evidence taken at the trial, which lasted many days, was brought here in a reporter's transcript of more than 3,000 pages, the points and authorities of the respective parties cover many hundreds of printed pages, and the case was orally argued at length. Counsel, with indefatigable industry, have raised and presented their contentions from every conceivable point of view. Every point raised or remotely suggested by either side has received attention and consideration from the opposing side. Viewed, however, from any and every angle, the appeal presents but one question: Was the contract entered into between the plaintiff and the defendant for the construction of the dam terminated by agreement of the parties and

the resulting order given by plaintiff to defendant on May 21, 1921, to complete the dam on an angle of 44 degrees? From our examination and understanding of this voluminous record, we are convinced that the contract was not so terminated and that the finding of the trial court that the defendant abandoned the contract is amply supported by the evidence, and that the judgment must be affirmed. The findings are not attacked beyond a suggestion that they are in part contradictory as to the question of abandonment. As appellant expressly states in his opening brief that "no reversal is sought upon that ground," we will consider the point no further.

[2] In support of the appeal, the appellant contends that it was not he, but the respondent, who breached the contract. On the facts found he contends judgment should have been in his favor. In short, his position is that as the contract between the parties called for the construction of a dam upon a straight line axis between defined lines, and between definite points on the north and south banks of the river, the notification given by respondent on May 21 to quit work on the straight line axis was, in itself, a termination of the contract, and such a breach on the part of the company as to entitle the contractor to recover the reasonable value of all the work done.

Appellant's argument is that the proposed change to the 44-degree angle was unreasonable, and was such a radical change in the nature of construction that it could not have been supposed to have been in the minds of the parties at the time the agreement was entered into. The proposed change was unreasonable, he insists, because the required amount of excavation to be done by reason of the change was not bid upon by him, and the ground to be excavated was physically of a different character, more difficult and more costly to excavate. The trial court found that the completion of the dam on the angle of 44 degrees was the most economical, practical, and efficient method of completing the structure, and was a reasonable alteration of the contract plan. The evidence amply establishes the fact that it was more feasible, cheaper, and better to build the dam on the angle rather than on the straight line, and was a reasonable alteration of the original plans and specifications. It will be recalled in this connection that it was the appellant who first advocated that the work be completed on the angle of 44 degrees, in order to avoid the slide caused by the flood.

The whole course of dealing between the parties tends to destroy the contention of appellant. One of the noticeable features throughout the contract is the evident intention of the parties to vary the plan of construction of the dam if it be found beneficial or necessary. The essential feature of the contract was the construction of the dam. It is obvious that in a work of the nature and magnitude of the proposed construction, the highest engineering skill, even when exercised with utmost care, could not learn in advance all the physical conditions to be met with during the progress of the work. Those to whom the undertaking was intrusted, even with the aid of expert engineers, could not be expected to know in advance all along the line of operations what Nature had placed beneath the surface of the earth in the form of obstacles to construction. Alterations and changes, many slight and some substantial, would almost inevitably be required at certain points in a work of such nature. Prudence on the part of those in charge would compel them to make provision for such contingencies as could not be foreseen with ordinary care and prudence. This was the object of the clause inserted in the contract, which should be so construed as to effect its important purpose. The various alterations ordered by the respondent and carried out by the appellant without objection, and the final change ordered to be made from a straight line axis to the angle of 44 degrees, were all in conformity with changing conditions. If reasonable, they were clearly within the scope and object of the contract and the plan. Kinser Const. Co. v. State, 204 N. Y. 381, 394, 97 N. E. 871; Kingsley v. City of Brooklyn, 78 N. Y. 200; Daly v. Busk Tunnel Ry. Co., 129 Fed. 513, 64 C. C. A. 87; Phila., Wilmington & B. R. R. Co. v. Howard, 54 U. S. (13 How.) 307, 341, 14 L. Ed. 157.

In order to furnish contractors with bases for their bids for building the dam, it was necessary to assume certain quantities and lines. Appellant offered to do the work called for within these lines for a definite amount. For additional work within these lines, which the drawings on their face showed might be necessary, but the full extent of which could not be determined until the work progressed, he was to be paid at the unit prices fixed in the contract. But if the work fell outside the lines of the plans, he was to be paid cost, plus 12½ per cent. for profit, excluding overhead expense, for such extra work. The contract itself thus making specific provision "for additional depth of excavation beyond that specified," and "for additional concrete work over the dam as specified," and "for reasonable alterations, omissions, additions or substitutions," tends further to support the view that the parties had the conditions which subsequently arose in their minds at the time of entering into the agreement. The practical interpretation of the parties placed upon the contract also shows clearly that the different changes in the axis of the dam were regarded by them as alterations under the terms of the contract. Soon after the work was commenced it became apparent that it would be more economical and advantageous to complete the remaining portion of the dam on an angle rather than on a straight line axis. On May 25, 1920, and again on October 28 of the same year, during construction, as previously noted, orders were given to the appellant, and acted on by him, to change the axis of the dam to an angle with its original position. These changes were made and carried out under the contract. Appellant accepted these orders and never questioned the respondent's right to make such material alterations in the plan of work. After the flood of November, 1920, the respondent directed the appellant to return to the straight line axis of June 7, 1920, which direction the appellant accepted, and proceeded with the work. The evidence also indicates that it was the understanding of the appellant at the time the contract was entered into that the axis of the dam might be moved. At the very inception of the work, he built the trestle work from which the concrete was poured into the foundation in such position that, if a change was made in the location of the axis of the dam, it would not interfere with such temporary construction.

[3, 4] By this cross-complaint the appellant sought to recover from respondent the difference between the contract price for the work and cost to him plus 10 per cent. The question whether or not the change from a straight line axis to an angle of 44 degrees was unreasonable and so radically material as to terminate the contract for the construction of the dam, and give appellant a right to recover in quantum meruit for the value of the work done, was one of fact. Tribble v. Yakima Valley Transp. Co., 100 Wash. 589, 595, 171 Pac. 544; Annapolis, etc., Co. v. Ross, 68 Md. 310, 319, 11 Atl. 820. The trial court has not only construed the contract as a matter of law contrary to appellant's contention, but has also found, with ample support in the evidence, that the change ordered was a reasonable alteration under its terms. Appellant was not absolved from his contract by the natural obstacles intervening, unless they rendered performance practically impossible. Mere difficulty, or unusual or unexpected expense, would not excuse him. Carlson v. Sheehan, 157 Cal. 692, 697, 109 Pac. 29. Respondent was willing at all times, and, so for as we are able to judge from the record, able, to pay for all work measured by the terms of the contract. The order to quit work on the straight line axis and proceed on the angle of 44 degrees was not an order to quit work on the dam.

[5, 6] For another reason, appellant is not in position to question the order of May 21, 1921. The record is uncontradicted that he not only suggested the change from the straight line axis to an angle of 44 degrees, which was adopted by the respondent, but agreed to and accepted the order given him to complete the structure in that way. Appellant began exploratory work for the purpose of locating the foundations for the dam within the new lines. The answer to his contention that no written instruction was received by him is that he agreed to wait for the order in writing from the respondent to do the work until the Railroad Commission should give its consent for the location of the work within the new lines. Later, when asked if he would proceed provided the written order was given, he said he would not continue work under the contract at all. The law does not require an idle act. Civ. Code, § 3532. The provision in the contract that the respondent should direct alterations and substitutions in the work only by written order was for the benefit of the contractor and could be waived by him. Enterprise Hotel Co. v. Book, 48 Or. 58, 64, 85 Pac. 333; Cowles v. U. S. Fid. & Guar. Co., 32 Wash. 120, 126, 72 Pac. 1032, 98 Am. St. Rep. 838. The finding that the appellant accepted and acted upon the verbal order to cease to perform further work in and about the construction of the dam on the straight line axis, and to complete the work on the angle of approximately 44 degrees, was expressly requested by appellant, and was made by the court at his instance. He is now estopped from challenging a finding made at his request. Nat. Loan & Inv. Co. v. Rockland Co., 94 Fed. 335, 336, 36 C. C. A. 370.

[7] We deem it unnecessary to go into a consideration of the question suggested by the appellant that the grammatical construction placed by the respondent upon the clauses of the contract relating to payment would have ruined the contractor, and the counter suggestion of the respondent that the appellant would have benefited by the construction of the dam on the 44-degree angle, and would have received a substantial profit. As the trial court found, upon sufficient testimony, that the alteration of the plans was reasonable, we need not enter upon a discussion of the exact measure of compensation which might have governed had other conditions been found to exist.

[8] Appellant contends that when the respondent served notice of election on June 30, 1921, whereby it elected to take over the equipment of appellant, and followed that notice by commencing this action and obtaining an injunction restraining appellant from continuing the work, which, he alleges, he was then doing under the contract, it was the respondent and not appellant that broke the agreement between the parties. He argues that there was never any threat on his part to quit the work, except a conditional threat which he asserts is meaningless in law, and which he also maintains he had a right to make, for it involved a mere proposition of compromise on his part. These considerations derive importance, he asserts, because of the fact that he did not abandon his contract but remained at work, and that therefore respondent's election to take over the equipment and the institution of the suit for

a restraining order were a breach by respondent of a still valid and existing contract. We are not impressed with appellant's argument on this point. It would have more convincing weight if he had not so readily contented himself with the situation at the time. He made no effort on the hearing of the order to show cause to show that the restraining order had been improvidently granted, or to resist the granting of the temporary injunction which only went to the length of preventing him from removing his equipment and supplies from the dam and from interfering with respondent in taking over and using the same. He stipulated that it be granted. The reason he did so is quite apparent. He himself had declared the contract "dead." His contention was that any further work would have to be done as under a new contract. He had notified his foreman to take steps to shut down the work. The force of men he maintained at the dam was seemingly small for properly carrying on the work, if he intended in good faith to proceed. The officers of the respondent company were out of the state. For that reason appellant had agreed, so he represented, to keep his outfit at the dam. He was possibly hoping for a favorable consideration of his proposals upon their return. These proposals were for payment for the work on a basis different from that provided in the contract, and respondent was not required to consider them. Appellant had declined to proceed under the contract. His refusal was to continue the work on the angle of the dam under the contract. The trial court has found that such work was a reasonable alteration or substitution provided for and included in the contract. Appellant had accepted the order to do such work, and his definite and oft-reiterated declarations that he considered the contract terminated can only be regarded, as amounting to a clear, unequivocal, and absolute refusal to perform. Woodman v. Blue Grass Land Co., 125 Wis. 489, 493, 103 N. W. 236, 104 N. W. 920, 921.

The clause of the contract giving respondent authority to take over appellant's equipment and to proceed to complete the dam provides that—

> "If the contractor fails to diligently prosecute said work in every particular, or if he shall abandon the work, or any part thereof, or shall fail in any way to perform the conditions of this agreement on his part to be performed, or shall become insolvent, or make an assignment or commit an act of bankruptcy, the company shall have the right, if it so elect, to take over all tools, equipment and supplies of the contractor * * * and proceed to complete the work."

There was ample authority in this provision for the respondent to proceed as it did. The appellant constantly claimed that the contract was terminated on May 21 because the order given him to complete the dam on the angle was unreasonable in that it called for work for which he claimed he would not be properly compensated, and that therefore the contract was terminated on that date. Having gone thus far, appellant is not in position to advance the inconsistent claim that the contract was in force at the time of the issuance of the restraining order, and that performance on his part was prevented by the respondent, and not by any act of his.

The trial court found that on June 23 and continuously thereafter the appellant was insolvent. The respondent contends that it was an implied term of the contract that appellant would not permit himself, through insolvency, to be disabled from performing his contract, citing Trustee in Bankruptcy v. Chicago Auditorium Ass'n, 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580. For this reason, it argues, it was justified in taking over the equipment. Whether this be so or not, or whether the insolvency of appellant prevented his completing the contract, it is unnecessary to decide. What we have already said disposes of the meritorious issues raised by the appeal.

The judgment is affirmed.

We concur: WILBUR, C. J.; KERRIGAN, J.; LENNON, J.; SEAWELL, J.; LAWLOR, J.; MYERS, J.

(191 Cal. 295)

MAROVICH v. CENTRAL CALIFORNIA TRACTION CO. (Sac. 3207.)

(Supreme Court of California. June 19, 1923.)

1. Carriers 🔑318(3)—Evidence insufficient to sustain allegations of unsafe tracks.

Where photographs in evidence fail to disclose any unevenness, irregularity, or other defects in street railway tracks, and there was no evidence of any swaying, jolting, or unusual movement of the car from which the existence of such defects might be inferred, the allegation of maintaining the track in an uneven and unsafe condition was not sustained.

2. Carriers 🔑318(3)—Evidence held not to show failure to equip car with rear-view mirror negligence.

Evidence *held* insufficient to show that the failure to equip a street car with a rear-view mirror was a negligent omission under Civ. Code, § 2100, requiring that carriers must use the best precautions in known practical use, but not requiring them to adopt every possible preventive suggested by the highest scientific skill, and not requiring speculative and untried experiments.

3. Carriers 🔑321(8)—Instruction on failure to equip car with rear-view mirror erroneous.

An instruction submitting to the jury the question whether the failure to equip a street car with a rear-view mirror was negligence, and whether such negligence contributed to the injury of a passenger who fell from the moving car, was erroneous, where the evidence was insufficient to show either that the omission to install such equipment was negligence or that it contributed to plaintiff's injury.

4. Appeal and error 🔑882(11) — Right to question sufficiency of evidence to support finding held not waived.

The arguing of a question of fact to the jury does not operate to estop a litigant from urging on appeal that the evidence was insufficient to support a finding on that issue, nor does a request by a defendant, sued for personal injuries, for an instruction that before recovery can be had "negligence as charged in the complaint" must be established, operate in effect as a consent and stipulation to the submission of a particular issue, so that the party would be bound by the finding thereon, though unsupported by the evidence.

5. Carriers 🔑318(5)—Evidence held not to show negligence in leaving street car gates open.

Evidence that the front entrance and exit gate of a one-man street car was not intended to be opened and closed on the entry or exit of each passenger *held* insufficient to warrant the submission to the jury of the question whether it was negligent for the motorman to leave such gate open, or that the failure to close such gate was a proximate or contributing cause to the injury of a passenger who fell from the moving car.

6. Negligence 🔑62(1) — Omission must be shown to be efficient cause; "proximate cause."

It is not enough to prove "proximate cause" to show that the injury would not have resulted in the absence of particular negligent omission, but plaintiff must show that the negligent omission was an efficient cause from which the injury naturally followed in continuous sequence, unbroken by any efficient intervening cause.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

7. Evidence 🔑586(2) — Affirmative finding cannot be predicated on disbelief of negative evidence.

The fact that a jury may disbelieve the testimony of a witness who testifies as to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof, unless there is other evidence in the case to support such affirmative.

8. Carriers 🔑318(9)—Allegation that motorman negligently propelled car rapidly past stopping place, to injury of plaintiff's intestate, held unsustained.

In an action against a street car company for the death of plaintiff's intestate, who was shown to have stepped from the car while it was traveling rapidly at a point at which she had intended to alight, *held*, that an allegation that the motorman negligently propelled the car past her requested stop at a dangerous speed was not sustained by a showing that the rate of speed was the usual and customary one for that vicinity; there being no showing that the car slowed down so as to invite decedent to alight.

9. Carriers 🔑321(21)—Instruction requiring defendant to exculpate itself from all negligence conceivably applicable to the case held error where only specific acts of negligence charged.

In an action for death of plaintiff's intestate, where specific acts of negligence were alleged, an instruction that, if the jury believed decedent was killed while riding as a passenger on defendant's street car, defendant was called upon to show either that death was occasioned by inevitable casualty or was due to contributory negligence, *held* erroneous as requiring defendant to exculpate itself, not only from the negligent acts and omissions charged, but also from all others conceivably applicable to the case.

10. Negligence 🔑138(3)—Instruction applying doctrine of res ipsa loquitur should not be given where plaintiff makes no general charge of negligence.

Where plaintiff in his complaint makes no general allegation of negligence or no allegation of general negligence, instructions applying the doctrine of res ipsa loquitur should not be given.

In Bank.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Mike Marovich, as administrator of the estate of Katherine Marovich, deceased, against the Central California Traction Company. Judgment for plaintiff, and defendant appeals. Reversed.

Butler & Van Dyke, of Sacramento, for appellant.

Downey & Downey and G. A. Work, all of Sacramento, for respondent.

MYERS, J. Defendant appeals from a judgment in favor of plaintiff in an action for damages for the death of plaintiff's intestate by reason of falling or being thrown from a street car of the defendant while riding thereon as a passenger. The grounds urged upon the appeal are that the evidence is insufficient to sustain the implied finding that the defendant was negligent; that it is insufficient to sustain the implied finding that decedent was free from contributory negligence; and that the court erred in its instructions to the jury. The specifications of negligence in the complaint are five in number: (1) That the defendant's track was uneven and unsafe; (2) that the defendant's car was not equipped with a rear-view mirror in front of the motorman; (3) that the exit of the car was not guarded by a door or gate; (4) that the motorman negligently failed to stop the car at Q street after having been requested to do so; (5) that he negligently propelled the car past Q street at a dangerous rate of speed. The theory of plaintiff appears to have been that decedent had requested the motorman to stop at Q street, to which he had assented; that she thereupon took a position near the exit preparatory to alighting; that he negligently failed to stop the car; and that she fell or was thrown to the ground by the motion of the car.

The car was a small street car of a type in common use, having a central inclosed section with open platforms at the front and rear. Upon the front platform there were three seats on the left side and one upon the right side, with a central aisle between them; each seat being for two passengers facing forward. The only opening for the ingress and egress of passengers was a doorway at the front end of the right side of the car, to the right of the motorman. There were two steps below the level of the platform leading up to this doorway. It was equipped with a gate which could be closed, but in practice never was closed, and was not intended to be closed, except during the times when the car was being operated in the opposite direction, at which times this gate was kept closed and a corresponding doorway at the opposite end of the car was kept open. The car was operated as a one-man car.

The accident occurred at about 8:23 p. m. of September 25, 1919, while the car was proceeding along K street, in the city of Sacramento, a paved street in the residence district. It was after dark, but the car was lighted and the street lights were burning. Decedent had boarded the car and taken a seat in the inclosed section, intending to alight at Q street. She had made the same trip and alighted at the same place frequently. While the car was stopped at the intersection of T street, three blocks before reaching Q street, she went to the front platform and spoke to the motorman, mentioning either the words "Q street" or "U street," to which he made some response. He testifies that she asked him about U street, and that he told her it was one block back, but in support of the verdict we must assume that she asked him to stop at Q street and that he assented thereto. She then took a position near the front door of the closed section and remained there until after the car had passed Q street, and when it was about 100 feet beyond Q street she stepped quickly to the exit way and, without pausing or hesitating, stepped off the car and fell to the ground, striking her head violently upon the pavement and fracturing her skull. The car at the time was running full speed, about 15 or 18 miles per hour, which was the customary speed on that line when no stops were about to be made, and it had not slackened its speed at or near the intersection of Q street. The car was equipped with electric push buttons, at intervals of 30 inches along the sides of both the closed and open sections, for the purpose of signaling to the motorman. But the decedent, subsequent to the conversation at T street, gave him no signal or intimation of any kind of her intention to alight.

The witnesses vary slightly in their descriptions of the manner in which she left the car. Miss Button, a witness for the plaintiff, was seated in the front open section. She testified:

> "She walked to the door; she took hold of the—with her right hand—she put her foot down like this; she went right out straight into the dark; looked to me as though she turned a somersault; I don't know; she put her foot down just like this; she went out. * * * I saw her put her foot down; she took hold of the door; she went right out in the air. * * * Held on the right-hand side of the car, then just stepped off in the air, the way she did. * * * I don't know whether her foot reached the step; I saw her foot go down; instead of stopping she went on."

Reims, the motorman, called as a witness for plaintiff, testified:

> "She just walked off through the door and down on the steps. * * * She walked right out. * * * She was walking very fast."

Mr. Reynolds, a witness for defendant who was seated within the closed section, testified:

> "As I was sitting inside she stepped about like this (showing)—she fell over—I saw her start off; next I saw her when I looked out the window; she was on the street.
>
> "Q. You saw her walk up to the door? A. And start forward, start forward—I could not say.
>
> "Q. Just how did she start forward, you mean—how did she start forward? A. She walked up—there is—I don't know—the door, of course, she put her hand against this—That is up to the door— Just right in front of the steps, then just stepped right forward.
>
> "Q. Could you see from where you were whether she stepped down? A. I could not see whether she stepped down on the steps, the way the door was placed on the outside—I could not see until I saw her on the street—I saw her start forward; I thought, I knew, she was going to fall. I looked out of the window and saw her on the street."

The witness Tanner, called for defendant, was seated with his wife on the front open section. He testified:

> "Q. Then what happened? What did the woman do immediately leading up to the accident? A. Started to walk right out of the car; took hold of that iron, that bar—stepped right off the car. * * *
>
> "Q. After she got to the edge of the plat-

form leading down to the steps, describe her movements. What happened? A. She stepped right in the air; she was off the car then.

"Q. Did you see her take hold of anything with her hand? A. I saw her right hand was taking hold of the iron that is there for that purpose, and walk right off in the air."

Mrs. Tanner, also called for the defendant, testified:

"Q. When she started, after you crossed Q street, when she started forward, describe her movements. A. She just walked forward; walked off the car. * * *

"Q. When she stepped off the platform—did she hesitate before she stepped off? A. No.

"Q. What did she do? A. No, she walked right off the platform. * * *

"Q. Do you know whether as she stepped off the edge of the car she reached the top step? A. I do not think so. Looked to me she walked right off the top of the platform."

The foregoing comprise all of the witnesses who testified to the happening of the accident. The witnesses all agree that subsequent to the conversation at T street the decedent gave no signal or other intimation to the motorman of her intention to alight; that the car was proceeding at full speed, which they estimated at 15 to 18 miles per hour; that decedent did not stop or pause or hesitate when she reached the exit of the car; and that there was no slowing of the speed of the car until after she had left it. The motorman testified that when he first saw her she was in the act of stepping down onto the first step; that he immediately threw off the power and applied the brakes; but that decedent proceeded rapidly down the steps and onto the pavement, and that the brakes did not take hold so as to check the speed of the car until after decedent was on the pavement.

[1] We will now consider the several allegations of negligence with a view to determining the claimed insufficiency of the evidence to sustain them. There is no evidence to support the allegation that the track was uneven and unsafe. Respondent calls our attention in this connection to the fact that four photographs were introduced showing the track in the vicinity of the accident. These photographs do not disclose the existence of any unevenness, irregularity, or other defect. So far as is disclosed by their examination, the track appears to have been in excellent condition and constructed in accordance with the accepted method of constructing street railway tracks in paved streets. Furthermore, there was no evidence that there was at any time any swaying, jolting, or other unusual movement of the car from which the existence of such defect might be inferred.

[2] It was shown in the evidence that the car was not equipped with a rear-view mirror. But there was no evidence to support the conclusion that the omission of such a mirror was a negligent omission. Not only was there an entire absence of direct evidence upon this point in the form of expert testimony, but there was also an entire absence of indirect evidence showing that such appliances had been or were in practical use at any time or place. Respondent relies upon section 2100 of the Civil Code, which provides that "a carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill," and upon the statement in Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175, to the effect that "they are bound to keep pace with science, art and modern improvements in supplying safe vehicles, and must adopt the most improved modes of construction and machinery and appliances of safety in known use"; they are "bound to use the best precautions in known practical use to secure the safety of their passengers, but not every possible preventive which the highest scientific skill might have suggested"; they are "bound to have such vehicles and machinery * * * as the improvements known to practical men and tested by practical use may suggest, but not to take every possible precaution which the highest scientific skill might suggest, nor to adopt any mere speculative and untried experiment."

[3] The mere statement of the rule points to the insufficiency of the evidence herein. It was not shown that such appliance was known to practical men or that it had ever been tested by practical use, and the most that could be said under the evidence is that to adopt it would be a mere speculative and untried experiment. Even if it could be said that the omission of such a mirror was a negligent omission, it is difficult to conceive that it could have been a proximate cause of the injury to the decedent. A proximate cause is an efficient cause, and we are unable to perceive any chain of causation between the omission of the mirror and the injury to decedent. Puckhaber v. Southern Pacific Co., 132 Cal. 363, 64 Pac. 480. The trial court instructed the jury:

"If you believe that the street car * * * was not equipped with a mirror ahead of the motorman, and if you further believe that the failure to so equip this car on the part of the defendant was negligence, and that this negligence directly contributed to the death of Katherine Marovich, without fault on her part, your verdict will be in favor of the plaintiff."

Under the circumstances of the case it is not only possible, but highly probable, that the verdict of the jury was founded upon this erroneous conception of negligence, from which it follows that the judgment must be reversed, unless it can be said that this error was waived by appellant, or that it is estopped to complain thereof. O'Meara v. Swortfiguer (Cal. Sup.) 214 Pac. 975.

[4] It is suggested that appellant argued this issue to the jury, and thus in effect consented that the jury should pass upon it, but it has never been held, so far as we are advised, that the circumstance that a party has argued a question of fact to the jury debars him from urging upon appeal that the evidence was insufficient to support a finding upon that issue. Appellant might properly have requested the trial court to instruct the jury that the evidence was insufficient to support a finding in favor of plaintiff upon this issue. It did not do so, but requested, and the court gave, the following instruction:

> "The court instructs the jury that to entitle the plaintiff to recover in this action it must appear from the evidence that the injuries sustained by the decedent were occasioned by the carelessness or negligence on the part of defendant or its servants or employees *as charged in the complaint.*" (Italics ours.)

It is argued that by requesting this instruction appellant, in effect, consented and stipulated to the submission of this issue to the jury and should therefore be bound by the jury's finding thereon. There is no merit in this contention. The requesting and giving of this instruction were in no sense equivalent to a stipulation or a declaration that the jurors might make a finding of negligence in the absence of evidence to support the same. It cannot be said that the appellant waived this point by failing to object to proof of the fact that the car was not equipped with such mirror. Plaintiff was entitled to prove this circumstance as a part of the res gestæ and in support of his allegation. He might have followed up this proof by evidence tending to show that such omission was a negligent omission, but he did not do so.

[5] The proof shows that the exit was provided with a gate which could be closed, but it appears from the testimony of the motorman and from an inspection of a photograph of the car, which is in evidence, that it was not such a gate as is intended to be opened and closed each time a passenger enters or leaves the car. The question of negligence in this behalf therefore is not, was the motorman negligent in not having the gate closed at this particular time? but was the company negligent in not having equipped its car with a gate which was to be opened for the entrance and exit of passengers and kept closed at all other times? If the car had been provided with such a gate, it would be a natural and reasonable inference that it was the duty of the motorman to close it, and the question of his negligence in failing to do so would be properly submissible to the jury. The real question of negligence in this behalf relates to the failure of the defendant company to equip its car with such a gate, and the evidence is as barren of any proof which would support a finding that such failure was negligent as it is with respect to the omission of the mirror. Counsel for respondent suggests that the court may take judicial notice of the fact that there are thousands of street cars in operation which are equipped with such gates. If this be true, the court must at the same time take notice of the fact that there are other thousands of cars in operation which are not so equipped, and the question whether the omission of such equipment is negligence should not be submitted to the jury upon the basis of pure conjecture or speculation, wholly unguided by evidence.

[6, 7] In support of the fourth allegation of negligence it must be said that the evidence was sufficient to support a finding that the motorman negligently failed to stop the car at Q street after having been requested so to do. But, again, there is an entire absence of a sequential relationship of cause and effect between this negligent omission and the injury. It is true that if the car had been equipped with a gate at this exit and the gate had been closed the accident would not have happened. But it is not enough to prove proximate cause to show that the injury would not have resulted in the absence of the negligent omission. Plaintiff must go further and show that the negligent omission was an efficient cause from which the injury followed in a natural and continuous sequence, unbroken by any efficient intervening cause. In the instant case it is clear that the proximate cause of the injury was the act of the decedent in walking off the car while it was in motion. With respect to the absence of the gate, her act in so doing was an efficient intervening cause. It is the theory of respondent that she was induced, by her reliance upon the motorman's promise to stop at Q street, to take a position of danger near the exit, preparatory to alighting from the car; that the motorman, seeing her there, was reminded of his omission to stop; that he then suddenly and negligently applied his brakes; and that the sudden checking of the speed of the car caused her to fall. If this theory were supported by the evidence, it would serve to connect up each of the alleged specifications of negligence—the omission of a mirror, the omission of a gate, and the failure to stop—as proximate contributing causes of the injury. Appellant points out that this theory of the case is entirely outside of the issues as tendered by the complaint. But a more serious objection to it is that it is wholly unsupported by the evidence. There is no evidence of any reduction of speed until after decedent had left the car.

Respondent suggests that the jurors might have believed that portion of the motorman's testimony wherein he says that he applied his brakes as quickly as possible after seeing decedent upon the step of the car, and might have disbelieved that portion of his testimony wherein he says that the brakes did not take effect until after she was on the pavement. Conceding this, it still leaves the case barren of any evidence that they did so take effect. The fact that a jury may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative. A finding that the decedent, while standing near the exit, was thrown from the car by the sudden checking of the speed thereof, would be not only wholly unsupported by any affirmative evidence, but would be contrary to the evidence of several witnesses, including those of the plaintiff, who testified that the decedent did not stop or pause or hesitate at the doorway, but that, on the contrary, she walked right off the car.

[8] As to the fifth allegation, that the motorman negligently propelled the car past Q street at a dangerous rate of speed, it was shown without conflict that the rate of speed was the usual and customary one for that vicinity. There is no evidence that it was either negligent or dangerous. If the car had slowed down as it approached this intersection this might have been construed as an invitation to decedent to alight, and if she had attempted to alight under such circumstances the operation of the car might have been regarded as a proximate cause of her injury, but no sequential relationship is here discernible between the speed of the car and the injury to decedent.

[9] The court instructed the jury:

> "If you believe that Katherine Marovich was killed while riding as a passenger on the street car of the defendant by defendant's operation of any of its instrumentalities, then I instruct you that the defendant is called upon to show either that her death was occasioned by inevitable casualty which human foresight could not have prevented, or was due to contributory negligence on her part, and if you further believe that the defendant has not done this, your verdict should be for the plaintiff."

This instruction should not have been given under the issues as framed. The general rule is that—

> "Where the plaintiff in his complaint gives the explanation of the cause of the accident, that is to say where the plaintiff, instead of relying upon a general allegation of negligence, sets out specifically the negligent acts or omissions complained of, the doctrine of res ipsa loquitur does not apply." Connor v. A., T. & S. F. Ry. Co. (Cal. Sup.) 207 Pac. 378, 22 A. L. R. 1462, and cases cited.

The foregoing statement of the rule in the cited case was followed by the qualification that—

> "Where the explanation leaves it doubtful as to whether or not the ultimate cause of the injury is the negligence of the party charged, it is proper to instruct the jury as to the res ipsa loquitur doctrine."

[10] Regardless of the effect of the foregoing qualification upon the general rule, it is clear that, where the plaintiff in his complaint makes no general allegation of negligence or no allegation of general negligence, instructions applying the doctrine of res ipsa loquitur should not be given. This must be so, for the reason that in such case the plaintiff can recover only upon proof of one or more of the specific acts or omissions alleged in his complaint. Jahant v. Central Pac. R. R. Co., 74 Cal. 9, 15 Pac. 362; Verdelli v. Grays Harbor, etc., Co., 115 Cal. 517, 528, 47 Pac. 364, 778; Rowe v. Such, 134 Cal. 573, 576, 577, 66 Pac. 862, 67 Pac. 760; Cary v. L. A. Ry. Co., 157 Cal. 599, 603, 108 Pac. 682, 27 L. R. A. (N. S.) 764, 21 Ann. Cas. 1329; Roberts v. Sierra Ry. Co., 14 Cal. App. 180, 192, 111 Pac. 519, 527; Foley v. Northern Cal. Power Co., 14 Cal. App. 401, 410, 112 Pac. 467; Johanson v. Brookings Commercial Co. [The Frank D. Stout] (C. C. A.) 276 Fed. 382, 385. It follows therefore that the defendant, in order to exculpate itself, is not required to do more than disprove the specific acts and omissions alleged. But the effect of the instruction as given was to cast upon the defendant the burden of exculpating itself, not only from the negligent acts and omissions charged in the complaint, but also from all others conceivably applicable to the case, and told the jury, in effect, that, if the defendant failed to do so, they should return a verdict for plaintiff, even though it were based upon some act or omission not alleged in the complaint.

As the judgment must be reversed for the reasons indicated, it is unnecessary to consider appellant's claim that the evidence is insufficient to support the implied finding that the decedent was free from contributory negligence.

Judgment reversed.

We concur: WILBUR, C. J.; LAWLOR, J.; LENNON, J.; WASTE, J.; KERRIGAN, J.; SEAWELL, J.

191 Cal. 440

TANNAHILL v. SUPERIOR COURT OF ORANGE COUNTY et al. (L. A. 7646.)

(Supreme Court of California. July 6, 1923.)

Exceptions, bill of 🔑53(4)—Writ of mandate issued to compel settlement of bill, objection being insufficiency of evidence.

Where a judge of the superior court refused to settle a bill of exceptions because the evidence was insufficient to justify the finding, a writ of mandate will issue to compel such a settlement; the insufficiency of the evidence being the question sought to be reviewed.

In Bank.

Application by J. M. Tannahill for a writ of mandate to be directed to the Superior Court of Orange County and Judge Z. B. West. Writ granted.

See, also, 209 Pac. 77.

J. R. Jaffray, of Los Angeles, for petitioner.

A. H. Winder, of Riverside, for respondents.

WILBUR, C. J. This is an application by the successors of J. M. Tannahill, deceased, who was plaintiff in the case of J. M. Tannahill v. F. S. Greening, for writ of mandate to compel the respondent to settle a bill of exceptions in that case. The respondent refused to settle the bill of exceptions upon the objection of the defendant and entered the following order:

> "It is further ordered that objection No. 6 set forth in the objections to said bill on behalf of the defendant F. S. Greening is hereby allowed."

Objection No. 6 was that the settlement of the proposed bill should be refused for the reason that it was impossible to ascertain therefrom how or in what respect the evidence is insufficient to justify finding No. 1 or finding No. 2 or any or either of said findings, in that it appears from the evidence quoted in said bill that the same was amply sufficient to justify each and both of said findings.

The trial court should not have considered the question of whether or not the evidence was sufficient to justify the findings at the time of the settlement of the bill of exceptions, as that question was to be submitted on the bill of exceptions. The bill was proposed and should have been settled in order to secure a review of that very question.

It may be true that the bill of exceptions as finally adopted would require an affirmance of the judgment, but that is not to be considered upon the application for a settlement of the bill.

Let the writ issue.

We concur: LAWLOR, J.; WASTE, J.; MYERS, J.; SEAWELL, J.; KERRIGAN, J.

---

191 Cal. 497

THOMAS et al. v. GISMEGIAN et al. (S. F. 10243.)

(Supreme Court of California. July 9, 1923.)

Agriculture 🔑11—Lien for changing surface of land to adapt it to irrigation properly allowed; "improvement."

The grading and leveling of land so as to change the surface so that it could be irrigated is in the nature of a permanent improvement for the purpose for which it was intended, namely, farming by irrigation, and lien therefor was properly allowed under Code Civ. Proc. § 1191, as amended by St. 1913, p. 333, which provides that one grading, filling, or otherwise improving the land is entitled to a lien on the premises for work done thereon.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Improvement (Of Land).]

In Bank.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action to foreclose mechanic's lien by R. G. Thomas and others against O. G. Gismegian and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Lindsay & Conley, of Fresno, for appellants.

G. L. Aynesworth and L. N. Barber, both of Fresno, for respondents.

WILBUR, C. J. The plaintiffs recovered judgment for the foreclosure of a mechanic's lien for the grading of a tract of land belonging to the defendant. The plaintiffs' claim of lien was based upon the provisions of section 1191 of the Code of Civil Procedure as amended in 1913 (Stats. 1913, p. 333). Since the amendment the statute provides that—

> "Any person who, at the request of the owner of any lot or tract of land, grades, fills in, or otherwise improves the same, or the street, highway, or sidewalk in front of or adjoining the same, * * * has a lien upon said lot or tract of land for his work done and materials furnished. * * *"

The grading and leveling in this case was done to so change the surface of the ground that it could be irrigated, and was in its nature a permanent improvement of the land for the purposes for which it was intended, namely, farming by irrigation. Appellants contend that the case of Young v. Shriver (Cal. App.) 206 Pac. 99, is controlling, and that if that case is to stand as authority the judgment in this case must be reversed. The case of Young v. Shriver dealt with a claim that the first plowing of land, as distinguished from subsequent plowings of the same in the cultivation of crops, was an improvement within the meaning of section

1183, Code of Civil Procedure. We have no doubt as to the correctness of that decision as applied to the plowing of lands for the purpose of preparing them for the sowing of seed or planting of crops.

In the case at bar, however, the leveling of the land was in the nature of a permanent improvement as distinguished from the plowing and leveling essential to the raising of annual crops. The statute gives a lien to one who grades or fills in land, and both were essential in this case and are covered by the express terms of the statute. In some sections of the state the initial expense of leveling land so that it can be irrigated constitutes a very large proportion of the permanent value of the land, and there would seem to be no good reason in such cases for declining to allow the person making such improvements a lien therefor in accordance with the express terms of the statute. We are satisfied that the plaintiffs were entitled to a lien upon the premises in question under the express terms of the statute.

Judgment affirmed.

We concur: WASTE, J.; SEAWELL, J.; KERRIGAN, J.; LAWLOR, J.; MYERS, J.; RICHARDS, Justice pro tem.

---

191 Cal. 498

PACIFIC ROLLING MILL CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 10768.)

(Supreme Court of California. July 9, 1923.)

Prohibition ⚿3(3)—Remedy for review of acts of Industrial Accident Commission is adequate.

Even if Const. art. 20, § 21, as amended November 5, 1918, so as to give the Legislature plenary power to create a complete system of workmen's compensation, and Workmen's Compensation Act, § 67, subds. (a) and (d), relating to writs of review, did not deprive the Supreme Court of jurisdiction under the Constitution to issue writs of prohibition to the Commission, the remedy provided by the Legislature and by the Constitution for the review of the decision of the Commission is plain, speedy, and adequate, so that prohibition will not issue to prevent the Commission from proceeding with a rehearing on an application for compensation.

In Bank.

Original application for writ of prohibition by the Pacific Rolling Mill Company and another against the Industrial Accident Commission and the Commissioners thereof, to prevent the Commission from rehearing an application for compensation. Writ denied.

Burbank & Spence, of San Francisco, for petitioners.

PER CURIAM. This is an application for writ of prohibition to prevent the Industrial Accident Commission from proceeding with a rehearing in the matter of the application of Jean J. Ebbets. It is claimed that the Industrial Accident Commission has lost jurisdiction by reason of once having rendered a decision denying compensation. It is contended that this court has power under the Constitution to issue a writ of prohibition regardless of the provisions of section 67, subds. (a) and (d), Workmen's Compensation Act (Stats. 1917, p. 831). Subdivision (d) of section 67 provides as follows:

> "The provisions of the Code of Civil Procedure of this state relating to writs of review shall, so far as applicable and not in conflict with this act, apply to proceedings in the courts under the provisions of this section. No court of this state, except the Supreme Court and the District Courts of Appeal to the extent herein specified, shall have jurisdiction to review, reverse, correct or annul any order, rule, regulation, decision or award of the Commission, or to suspend or delay the operation or execution thereof, or to restrain, enjoin or interfere with the Commission in the performance of its duties; provided, that a writ of mandamus shall lie from the Supreme Court or the District Courts of Appeal in all proper cases."

Assuming, without deciding, that this court has jurisdiction under the Constitution and under the Workmen's Compensation Act (section 67, subds. [a], [d], supra) to issue writs of prohibition against the Industrial Accident Commission, the Legislature has provided a plain, speedy, and adequate remedy for errors as to jurisdiction committed by the Industrial Accident Commission. Moreover, the Constitution was amended November 5, 1918 (article 20, § 21), so as to give the Legislature—

> "plenary power, unlimited by any provision of this Constitution, to create and enforce a complete system of workmen's compensation, by appropriate legislation. * * * A complete system of workmen's compensation includes * * * full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this state, binding upon all departments of the state government.
>
> "The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by * * * any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by

> it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this state. * * * The creation and existence of which [Industrial Accident Commission] with all the functions vested in them, are hereby ratified and confirmed."

If this constitutional provision did not expressly authorize the Legislature to prohibit issuances of writs of prohibition directed to the Industrial Accident Commission by the courts of this state theretofore having power to issue such writs by reason of the jurisdiction vested in such courts by the Constitution itself, and if, as the petitioner contends, the Legislature has not attempted to prohibit interference with the Industrial Accident Commission by writs of prohibition, where they are acting without jurisdiction, nevertheless the remedy provided by the Legislature and by the Constitution for the review of the decisions of the Industrial Accident Commission is in this case a plain, speedy, and adequate remedy, and for that reason the petition for writ of prohibition must be denied.

(191 Cal. 438)

SHAINGOLD v. SHAINGOLD. (L. A. 6958.)

(Supreme Court of California. July 6, 1923.)

1. Divorce 🔑130—Finding of court on matters alleged in cross-complaint held sufficient to sustain judgment denying divorce.

In an action for separate maintenance, wherein defendant filed a cross-complaint asking for divorce on the ground of cruelty, a finding of the court to the effect that it was not true that matters complained of had caused defendant grievous mental suffering and great mental anguish, and the additional finding in the judgment denying a divorce that "the evidence does not support the allegations of the complaint and the cross-complaint" *held* sufficient to support a judgment denying a divorce.

2. Trial 🔑393(1)—Findings contained in the judgment itself held sufficient.

Findings contained in the judgment itself are sufficient.

3. Divorce 🔑150(2)—Decree denying divorce is sufficiently supported by finding of mutual condonation though other findings may be insufficient.

A finding of the court that there has been a mutual condonation is sufficient to support a judgment denying a divorce though insufficient findings may have been made concerning other matters.

4. Divorce 🔑135—Testimony that matrimonial intercourse continued until filing of cross-complaint insufficient to support finding of condonation.

Under Civ. Code, § 118, providing that, as respects cruelty consisting of course of conduct, cohabitation or passive endurance shall not be evidence of condonation, testimony by both parties that there had been matrimonial intercourse until the filing of husband's cross-complaint is insufficient, standing alone, to support a finding of condonation of husband's cruelty.

In Bank.

Appeal from Superior Court, Los Angeles County; John W. Summerfield, Judge.

Action for separate maintenance by Rebecca Shaingold against Jack Shaingold, wherein defendant filed a cross-complaint for divorce. From a judgment denying relief to either party, defendant appeals. Affirmed.

Wm. Lewis and Guy Lewis, both of Los Angeles, for appellant.

Max Rapaport, of Sacramento, for respondent.

WILBUR, C. J. This is an action by a wife for separate maintenance, based upon allegations of cruelty and nonsupport. The husband filed a cross-complaint for divorce upon the ground of cruelty. The court denied both maintenance and divorce. The defendant appeals from the judgment, and respondent files no brief and makes no appearance in this court.

[1] Appellant's claim is that the court did not sufficiently find the facts as to his allegations of cruelty. The finding of the court was to the effect that it was not true that the matters complained of had caused the defendant grievous mental suffering or great mental anguish. Reference was made in the finding to the paragraph of the cross-complaint and its numerous sudivisions charging plaintiff with cruelty.

Appellant relies upon the cases of Smith v. Smith, 62 Cal. 466, and Franklin v. Franklin, 140 Cal. 607, 74 Pac. 155, as authority to the effect that the finding in question is not sufficient because it leaves to inference the question of whether or not the cruelty complained of actually occurred. It is not, however, necessary to consider this question, because additional findings are included in the judgment denying a divorce, as follows:

> "Now, therefore, said court, having duly considered the same, makes its findings of fact and decision as follows: The court finds that the evidence does not support the allegations of the complaint and the cross-complaint, therefore it is ordered, adjudged and decreed that the said plaintiff is not entitled to a divorce from the defendant, and a decree of divorce is denied."

[2] Findings contained in the judgment itself are sufficient. Hopkins v. Warner, 109 Cal. 133, 41 Pac. 868; Hibernia Savings & Loan Society v. Clarke, 110 Cal. 32, 42 Pac. 425; Locke v. Klunker, 123 Cal. 231, 55 Pac. 993. This finding contained in the judgment, construed with the other findings in

the case, is sufficient to support the judgment denying divorce.

[3, 4] There is another reason for affirming the judgment. The trial court found that there had been mutual condonation, and this finding is not attacked. We do not base our decision on this ground, however, although it is amply sufficient in the absence of an attack, because an examination of the record shows that this finding is based upon the testimony of both parties that matrimonial intercourse continued until the filing of the cross-complaint, and if this is the sole basis of the finding of condonation the evidence would not support the finding. Civ. Code, § 118.

Judgment affirmed.

We concur: MYERS, J.; SEAWELL, J.; LAWLOR, J.; WASTE, J.; KERRIGAN, J.; RICHARDS, Justice pro tem.

191 Cal. 441

SCOTT v. SYMONS et al. (Sac. 3170.)

(Supreme Court of California. July 6, 1923. Rehearing Denied Aug. 2, 1923.)

1. Appeal and error 🔑880(1)—Sole appellant held to have no status to question judgment of accounting between copartners in sale of mining property.

In suit by the owner of a one-sixth interest in mining property for an accounting and to recover her interest in the escrow fund received from sale thereof, in which the steward of the fund and defendant as an alleged unauthorized payee of part of the fund were parties, defendant not being a party to the option agreement to sell the properties, nor to the agreement for disposition of the proceeds, as sole appellant from judgment declaring plaintiff's one-sixth interest in the proceeds after payment of authorized debts, cannot question correctness of the judgment on accounting between the copartners.

2. Appeal and error 🔑880(1)—Defendant as sole appellant excluded from urging objection to judgment against codefendant.

In a copartners' suit for accounting for funds received from the sale of mining property in which the steward of the fund and defendant as an unauthorized payee of part thereof were parties, defendant as sole appellee from judgment against the steward and himself for the amount paid by the steward to him cannot urge objections to judgment in so far as it affects the steward's individual liability.

3. Trusts 🔑95—Defendant accepting unauthorized payment from trust fund became an involuntary trustee.

Under Civ. Code, § 2243, providing that every one to whom property is transferred in violation of a trust holds it as an involuntary trustee unless purchasing in good faith and for value, where defendant knew that the steward of an escrow fund was authorized to make payment thereof only on claims against copartnership, and with knowledge of the character of the fund procured payment therefrom on claims against individual copartners and on claims not authorized by plaintiff to be paid therefrom, he became an involuntary trustee.

4. Trusts 🔑95—Good faith of party securing wrongful payment from trust fund held not to affect rights of owner.

In a copartners' suit for an accounting and to recover one-sixth of an escrow fund received from the sale of mining property in which the steward of the fund and an unauthorized payee therefrom were parties, notwithstanding there was no conspiracy between the steward, payee, and depositary to defraud plaintiff, having wrongfully come into possession of money from the fund, the fact that they acted in good faith cannot affect the rights of plaintiff, and payee became an involuntary trustee for plaintiff. Civ. Code, §§ 2223, 2224.

5. Limitation of actions 🔑39(11)—Wrongful payment of trust money governed by four years' statute.

For action based on a written contract creating a trust, which was violated by wrongful payment of moneys, contrary to the terms of the trust, the period of limitations is four years.

6. Limitation of actions 🔑201—Express finding as to statute of limitations not necessary where facts found show action not barred.

It is not necessary that the court find expressly as to the statute of limitations where the facts found show the action was not barred.

7. Judgment 🔑527—Judgment for plaintiff held to be finding of no unnecessary delay in bringing action.

A judgment for plaintiff in action for accounting and to recover her one-sixth interest in proceeds of sale of mining property was a finding against her alleged unnecessary delay in instituting action.

In Bank.

Appeal from Superior Court, Tuolumne County; George F. Buck, Judge.

Action by Annie C. W. Scott against Thomas F. Symons and others. Judgment for plaintiff, and defendant named appeals. Affirmed.

William M. Abbott and William M. Cannon, both of San Francisco, for appellant.

Grant & Zimdars and William H. Bryan, both of San Francisco (Frank M. Angellotti, of San Francisco, of counsel), for respondent.

WASTE, J. This action was brought by the plaintiff for an accounting and to recover from the defendants various sums of money claimed to be due her by reason of the acts and conduct of the defendants in connection with the application and distribution of the proceeds of the sale of what was known as the Black Oak group of mines in Tuolumne county and in which plaintiff was the owner of an undivided one-sixth interest. The appeal is by the defendant Symons alone, under the alternative method, from a judgment rendered against him and the defendant J. B. Curtin, jointly, in favor of the plaintiff, for the sum of $15,016.33, which sum the trial court found was wrongfully diverted from the trust fund created by the deposit in bank of the proceeds of the sale of the mining property.

The mining property in question was acquired in 1890, and was thereafter owned by the following parties as tenants in common: W. P. Scott, this plaintiff's husband, hereinafter at times referred to as Proctor Scott, having an undivided one-sixth interest, W. G. Scott having an undivided one-sixth interest, C. S. Dowe holding an undivided one-third interest, and George W. Campbell and Olive R. Campbell, his wife, jointly holding the remaining undivided one-third interest. When the mines were acquired, these parties, excepting Olive R. Campbell, formed a partnership for the working of the mining property, which partnership was known by the firm name of Scott, Dowe & Co., and which continued to operate the mines until 1903, when Proctor Scott died, and his wife, the plaintiff and respondent herein, succeeded to his interest therein. No conveyance was ever made by the tenants in common, or any of them, to the partnership. At the time of the death of Proctor Scott the partnership was heavily in debt, including taxes chargeable against the mining property, in the sum of $69,408.83. At the time, as appears from the findings, no one of said copartners had overdrawn his accounts with the partnership, or was indebted to the partnership or to each other on account of partnership transactions, or otherwise, and the partnership was not indebted to any of the members composing it on account of partnership transactions. It also appears that none of the firm had advanced to the partnership any sum in excess of the original contributions made at the time of its formation. The court also found that prior to the death of W. P. Scott no accounting of the mine operations carried on by the partnership was ever had, and the relations of the partners to the business had never been adjusted. Continuously from the time of the death of Proctor Scott until the commencement of this action the most unfriendly relations existed between plaintiff and the associates of her deceased husband. Plaintiff desired a sale to be made of the mining property, and at all times objected to the working of the mines or the incurring of any indebtedness or obligation in connection therewith. Over these objections the surviving copartners continued, at a financial loss, to operate the property under the firm name until 1904, when Campbell, Dowe, and W. G. Scott formed a corporation, styled and known as the Black Oak Mining Company, no other person being connected with the corporation but those named. Campbell, Dowe, and W. G. Scott leased the mining property to the new corporation, and operations were thereafter carried on in the name of the company, which had separate books of account, and all of its transactions were conducted in the name of the corporation. The plaintiff refused to, and did not, have anything to do with the corporation, and refused to, and did not, join in the lease for the property to the company. She never participated in the affairs of the corporation. By the beginning of 1906, Campbell, Dowe, and W. G. Scott and the lessee corporation, Black Oak Mining Company, had exhausted their credit, and the mines were closed down.

Pursuant to a common desire, all the parties interested, the plaintiff included, on December 6, 1907, joined in the execution of an option or agreement to sell the mining property to S. A. Knapp for the sum of $202,500 net to the owners, payable within three years and four months from date of the agreement. At the time of entering into the contract, Knapp was aware, in a general way, that an unpaid indebtedness existed, having been contracted by Scott, Dowe & Co. in carrying on mining operations under the old partnership, prior to the death of W. P. Scott, and that a larger indebtedness had been incurred by the Black Oak Mining Company. He also knew there were certain liens against the property. The option agreement, therefore, provided that the owners, including this plaintiff, should cause to be executed and placed in escrow with the First National Bank of Sonora, a grant, bargain, and sale deed of the mining property, and should also (and this is a vital consideration in the case) "cause to be executed and placed in escrow, at the same time with said deed and conveyance, an agreement from all the creditors or persons holding outstanding claims of indebtedness against the parties of the first part (the owners of the mine), to the effect that none of said claims or indebtedness will be pressed for payment by any suits which may constitute a lien or institute other proceedings against any of the properties before mentioned, or in any wise interfere with the quiet use, possession, and working thereof by the party of the second part (S. A. Knapp) during the life of this agreement, and will, at the same time, place in escrow, with said deed and conveyance, proper satisfaction of mortgages and liens upon said property, the same to be delivered when the indebtedness evidenced and secured thereby shall have been paid out of the proceeds of the sale of said property to be hereinafter mentioned." The agreement further provided for partial payments on the purchase price of the mine, and that when the purchase price was fully paid the First National Bank of Sonora, as escrow agent, should deliver to Knapp deeds, transfers, and documents placed in escrow; and the bank was further authorized "out of the moneys thus received, as the purchase price of said mines, to apply the same in discharging the indebtedness of the parties of the first part in accordance to their priority of record, all taxes due being especially hereby agreed as the first in priority, and thereafter, mortgages and liens, as the same appear of record, and next thereafter all indebtedness not constituting a lien on said property as shall be given to said bank by the parties of the first part on agreements to be made by said creditors, and the balance then remaining shall be paid over to the parties of the first part in the proportions of one-third to G. W. Campbell and Olive R. Campbell, one-third to C. S. Dowe, one-sixth to W. G. Scott, and one-sixth to Annie C. W. Scott; and the said bank shall further cause to be recorded, the expense of which shall be paid by the parties of the first part, the said satisfaction of said liens, so that, at the time of the delivering of said deeds and conveyances to the party of the second part, all liens against said properties to be conveyed shall be satisfied of record." The option agreement also provided that Knapp should keep correct books of account of all moneys invested and expended in the operation of the mining property, and should render to the owners, "or to the agent of them as may be hereafter agreed upon," true and correct statements of the total receipts.

Almost coincident with, and as part of the same transaction, an agreement was made by W. G. Scott, George W. Campbell, and Olive R. Campbell, C. S. Dowe and Annie C. W. Scott, this plaintiff, and the Black Oak Mining Company, by its vice president and secretary, with the creditors of Scott, Dowe & Co. and of the Black Oak Mining Company, by the terms of which the creditors agreed not to enforce their demands pending the exercise of the option by Knapp, and that such creditors would look for payment of their demands to the First National Bank of Sonora. All of the debtors, including this plaintiff, agreed that the statute of limitations would be waived, and that the creditors should be paid by them, through said bank, out of the purchase price of the mining property in the event the option was exercised. On September 19, 1908, proper deed conveying the property to Knapp, together with copy of the option and the creditors' agreements entered into with the owners, were deposited with the First National Bank of Sonora in escrow, and the bank agreed in writing to accept and administer the trusts and make the payments provided for, and directed to be made, by the terms of the option agreement. Knapp took immediate possession of the property, and proceeded to work the mines. Thereafter, on the 13th day of October following, the owners of the property, other than Annie C. W. Scott, plaintiff and respondent, together with S. A. Knapp, in writing, pursuant to the terms of the option agreement, constituted the defendant J. B. Curtin agent of the owners "to carry out any and all things provided for in said agreement." Among other things provided for in such power of attorney, all claims were to be paid on his order by the escrow agent under the option agreement, and he had power to designate whether the funds in the hands of the bank should be kept in a special or regular deposit. He might change the escrow agent at any time.

Thereafter, on December 5, 1910, plaintiff and the surviving partners of Scott, Dowe & Co. granted the Black Oak Development Company, as assignee of Knapp, an extension of time. On April 3, 1913, three days prior to the expiration of this extension, the development company exercised its rights, and deposited with the First National Bank of Sonora $202,500, being the full amount of the purchase price of the mining property, and in addition thereto certain amounts of interest required by the extension. On that same date, as appears from the record, Annie C. W. Scott, this plaintiff and respondent, in writing, authorized and empowered the defendant J. B. Curtin "my agent for the purpose of the adjustment and payment of the claims of the creditors of the copartnership heretofore existing under the name of Scott, Dowe & Co., and for the purpose of the payment of the indebtedness of said Scott, Dowe & Co. * * * to sign checks and draw upon the moneys now in the hands of the First National Bank of Sonora, California, paid thereto by Black Oak Development Company on account of the purchase price of the Black Oak Mining properties; and I further authorize and empower said J. B. Curtin to sign and draw checks upon the said funds now in the said bank for the purpose of the payment of the indebtedness of the Black Oak Mining Company, a corporation, but this authorization is given with and under the express understanding and consideration that my one-sixth interest in the moneys now in said bank shall not be liable for any indebtedness of or claims paid to the creditors of the said Black Oak Mining Company." Defendant Curtin, as agent of the owners, began paying the claims asserted against the escrow fund. He continued until he had paid out about $168,000. Of this amount, the trial court found that $69,408.83 was properly payable on the debts of Scott, Dowe & Co. incurred before the death of plaintiff's husband, with interest thereon up to April 3, 1913, and the amount of taxes chargeable against the mining property to that date. Curtin also paid to the defendant Symons $18,611.14, of which $3,594.81 was for unsecured demands representing debts and liabilities contracted by the Black Oak Mining

Company, and included in the creditors' claims required by the option agreement, and two smaller claims, held by Symons under assignment, and all of which he purchased for about 30 cents on the dollar. Included in the above sum paid by Curtin to Symons was an item of $13,926.13, paid to him as assignee in satisfaction of a judgment rendered in favor of the California Safe Deposit & Trust Company on a claim and demand against W. G. Scott and C. S. Dowe, as individuals, two of the former owners of the mining properties, for that amount. This judgment was not a claim or demand against either the Black Oak Mining Company or Scott, Dowe & Co., but was a claim against Scott and Dowe individually, and was not a lien on the mining properties, and was not included in the creditors' agreements. Another item of the aggregate amount paid by Curtin to Symons was a claim of the California Safe Deposit & Trust Company, on a note signed by W. G. Scott, C. S. Dowe, G. W. Campbell, and the Black Oak Mining Company, for $831.30, with interest amounting to the sum of $195.75, which was not included in the creditors' agreement. The total amount of these demands purchased by Symons from the California Safe Deposit & Trust Company was the sum of $14,953.73, for which he paid $5,000. Curtin also paid him $62.60 for two claims not on the creditors' list, making his total trespass on the fund equal $15,016.33.

Before the death of W. P. Scott, plaintiff's husband, a mortgage on all of the mining property was executed by said W. P. Scott, W. G. Scott, C. S. Dowe, G. W. Campbell, and Olive R. Campbell to Thomas A. Fisher for the sum of $10,048.50. After the death of W. P. Scott, G. W. Campbell and Olive R. Campbell executed a mortgage on their undivided one-third interest in the property to Fisher for $3,296.70. Thereafter W. G. Scott, C. S. Dowe, G. W. Campbell, and Olive R. Campbell executed two mortgages to Fisher of their individual undivided five-sixths interest in the mine, one for $5,000 and one for $24,800. All of these mortgages bore exorbitant rates of interest. Because of this fact, and for the reason that the mortgages, with the exception of that joined in by W. P. Scott, were mortgages of the individual interests of the mortgagors, defendant Curtin declined to make disbursements from the escrow fund in full payment of the mortgage debts, but made a tender and a deposit of the sum of $54,755.14 in full satisfaction. This tender appears to have been made under an agreement between Fisher and Curtin, whereby the former agreed to accept a flat rate of 7 per cent. interest.

Including this last tender and deposit in satisfaction of the Fisher mortgages, Curtin had now paid out about $168,000 of the escrow funds. There remained subject to his order on special deposit the sum of $38,843.08, which amount the trial court found he considered at that time to be in excess of the equity and claim of the plaintiff, Annie C. W. Scott, in the fund derived from the sale of the mines.

Fisher subsequently repudiated the agreement for a settlement, and brought suit to foreclose the mortgages held against the mining properties. The owners of the mine, the First National Bank of Sonora, and the Black Oak Development Company were made defendants in the actions. He recovered judgment for the sum of $76,644.20. Fisher was one of the signers of the creditors' agreement. The option agreement and the agreement between the owners and the creditors were before the court in the foreclosure actions by proper pleadings. The trial court found that the lien of the mortgages had been transferred from the mining property to the escrow fund, and that Fisher was obligated to look to the bank for the payment of his money, and that the purchaser of the property who had paid the purchase price into the bank was entitled to obtain title to the property free and clear of any liens arising by reason of the mortgages. Backed by this judgment and an order of court, over the express written instructions of Curtin, the bank paid over the entire balance of the escrow fund to Fisher. By this payment the fund was completely exhausted.

Plaintiff brought this action upon the theory that she was entitled to one-sixth of the amount remaining in the escrow fund after the payment by Curtin of the antecedent debts of Scott, Dowe & Co., including interest and taxes, and that the payment or adjustment of any other claims and demands against the fund by Curtin was unauthorized. In this connection the trial court found that by the terms of the written authorization executed by plaintiff to Curtin, taken in conjunction with the provision of the option agreement, the agreement between the owners of the mining property and the creditors, and by other writings which appear in the record, plaintiff "authorized said J. B. Curtin to pay the creditors of Scott, Dowe & Co. and the creditors of the Black Oak Mining Co. who had signed the creditors' agreement out of the purchase price fund, resorting, if necessary, to her (plaintiff's) share of the fund for that purpose," but that "her interest in said purchase price fund, as the successor in interest of her husband, W. P. Scott, * * * was not liable for the debts contracted by the Black Oak Mining Company, or by W. G. Scott, C. S. Dowe, George W. Campbell, or Olive R. Campbell after the death of W. P. Scott. * * * That the said power of attorney of April 3, 1913, was given to Curtin by plaintiff upon the understanding and conditions recited in the said writing that plaintiff was not liable for the debts of the Black Oak Mining Company and all persons justifying or claiming under said power of attorney are estopped from asserting that said plaintiff was liable for payment of Black Oak Mining Company debts, or that plaintiff's share of the fund resulting from said sale can be charged with the payment of said debts." The trial court also found that plaintiff did not, by the terms of the power of attorney, or otherwise, authorize the payment by Curtin of any indebtedness that was not included in the creditors' list, and that her authorization did not empower Curtin to pay the individual indebtedness of any of the other owners of the property. Nor was Curtin, nor the bank authorized to pay any unsecured debt which was not a lien against the mining property, unless the creditor who was the owner of said indebtedness had signed the creditors' agreement. The court also found that, after the signing of the power of attorney and prior to the payments by Curtin of any moneys to Symons, as assignee of certain demands, plaintiff notified Curtin that her authorization did not authorize or empower him to pay any moneys whatever out of the escrow fund excepting in payment of the debts of Scott, Dowe & Co., whereby the payments would diminish the amount of moneys remaining in the bank to such a sum that, after subtracting the debts of Scott, Dowe & Co. owing at the time of the death of W. P. Scott, there would not be left sufficient money to give to plaintiff the undivided one-sixth of the full purchase price of said mining property.

The trial court found that the full amount of all taxes against the mining property owing or unpaid on April 3, 1913, including interest, penalties, and costs, and the full amount of all obligations of every kind owing by the partnership of Scott, Dowe & Co. at the time of the death of W. P. Scott, with interest to April 3, 1913, was the sum of $69,408.83. It deducted that amount from $207,091.85 (being the sum of $202,500 plus $4,591.85, interest due and payable under the terms of the extension contract with Knapp), the result of which subtraction is $137,683.02. It found that of this amount plaintiff was entitled to receive an undivided one-sixth, or the sum of $22,947.17, on the 3d day of April, 1913, when the mine was fully paid for. The court then "finds that W. G. Scott, George W. Campbell, Olive R. Campbell, and C. S. Dowe were entitled to the remaining five-sixths of the said purchase price and interest so paid to said bank; and the court finds that said five-sixths, to which the said W. G. Scott, George W. Campbell, Olive R. Campbell, and C. S. Dowe were entitled, has been received by them by being paid out by their consent and approval in discharge of the debts and obligations of the Black Oak Mining Company, for which debts the said W. G. Scott, George W. Campbell, and C. S. Dowe were liable, and to the payment of which Olive R. Campbell consented, or the same was paid in discharge of the individual indebtedness of W. G. Scott, George W. Campbell, Olive R. Campbell, or C. S. Dowe, or to some of them individually, or was paid otherwise with their approval and consent, and no part of the full sum paid into said bank on account of said purchase price and interest was left in said bank at the time of the commencement of this action, and that no part of said purchase price was paid to this plaintiff."

The trial court also found that the defendant Curtin made certain unauthorized payments from the trust fund. In the foregoing facts the trial court concluded, and by its decree declared, that plaintiff, as the successor in interest of W. P. Scott, her deceased husband, to a one-sixth share of the mining property, was entitled to receive, on April 3, 1913, and was the owner of, $22,947.17 out of the purchase price of the property. It was further decreed that plaintiff have and recover from defendants Symons and Curtin the sum of $22,324.65, said amount being the sum of $15,016.33, paid by Curtin to Symons for demands which were not on the creditors' agreement and which were not a proper disbursement under the terms of either the option or the creditors' agreement, with interest thereon from May 8, 1913, the date on which the unauthorized payment was made. Judgment was also decreed in plaintiff's favor against the defendant Curtin for two several amounts aggregating $9,149.52, with interest, by reason of the alleged unauthorized payments by Curtin out of the trust fund.

[1] Appellant takes the position that the action was not tried as one for an accounting between the co-owners of the mine, but, in fact, as one to compel defendant Curtin to give an accounting of *his* stewardship. As sole appellant from the judgment "in favor of Annie C. W. Scott, the plaintiff in said action, and against said Thomas F. Symons," he cannot question the correctness of the judgment of the lower court settling the accounts between plaintiff and her co-owners. The prayer of the complaint was that an accounting be had and taken of all the dealings and transactions of the partnership, Scott, Dowe & Co., from the time of its organization, and of the moneys received and paid out and accounted for in the operation and working of the mines and mining property of such partnership, and that an accounting be had between plaintiff "and the other defendants herein." All the parties to that controversy were before the trial court, and the court has determined as between them that plaintiff was entitled to an undivided one-sixth of the amount realized from the sale of the property after deducting therefrom only that portion of the fund which was applicable to the payment of taxes on the property and the debts of the partnership, Scott, Dowe & Co., contracted before the death of plaintiff's husband. Appellant says that on the trial the taking of an ac-

count was waived. The record affords some support to appellant's contention, but the fact remains that the action did embrace the claim for an accounting of the funds arising from the proceeds of the sale of the mining property. As to that fund, it was definitely and finally decided that between the various persons interested in the fund, of whom appellant Symons is not one, this plaintiff was entitled to the whole of the balance. Defendant Curtin, who was the disbursing agent of all the parties in the transaction, and who paid out the various claims against the escrow fund, rendered an account of his transactions. The trial court found that no one of the partners had overdrawn his accounts with the partnership, or was indebted to the partnership or to each other on account of partnership transactions, or otherwise, and that the partnership was not indebted to any of the members composing it on account of partnership transactions. It also found that none of the firm had advanced to the partnership any sum in excess of the original contributions made at the time of its formation. From these and the other findings to the effect that plaintiff was entitled to an undivided one-sixth interest in all of the escrow fund remaining after payment of claims strictly arising out of the partnership of Scott, Dowe & Co., and that the other members of the partnership and owners of the mining property were entitled to the remaining five-sixths of the purchase price and interest paid the bank, and had received their proportion through its being paid out by Curtin with their consent and approval in discharge of the debts and obligations of the Black Oak Mining Company, for which debts they were liable, we may readily conclude that the court did, in effect, take an accounting between all the parties to the option. It does not matter that there may not have been in the strictest sense an accounting, as appellant contends. The lower court, to all intents and purposes, found that plaintiff was entitled to an accounting, and upon that accounting adjudged the amount owing to plaintiff from her associates to the option agreement. Her associates, all of whom were parties to the action, have not appealed from the judgment declaring that she was entitled to such an accounting, and fixing the sum of money payable to her. Appellant was not a party to the option agreement, nor, as to the unlawful payments made by Curtin to him, was he a beneficiary under its terms or by the creditors' agreements. He had no lien of any kind against the interests of any of the parties to the instruments or to the fund, either by way of assignment, execution, attachment, or otherwise. Neither was the California Safe Deposit & Trust Company, under which he claimed, a party to the option agreement or to the creditors' agreements, nor was it privy legally to any party holding claims under those agreements. He occupied simply the position of an open, unsecured, individual creditor of two of the parties to the option. That the claim advanced by Mrs. Scott and sustained by the trial court may be opposed to documentary evidence, or that there may be findings in the record, based upon the reservation contained in the power of attorney executed by Mrs. Scott, which are contrary to the evidence, is no concern of this appellant. He has no status to question the correctness of the judgment on the accounting between the parties interested in the sale of the mining property.

[2, 3] Neither is the appellant in position to urge any objections on this appeal to the judgment in favor of plaintiff, in so far as it affects the individual liability of the defendant Curtin. If it were possible that upon some conceivable theory he might be, he has excluded himself from such action by the limitation contained in his notice of appeal. His sole concern now is as to the correctness of the judgment by which it is decreed that plaintiff is entitled to recover from Curtin and himself the amount paid him by Curtin out of the escrow fund in discharge of the claims of the California Safe Deposit & Trust Company against W. Guy Scott and C. S. Dowe, with interest from the date of such payments. The theory of the complaint as to appellant, Symons, in this regard is that he had full knowledge of the option agreement, and therefore knew that certain claims held by him, and paid by Curtin out of the moneys deposited in the bank, were not legitimate claims against the escrow fund; that Curtin, as the agent of plaintiff and others, was the trustee of the fund, and hence paid the money to appellant in violation of his trust; and that thereby Symons became an involuntary trustee of so much of the fund as was unlawfully paid to him. Section 2243 of the Civil Code provides that "every one to whom property is transferred in violation of a trust, holds the same as an involuntary trustee under such trust, unless he purchased it in good faith, and for a valuable consideration." There can be no question, from the evidence and findings in this case, which we have already referred to and which we do not need to repeat, that Curtin paid Symons the sum of $15,016.33, in violation of his trust. Symons was the vice-president and director and a member of the finance committee of the First National Bank of Sonora for ten years prior to and for some months after April 3, 1913. It appears, also, that Symons was a party to the creditors' agreement representing certain demands in his own favor other than those involved in the present appeal. When it became known to Symons that the holders of the contract to purchase the mining property would exercise their option, and that the full amount due and payable under the terms of the agreement would be paid into the bank, Symons began purchasing at discount demands against the

fund which were contained in the creditors' agreement. There is much in the record indicating that Symons had full knowledge and notice of the contents of the option agreement, and he certainly must have had a thorough understanding of the terms of the creditors' agreement which he himself signed. Prior to the payment of any money by Curtin to Symons, as assignee of his various demands, plaintiff, through her attorney, notified Curtin in writing that the authorization of April 3, 1913, contained in the so-called power of attorney, did not give him authority or empower him to pay any moneys whatever out of the fund except in payment of the debts of Scott, Dowe & Co.

[4] The trial court found no conspiracy was entered into by the defendants Symons, Curtin, or the First National Bank, or any of them, for the purpose of defrauding plaintiff, either in the matter of the purchase of creditors' claims at a discount by Symons, or in the payment of any of such claims out of the moneys resulting from the sale of the mining properties. Even though such finding may have the effect, as appellant contends, of establishing that Curtin and he acted in good faith, still, if money in the trust fund was wrongfully disbursed, the fact that they acted in good faith in the wrongful disposition cannot affect the rights of the true owner. Having wrongfully come into possession of money belonging to the trust fund, whether it was by mistake, violation of the trust, or otherwise, Symons became an involuntary trustee of the amount thereby gained for the benefit of plaintiff, who, the court found, would otherwise have had it. Civ. Code, §§ 2223, 2224; Heydenfeldt v. Jacobs, 107 Cal. 373, 377, 40 Pac. 492. Neither do we doubt in the least that he had full knowledge of the character of the fund in the hands of the bank, and exact notice of the instruments declaring the purpose to which such fund could be lawfully applied and paid out by Curtin. Appellant gave no consideration of value or otherwise to this plaintiff for the money paid him by Curtin from the trust fund. He bought for an amount far less than their face value the judgments of the California Safe Deposit & Trust Company against W. Guy Scott and C. S. Dowe, individually. Plaintiff derived no benefit from the satisfaction of the judgments against Scott and Dowe which appellant gave to Curtin in return for the unlawful payment from the trust fund.

The trial court found that there was no accord or satisfaction of any claims or demands between plaintiff and Symons; that there was no understanding or accounting of any kind between them concerning any matter whatsoever; and there was no agreement on the part of plaintiff that there was any sum of money due to Symons from the fund derived from the sale of the mining property.

What we have already said disposes in effect of appellant's contention that the judgment must be reversed, even if respondent's other positions are sound, because he is obliged to account to her only to the extent of one-sixth of the fund remaining after the payment of the debts properly chargeable against it. Appellant overlooks the two-fold nature of this action. One purpose was for an accounting of the affairs of the copartnership of Scott, Dowe & Co., and a determination of the rights of the plaintiff and her co-owners of the mining properties in connection with the purchase-money fund. Under this phase of the case, the court has determined, and its judgment in that respect is final, that the plaintiff alone is entitled to a certain definite amount, to wit, $22,947.17, and that the other parties who were interested in the fund have been paid, and their claims against it discharged, through the disbursements made by Curtin. The other purpose of the action is to have the defendants, including appellant, account for and return to the fund any moneys unlawfully taken from it by them. Under the evidence and findings, Symons trespassed against the fund and became an involuntary trustee to the extent of his unlawful acquisition. Respondent seeks in this action, so far as appellant is concerned, to recover judgment against him for the amount that respondent, as the sole beneficiary of what should have remained in the trust fund, was entitled to have, and to force him to make good that which she lost through his action, with simple interest thereon during the time of its unlawful detention. Civ. Code, §§ 2238, 2262.

[5, 6] Other considerations urged by the appellant in support of his appeal may be more briefly disposed of. The court did not expressly find upon the issue of the statute of limitations. The action is based upon a written contract whereby a trust was created, which was violated by the wrongful payment of moneys contrary to the terms of the trust. The period of limitations for such action is four years. McArthur v. Blaisdell, 159 Cal. 604, 608, 115 Pac. 52; Code Civ. Proc. § 343. The findings do say, however, that the wrongful payment to Symons was made on May 8, 1913. The original complaint was filed April 1, 1916. The action was commenced within three years after the wrongful diversion of the fund. It was not necessary that the court find expressly as to the statute of limitations where the facts found show the action was not barred. Woodham v. Cline, 130 Cal. 497, 499, 62 Pac. 822.

The contention of appellant that the judgment must be reversed because the trial court did not find upon the issue of ratification is disposed of by the finding of the trial court that there was no understanding or accounting nor accord or satisfaction of claims and demands between plaintiff and Symons, and by pertinent facts elsewhere in the findings which negative any idea that plaintiff ratified, approved, or confirmed the acts of the defendant Curtin, done or performed in her behalf, to the extent of approving his dealings with appellant.

[7] The contention that the judgment must be reversed because plaintiff's claim is barred by her laches, and because the trial court failed to find upon that issue, is disposed of by the fact that the court, having given judgment in favor of plaintiff, in effect, found against unnecessary delay on her part in instituting the action. Stevinson v. San Joaquin, etc., Co., 162 Cal. 141, 144, 121 Pac. 398. The evidence fully sustains the trial court in this regard.

The judgment is affirmed.

We concur: WILBUR, C. J.; MYERS, J.; KERRIGAN, J.; SEAWELL, J.; LAWLOR, J.

191 Cal. 418

WESTERN INDEMNITY CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (L. A. 7521.)

(Supreme Court of California. July 5, 1923.)

Master and servant ⚷419—Change of compensation from permanent disability payment to temporary disability payment authorized.

The power of the Industrial Accident Commission, under Workmen's Compensation, Insurance and Safety Act, §§ 9(8), 20(d), to allow a temporary disability payment in lieu of a permanent disability payment for a single injury is a power which, from the nature of the object to be accomplished, must be a continuing power and within the scope of the continuing jurisdiction for which provision is made by the act, and such change does not violate section 17(c), providing that there shall be but one cause of action for each transaction.

In Bank.

Application for writ of review by the Western Indemnity Company to annul an award by the Industrial Accident Commission of California for compensation for injury to Leo Vane. Award affirmed.

Jennings & Belcher, of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

SEAWELL, J. This is an application for the annulment of an award made by the Industrial Accident Commission of this state under the provisions of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831).

Respondent Leo Vane, employed as an auto truck driver by the Floribel Farm & Cattle Company, a corporation, was injured June 15, 1918, in the course of his employment and while engaged in an attempt to set in motion the engine of said auto truck by rotating the starting crank. The engine "backfired," suddenly setting in motion the starting crank, which struck his right arm with great force, fracturing the radius of the right (major) forearm. The employer, Floribel Farm & Cattle Company, carried a policy of insurance with the Western Indemnity Company, petitioner herein. Shortly after said injury was inflicted, respondent was taken to the city of Los Angeles and placed in the care of a physician, appointed by petitioner, for treatment. Two operations were performed by said physician, including bone grafting, but neither operation seemed to have resulted satisfactorily. The fractured bone refused to unite. This caused a deformity of the injured member and affected the free use of the wrist, thumb, and fingers. It also resulted in the shortening of the injured arm to the extent of one inch and a fraction more. During the last stages of treatment, which extended over a period of about four years, upon the request of respondent, a change of physicians was granted by the Commission. Two other operations were subsequently performed by a physician skilled in the treatment of fractured bones. As a result of these operations the fractured bones became solidly united and the impaired condition of the hand and wrist were greatly restored.

The record shows that respondent filed, on February 7, 1921, with the Industrial Accident Commission an application for the adjustment of his claim. It is stated therein that a permanent disability rating of 30.3 per cent. had theretofore been made. This rating entitled respondent to receive as compensation a weekly payment of $16.67 per week for a period of 123 weeks, totaling $2,060.41. The payment of this sum, together with payments in full for medical care and attendance was acknowledged. The primary purpose of respondent seems to have been to obtain from the Commission an order for another operation to relieve him from the ill effects of the injury. The statement of facts in support of the application is, in part:

> "That a permanent disability rating of 30.3 per cent. or 123 weeks at $16.67 was given applicant for one inch shortening of right (major) radius, limited motion of thumb and wrist; partial loss of grasping power and deformity. The rating has been paid out. It is now claimed that there is nonunion of the radius, remedial by operative treatment."

This application was resisted on the ground that respondent had been paid in full for a permanent disability rating of 123 weeks, and that full medical, surgical, and hospital treatment had been furnished:

that two operations had been performed, including a bone graft, and that it was the opinion of the operating surgeons that it would be of no benefit to respondent to operate on his arm further; that, so far as the fracture was concerned, his arm was in an apparently satisfactory condition.

On May 17, 1921, the Commission found that the injury had resulted in a permanent disability, the extent of which could not then be determined. It further found that there existed an ununited fracture of the right radius with deformity at the wrist, producing restricted motion of the wrist and hand, and that an operation would probably reduce the same as outlined by the reports of physicians in the case. The operation was ordered and accordingly performed at the expense of petitioner. The employer was released from liability thereon.

On May 22, 1922, the application of respondent requesting that a rating of permanent disability be made and that the findings and award theretofore made be amended accordingly was granted without opposition. The Commission found that the injury had caused a permanent disability equal to 30.75 per cent. of total disability, amounting to $2,040.50, which sum had been paid, and it ordered that "applicant take nothing further by reason of his injury forming the basis of this proceeding." On the following day, to wit, May 23, 1922, respondent petitioned for a rehearing. This petition was based on the ground that the evidence did not support the findings and that respondent had discovered new evidence which he could not with reasonable diligence have discovered and produced at the hearing. It was also urged as a ground for rehearing that he "had no notice of the amount of the permanent disability rating which was to be given him and had no opportunity of showing to the Commission what the period of temporary disability was." He also claimed that he was unable to do any work from the day he received the injury, to wit, June 15, 1918, to the day the petition was filed, to wit, May 22, 1922. The injury with its resultant effects following surgical operations performed at various times in an effort to unite the fractured radius and severed tendons during the period of disability are described and declared to have rendered respondent totally unable to perform any kind of work. The prayer of the petition was that the period of temporary disability be definitely determined and that the award be based on temporary disability instead of permanent disability for the reason that an award based on the first ground would exceed the award made for permanent disability. The petition for a rehearing was granted on the ground that the evidence did not justify the findings as to the character of disability sustained, inasmuch as a temporary disability payment would exceed the award made for permanent disability. After contest had, the Commission filed its decision October 13, 1922, by which it was found that the injury inflicted upon the respondent caused a temporary total disability extending from the day of injury to and including May 22, 1922, and that said injury also resulted in a permanent partial disability as set out in the amended findings. It further found that the period of payment for said temporary total disability and the amount of compensation due therefor exceeded the period of payment and the amount of compensation for permanent partial disability, and that respondent was entitled to the greater payment. Said findings and award of May 22, 1922, were amended by adding thereto a finding that the injury caused temporary total disability dating from the date of injury to and including May 22, 1922, entitling respondent to a weekly payment of $16.67 for a period of $203^6/_7$ weeks, amounting to the sum of $3,398.30, of which sum $2,050.41 had been received by respondent. In other words, respondent was awarded the sum of $1,347.89 as unpaid compensation for temporary disability suffered in addition to the amount found to have been received by him as compensation for said injury by the findings and award filed May 17, 1921. The moneys previously paid were treated as a credit on account of temporary disability payments.

By the application filed February 7, 1921, the only relief sought was an order for a surgical operation. It was specifically so stated in the following language:

> "Question: Whether operation should be resorted to to relieve from the effects of the injury, a permanent disability rating having been made and paid out?"

Prior to the filing of said application the permanent disability rating department of the Commission made on November 30, 1920, the following entry of record:

> "Digest: One inch shortening of the radius of major forearm; limited motion of thumb and wrist; partial loss of grasping power and deformity, 30.75 per cent., 123 weeks at $16.67 per week."

This order seems to furnish the original ground or basis for the claim that a finding of permanent disability had been made. It was carried into both the petition requesting further operative treatment and the order granting said treatment, which contains a statement or recital that the injury had resulted in permanent disability the extent of which could not then, to wit, May 17, 1921, be determined, but that probably the injury would be materially decreased by surgical operation.

Respondent's condition seems to have baffled medical skill. Eminent surgeons disagreed as to whether he would be improved by another operation. There is but little of definiteness expressed in the testimony or reports of experts with respect to the extent of the injury. It seems quite certain that whatever use respondent was able to make of the injured member prior to the operations performed pursuant to the order of May 17, 1921, was totally lost, temporarily, at least, as the result of said operations, which, however, in the end proved to have been wisely performed. He was sufficiently restored thereby in body to resume farm labor on May 24, 1922. As before stated, there was a decided difference of opinion shared by the medical profession, both as to the treatment that should be administered and as the prognosis of the case. Two delicate operations of bone grafting had been performed. A supposedly united fracture had upon two occasions become loosened. Severed nerves and tendons caused new trouble. Under such circumstances it was practically impossible in the earlier stages of the injury for the Commission to determine with any degree of definiteness the extent or permanency of the disability.

The objections of petitioner have their origin entirely in the amendments to the award and findings made and entered May 22, 1922. By that amendment the disability payments were changed from permanent to temporary disability payments. It is the contention of petitioner that the character of disability was unalterably fixed and determined by the order or findings made May 17, 1921, and, no rehearing having been requested or ordered, the matter had long since become final. The purpose and scope of the last-mentioned order has already been adverted to. The findings and award of May 22, 1922, which were subsequently amended over the objection and opposition of petitioner, were not objected to or opposed at any time before proposal or at the time of their adoption or since. It is the amendment thereto that is challenged. But do not the facts of the case present more than a mere question of the right of the Commission to amend its orders, findings, and awards as these matters ordinarily arise? Section 9(8) of the Workmen's Compensation, Insurance and Safety Act provides as follows:

> "Where an injury causes both temporary and permanent disability, the injured employee shall not be entitled to both a temporary and permanent disability payment, but only to the greater of the two."

Under the state of the case as shown by the record and the law as written did the Commission have the authority to change the award from a permanent disability payment to a temporary disability payment? Petitioner contends that it had no such right. If this contention be sound, the section last above cited would in many cases be rendered inoperative, and the right of an injured employee to avail himself of its benefits would be dependent upon the ability of the Commission to foretell the result of an injury from the beginning and in advance of all possible future developments. The present case illustrates the injustice that might be done should an interpretation be given to the act which would hold an injured workman to a rating which thereafter is proved to have been prematurely and erroneously made. The award here complained of was made within the limits of the statutory period, to wit, 245 weeks from the date of the injury, and we are of the opinion that the case falls within the provisions of the act by which the Commission is granted continuing jurisdiction over all its orders, decisions, and awards. After an opportunity to be heard has been had and good cause appearing therefor, the Commission may rescind, alter, or amend any order, decision, or award made by it. The right is reserved to it to review, grant or regrant, diminish, increase, or terminate, within the prescribed limits of the act, any compensation awarded, upon the ground that the disability of the person in whose favor such award was made has recurred, increased, diminished, or terminated. Any order, decision, or award rescinding, altering, or amending a prior order, decision, or award can have the same effect as is provided for original orders, decisions, or awards. (See section 20(d) of said act.)

We are persuaded that the power of the Commission to allow a temporary disability payment in lieu of a permanent disability payment is a power, which, from the nature of the object to be accomplished, must be a continuing power and within the scope of continuing jurisdiction for which provision is made by the act. Otherwise the act, in part at least, would be self-destructive.

But aside from what has been said on the subject of continuing jurisdiction it is by no means certain that the act requires a formal application to be made on the part of an injured employee to entitle him to a change from one kind of disability classification to another if such change is for his benefit. The act seems to indicate that it is the duty of the Commission to make such a change whenever the facts before it clearly disclose that a change would be beneficial to the employee. The language of the statute is that the employee, when the injury causes both a temporary and a permanent disability, "shall not be entitled to both a temporary and permanent disability payment but *only to the greater of the two.*" (Italics ours.) Thus it is seen that the larger amount is awarded by force of the statute itself. There is no denial of the fact that the temporary disability payments exceed the permanent disability payments. The weekly amounts in each instance are the same; the advantage of a temporary disability payment being accounted for by the greater period over which it extends.

No question of the violation of the provisions of paragraph (c) of section 17 of the act under consideration, which provides that there shall be but one cause of action for each transaction coming within the provisions of the act, and that certain claims may be joined in the same proceedings, is here involved as contended for by petitioner. There was but one injury suffered and but one action brought to recover compensation therefor. There is no room to urge laches against respondent. The rules announced in the cited cases (Ehrhart v. Industrial Accident Commission, 172 Cal. 621, 158 Pac. 193, Ann. Cas. 1917E, 465; Georgia Casualty Co. v. Industrial Accident Commission, 177 Cal. 289, 170 Pac. 625) are not in conflict with any principle of law announced here. In the instant case no claim is made that respondent suffered two distinct injuries, one of which was not mentioned or investigated until after the statutory time had run against it, but for which compensation nevertheless was allowed; neither do the facts and method of procedure, as shown in the case last above cited, wherein the Commission, after the denial of a petition for rehearing, annulled the original award and made an award not predicated upon any new facts occurring since the original award was made, but which was based solely upon a reconsideration of the facts upon which the former award was made, present a case analogous to the one at bar.

If the order made May 17, 1918, is in legal effect a finding and award, as claimed by respondent, then beyond question sufficient new facts have arisen in this case but which were absent in Georgia Casualty Co. v. Industrial Accident Commission, supra, to sustain the final award made October 13, 1922. If, on the other hand, said order of May 17, 1918, did not amount to an award, the Commission was not concluded by it, and the final award was authorized.

The cases cited to sustain petitioner are totally different in material respects from the facts constituting the instant case, and the provisions of law relied upon to sustain those cases are not repugnant to the conclusion we have reached in the case at bar.

The award is affirmed.

We concur: WILBUR, C. J.; LENNON, J.; LAWLOR, J.; MYERS, J.; WASTE, J.; KERRIGAN, J.

191 Cal. 353

Ex parte OKAHARA. (Cr. 2473.)

(Supreme Court of California. June 28, 1923.)

1. Aliens 🔑6(1)—Contract for working lands held not a lease giving interest in land contrary to land law.

A contract designated one of employment by which the employer was to furnish the land which the other party, called the contractor, a Japanese citizen, was to work and prepare for cultivation, plant designated fruit trees and fruits, the crops of which he was to gather and deliver as designated by the employer, who was to pay the contractor percentage of the net proceeds, the contractor to have access to land at all times and employer to have control of the contractor and employees with privilege of terminating the contract, *held* not a lease of land or an agreement of a nature to transfer or convey any interest in the land to the contractor contrary to Alien Land Law, §§ 2, 10.

2. Tenancy in common 🔑1 — May exist in crops without existing in the land.

Tenancy in common may exist in crops without existing in the land.

3. Aliens 🔑6(1)—Statute forbidding aliens to "acquire," "possess," "enjoy," or "transfer" land construed, and terms defined.

As used in the Alien Land Law, Nov. 2, 1920, Stat. 1921, xxxiii, the words "acquire, possess, enjoy and transfer," used in an inhibitory sense, are well understood legal terms. "Acquire" as used in the law of contracts and descents means to become the owner of property; to make one's own. "Possess," used in reference to land titles and estates, means to own; have as a belonging; property; in popular usage the word "possess" includes real and personal property to which one has title as his landed possessions." The word "enjoy" is one frequently found in instruments of transfer and means to make such use of the thing transferred as is consistent with the tenure by which it is held. "Transfer" is a word commonly used to denote a passing of title in property (usually realty) or an interest therein from one to another, the purpose of the law being to prevent ownership and legal interest in farming lands from passing to aliens who could never become citizens (citing Words and Phrases, First Series, Acquire; Possess).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Enjoy; Transfer.]

In Bank.

Application by K. Okahara for habeas corpus to the Sheriff of Placer County to secure petitioner's release from custody on charge of conspiracy to violate the Alien Land Law. Petitioner discharged.

Thomas & Sullivan, of San Francisco, and Raglan Tuttle, of Auburn, for petitioner.

U. S. Webb, Atty. Gen., Frank English, Deputy Atty. Gen., and C. C. Coolidge, Dist. Atty., of San Jose, for respondent.

SEAWELL, J. Petitioner, K. Okahara, a person of the Japanese race and a native born subject of the Empire of Japan, and being ineligible to citizenship in this country, is restrained of his liberty by the sheriff of Placer county, this state, upon a warrant issued on a complaint charging him with conspiring with one Tom Vicencio to unlawfully and feloniously effect a transfer of an interest in real property in violation of section 10 of the Alien Land Law, approved November 2, 1920, by the people of this state as an initiative measure (Stats. 1921, lxxxiii). By this proceeding he asks to be released from custody on the theory that he has committed no public offense.

The gravamen of the offense charged is that on March 20, 1922, petitioner, in furtherance of an unlawful conspiracy, executed an agreement and contract with said Vicencio whereby said Vicencio transferred to petitioner for a term of five years an interest in a certain parcel of agricultural land containing 20 acres, situate in the county of Placer. The portions of the act which bear directly on the case are sections 2 and 10 which provide as follows:

> "Sec. 2. All aliens other than those mentioned in section 1 of this act (aliens eligible to citizenship) may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner, and to the extent, and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise. * * *"
>
> "Sec. 10. If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary, not exceeding two years, or by a fine not exceeding $5,000, or both."

The acquisition or ownership of agricultural lands or an interest therein is not one of the rights guaranteed to or conferred on alien Japanese by any treaty relations existing between the Empire of Japan and this country.

The facts relied upon to sustain the charge of conspiracy are those which constitute the substance of the covenants of the parties to the contract and therefore appear upon the face of the instrument, the material portions of which follow:

Vicencio, the party of the first part, who is himself but a tenant of the real property in controversy, is called by the instrument the employer, and Okahara, the party of the second part, is called the contractor. Said contractor agrees to clear all of said 20 acres of land and make it ready for plowing and planting within a period of two years from the date of the execution of said agreement, one-half of said land to be cleared during the first year of the agreement and the remaining half during the second year at the price of $50 an acre. The contractor is to plant the whole of said property to orchard within two years from the date of said agreement, all trees to be furnished by the employer. The contractor agrees to plant between the rows of fruit trees 5 acres of the land to raspberries, 5 acres to blackberries, 5 acres to strawberries, and 5 acres to tomatoes, cantaloupes, and other garden truck. The agreement provides that the party of the second part is an independent contractor and he is required to adopt the most approved customs of the neighborhood in the care, raising, and cultivation of fruit trees, vines, and such vegetables as shall be grown on said property. He also agrees to gather, pick, and pack all merchantable fruits, berries, and vegetables at seasonable times and make delivery thereof at any fruit house designated by the employer. The contractor further agrees to furnish all and every kind of labor and all and every kind of machinery, tools, and equipment necessary for the performance of the terms of said agreement. Such tools and implements as are on said premises may be used by the contractor in the performance of the contract and are to be returned at the expiration thereof in as good condition as when received, wear and tear excepted. The products from the soil are to be sold by the employer on such terms and conditions as he may deem best, and the contractor is to receive as his compensation (in addition to the allowance hereinbefore mentioned of $50 per acre for clearing said land) 50 per cent. of the net proceeds derived from the sale of said products. The contractor's share of the net proceeds shall be paid to him in cash by the employer within 30 days after receipt thereof. Certain deductions are to be made from the net proceeds and allowed the employer, such as for shook, hay, straw, or other materials furnished by him to the contractor, and all costs, charges, commissions, and expenses paid or incurred by said employer on account of the products or the marketing thereof, including all costs, charges, and expenses paid or incurred by the employer in the cultivation of said land and orchard other than work done by the contractor, as well as all sums of money advanced by the employer to the contractor, and all indebtedness due or payable to the employer by the contractor.

Paragraphs 6 and 7 of said agreement contain the terms and covenants by which the legal status of the agreement must be fixed and follow in the language of the contract:

> "6. It is understood and agreed that the contractor shall have access to the land hereinbefore described at all convenient times for the purpose of doing the work aforesaid. All crops of every nature and character to be grown on said land shall belong to and be the property of the employer and the contractor shall have no interest, right, or claim in or to any part of

the said crops but his sole right shall be to the compensation paid by the employer as herein provided and the said compensation shall be in full payment for all services of said contractor for outlays and expenses paid or incurred by the contractor in or about said work.

"7. The employer shall have no control over the said contractor and his employees and equipment, but the contractor agrees that he and all persons employed by him shall be sufficient and diligent in the prosecution of said work, all of which shall be done in good and workmanlike manner and according to the best husbandry and methods of doing said work. It is further understood and agreed that if at any time the employer is dissatisfied with the work done by the contractor or with the progress of such work he may immediately terminate this contract on paying to the contractor compensation up to the time of such termination, as follows: Upon ten days' written notice given by employer to contractor, said compensation to be the usual wages paid for similar work in the same neighborhood.

"Neither this agreement nor any interest therein shall be assignable or transferable by the contractor, either voluntarily or involuntarily, without the consent of the employer, in writing first had and obtained."

The validity of section 10 of the Alien Land Law is not open to question, as this court recently in a proceeding in which its validity was assailed, pronounced it valid. In re Y. Akado, known as S. Ikada, 207 Pac. 245. It is there said:

> "It is well settled that, in the absence of a treaty to the contrary, a state may forbid the taking or holding of property within its limits by aliens. (Blythe v. Hinckley, 127 Cal. 436, 59 Pac. 787.) Our Constitution leaves to the Legislature this power with regard to all aliens ineligible to citizenship. (Article I, § 17.) The provisions of the act in terms allow such aliens to take and hold agricultural land to the extent that such taking or holding is prescribed by any treaty with the country of which such alien is a subject. The treaty with Japan does not prescribe or secure to its citizens the right to take or hold agricultural land situated in this state. Hence the act does not violate the treaty in that respect."

See, also, cases cited in Blythe v. Hinckley, 127 Cal. 436, 59 Pac. 787; O'Brien v. Webb (D. C.) 279 Fed. 117; Porterfield v. Webb (D. C.) 279 Fed. 114; Terrace v. Thompson (D. C.) 274 Fed. 841.

[1] The only question before us therefore is whether the acts, purposes, and objects as shown upon the face of the instrument are, in fact, such acts, agreements, purposes, and objects as are forbidden by subdivision 10 of the Alien Land Law. If by a reasonable construction of the agreement the case is fairly brought within the inhibition of the law the petitioner should be remanded, otherwise he must be discharged.

It is the law of this and most of the states of our Union that contracts of the character of the one before us do not transfer or convey any interest in real property. Neither do they constitute agreements to do so. At a very early period in our judicial history and at a time before the ownership of lands by aliens not eligible to citizenship had excited public interest, this court in Bernal v. Hovious, 17 Cal. 542, 79 Am. Dec. 147 (decided in 1861), Field, C. J., writing the opinion, held that an agreement in relation to the use and cultivation of land between the parties whereby the owner was to furnish the seed, teams and sacks, and the other party was to do the work and give the owner for the use of the land one-third of the grain raised, although designated by the parties a lease, was not one, but a contract for the working of a farm upon shares. Bernal v. Hovious, supra. That case, a leading one, is based on the rule declared in Caswell v. Districh, 15 Wend. (N. Y.) 379, and Putman v. Wise, 1 Hill (N. Y.) 235, and runs through the decisions of this state.

Unquestionably, much care was taken in the selection of the words and phrases by the parties to the agreement with a view to avoid a violation of the law under which the charge is laid. But few of the formal words and phrases ordinarily found in freehold or leasehold instruments appear in the agreement. It is true, as suggested by counsel for the state, that the character of an instrument depends upon the intention of the parties as disclosed by the language used to express the intention of the parties and not by any particular name given it by them. But it is also true that we are not permitted to make the instrument before us the basis for a criminal action even though we may be able to concur in the suggestion that it was artfully and adroitly drawn for the purpose of avoiding a conflict with a penal statute of the state. The question is: Does it show upon its face a violation of the law as written? In form and in substance this contract follows closely a contract considered and upheld by the United States District Court, Northern District of California, in the case of O'Brien v. Webb, supra, and we entertain no doubt but that it was patterned after that contract and its drafters were aided by the discussion of the question therein made.

By the application of the rule above invoked the instrument before us cannot be characterized as a lease or transfer of any interest in real property because it lacks many of the essential elements of a lease, while on the other hand it bears all the characteristics of an agreement of hiring. But if it cannot be said to be an agreement of employment pure and simple, it cannot under any rule of construction be held to be more than a cropping contract. The right of entry or access is not, as it is contended, equivalent to possession as that word is used in a prohibitive sense. Access to the place upon which labor is to be performed is necessary for the execution of any conceivable contract of employment. Petitioner here is merely given access to the premises at all convenient times for the purpose of performing service. The situation in this respect is precisely as it would be if he were paid a daily or monthly wage. Under such employment no one would question his right to physically go upon and remain upon the premises. Every agreement or contract to perform farm labor must of necessity give the physical right to go upon the premises upon which the labor is to be done. In the contract under consideration nothing is said about leasing or letting the premises but on the contrary it is expressly provided that "all crops of every nature and character to be grown on said land shall belong to and be the property of the employer and the contractor shall have no interest, right or claim in or to any part of said crops, but his *sole right* shall be to the compensation paid by the employer" as provided by said agreement. (Italics ours.)

The fact that the crops are to be converted into money by the employer and divided on a net basis with the contractor could not work a transfer of any interest in the soil to the latter any more than the payment of wages made with moneys derived from the sale of the products of the soil under the most informal contract of employment would convey an interest in the soil to an employee who assisted in the labor of production.

The clause of the contract most criticized is the one which provides that "the employer shall have no control over the contractor and his employees." This clause amounts to no more than a statement of an implied privilege or right granted to every contractor, unless expressly limited, and has no special significance in determining the character of the agreement one way or the other. The above-quoted clause is immediately followed by the provision that the employer "if dissatisfied with the work done, or the progress of such work," may upon giving the contractor ten days' notice, terminate the contract. If the employer elects to terminate the contract, the contractor is to receive for his compensation the wages usually paid for the performance of similar work in the neighborhood. The contractor is not given a free hand to plant as he wills, but is specifically held to the planting of certain named varieties of berries of limited acreage, garden truck, and an orchard of 20 acres. All crops of every kind and character grown on the land shall belong to and be the property of the employer, and the contractor shall have *no interest, right or claim to any part of said crops.* By the abundance of the crops produced and the market price, less the cost of production, his compensation is fixed for the services performed.

[2] The authorities are quite general to the effect that a tenancy in common may exist in crops and none whatever exist in the land. This principle of law is recognized in Woodson v. Chatom, 65 Cal. Dec. 405; Clarke v. Cobb, 121 Cal. 595, 54 Pac. 74; Bernal v. Hovious, supra; Henderson v. Allen, 23 Cal. 519; Walls v. Preston, 25 Cal. 60; Baughman v. Reed, 75 Cal. 319, 17 Pac. 222, 7 Am. St. Rep. 170; Jones v. Durrer, 96 Cal. 95, 30 Pac. 1027; O'Brien v. Webb, supra; Smyth v. Tenkersley, 20 Ala. 212, 56 Am. Dec. 193.

In Henderson v. Allen, supra, it is said:

> "It has been repeatedly held that even the letting of land to a person to cultivate—the crops to be divided between the owner and the cropper, in certain proportions—did not amount to a lease, or create the relation of landlord and tenant between them. In such case, the owner is held to be in possession of the land, and the parties are joint tenants in the crop. [Citing authorities.] In such case, it is an agreement to work on shares, and not a lease to render rent, for which an action will lie against the tenant."

Warvelle on Ejectment, § 26, states the situation as follows:

> "It is common for parties to enter into agreements for the cultivation of land 'on shares,' that is, one person contributing the use of land while another plants and cultivates the crop, which, when harvested, is divided between them. It is well settled that such an agreement does not create a tenancy of any kind on the part of the cultivator. At best, he is only a tenant in common of the crop, which is generally regarded as personalty, and the legal possession of the land is in the owner."

See, also, Fuhrman v. Interior Warehouse Co., 64 Wash. 159, 116 Pac. 666, 37 L. R. A. (N. S.) 89; Taylor on Landlord and Tenant, vol. 1, § 24a; State v. Jewell, Collector, etc., 34 N. J. Law, 259.

In Taylor v. Donahoe, 125 Wis. 513, 103 N. W 1099, the distinction between a tenant and a cropper is clearly stated by the author of the opinion. It is there said:

> "The distinction between a tenant and a cropper is that a tenant has an estate in the land for a given time, and a right of property in the crops, and hence makes the division thereof between himself and the landlord in case of an agreement upon shares, while a cropper has no estate in the land, nor ownership of the crops, but is merely a servant, and receives his share of the crops from the landlord, in whom the title is. * * * It is always a question of construction of the agreement under which the parties are acting. The agreement in question here seems to us to be very clear and definite upon the subject. It nowhere refers to Finnegan as a tenant, but specifically refers to his work as 'service,' and expressly provides that Donahoe shall pay him for his service by certain shares of the crops, and that the possession of the land and ownership of the crops are to remain in Donahoe, and that Finnegan is merely to be an employee in the tilling of the land and caring for the stock. Language could hardly be plainer or

more appropriate for the purpose of creating a cropper arrangement."

It will be noted that the phraseology in many of the instruments under consideration is that which is usually found in leases but the substance of the agreements being regarded the instruments were held to create the relationship of a tenancy in common. In some cases they purported on their faces to be leases. It is true that there may be created by the use of appropriate language, in a single instrument, the relationship of landlord and tenant and also the relationship of a tenancy in common in crops. But the intention of the parties and the nature of the covenants to be performed must be of such a character as to sustain such a construction. Nothing in the language of the instrument before us would permit of such a construction.

[3] The words "acquire, possess, enjoy and transfer" used in an inhibitory sense are well understood legal terms. "Acquire" as used in the law of contracts and descents means to become the owner of property; to make one's own. 1 Words and Phrases, 113. "Possess" used in reference to land titles and estates means to own; have as a belonging; property. Cent. Dict. "In popular usage the word 'possess' includes real and personal property to which one has title as his landed possessions." Webster's Dict.; 6 Words and Phrases, 54, 63, and cases cited. The word "enjoy" is one frequently found in instruments of transfer and means to make such use of the thing transferred as is consistent with the tenure by which it is held. "Transfer" is a word commonly used to denote a passing of title in property (usually realty) or an interest therein from one to another. The entire clause, if considered with reference to its context, leavès no room for doubt as to what is meant thereby. The purpose of the Alien Land Law, as is well said in O'Brien v. Webb, supra, "was apparently to prevent ownership and legal interest in farming lands from passing to aliens who never could become citizens; and there is nothing from which it can be legitimately inferred that the design of the law is to prevent an alien from entering into a cropping agreement whereby he gives his labor for a share in the crops to be raised." It must be presumed that the act was adopted by the people with full understanding on their part of the law of estates, tenures, and transfers as created by constitutional and legislative authority and as expounded by the courts of the land. It must further be presumed that the law was passed with full understanding on the part of the people of the state of existing laws governing or affecting cognate subjects. The argument that the law forbids the making of a contract of employment or agreement to till the soil on shares can only be sustained by adopting the theory that the particular agreement under consideration transfers an interest in land. To accept this theory it would become necessary to give a new and unwarranted interpretation to words and terms of ancient and established usage the meaning of which has long been settled by judicial pronouncements and legislative sanction.

The extreme care exhibited by the selection of terms to avoid a transfer of an interest in real property seems to have strengthened the conviction in the minds of counsel for the state that the entire transaction is a cunningly devised plan calculated to circumvent the law and defeat the object intended thereby to be accomplished. No undisclosed or secret designs on the part of either of the parties to the agreement, if any such really exist, have been revealed in this proceeding. and we cannot from the face of the instrument alone presume that any exist. If the agreement be but a subterfuge, as argued. by which illegal and forbidden purposes may be consummated, the state is not shorn of its power by anything here decided to show by legal evidence the true relationship existing between the parties by such conduct, facts, and circumstances as may tend to establish a relationship different from the one claimed to exist as in other cases charging conspiracy.

Courts are not clothed with legislative power. And it is not within the province of judicial tribunals to suggest what the state's policy should or should not be in respect to questions purely legislative in character. We can only say that we have examined the questions presented with care and feel convinced that we are not authorized by the language of the act under which the charge is laid to hold that the facts as presented are sufficient to justify us in holding that petitioner has committed a public offense. We are not at liberty to extend the application of the law to subjects not included within it either by express language or by fair implication.

The petitioner must therefore be discharged.

We concur: WILBUR, C. J.; WASTE, J.; KERRIGAN, J.; MYERS, J.; LENNON, J.

191 Cal. 435

REYNOLDS v. REYNOLDS. (L. A. 7524.)

(Supreme Court of California. July 6, 1923.)

Appeal and error 🔑113(2)—Order refusing to vacate interlocutory and final decrees held not appealable.

Where interlocutory and final decrees were entered, and thereafter a motion to vacate such decrees was denied, the order denying vacation was not appealable; both the interlocutory and the final decrees being themselves appealable.

In Bank.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Suit by Louise Lawlor Reynolds against Lynn Fairfield Reynolds. From an order refusing to set aside findings and interlocutory and final decrees of divorce, plaintiff appeals. Appeal dismissed.

Francis G. Burke and N. A. Courtright, of Los Angeles, for appellant.

Ray L. Chesebro, of Los Angeles (Edward T. Winterer, of Los Angeles, of counsel), for respondent.

WILBUR, C. J. This is an action for divorce. The plaintiff appeals from an order of the trial court refusing to vacate and set aside the findings, interlocutory and final decrees of divorce. It appears from the record that the court, upon the trial, decided that neither party was entitled to a divorce, although both had asked for one on the ground of extreme cruelty. The findings negative all of the allegations of cruelty made by the wife, who was plaintiff, but found affirmatively that the plaintiff had struck and threatened the defendant, had pulled his hair, and had called him some abusive epithets, and had taken a revolver and threatened to shoot the defendant; that she had assaulted him with a pair of shears, had knocked his tooth loose by a blow of her fist, and had kicked him on his legs and in the abdomen. The court further found:

> "That the said facts hereinbefore found do not amount to and are not sufficient to constitute extreme cruelty."

As a conclusion of law upon these facts the court declared that neither party was entitled to a decree of divorce. These findings were made October 8, 1918, and filed October 9, 1918, and on October 8, 1918, the court signed a decree denying a divorce, which decree was entered October 9, 1918. On February 11, 1919, defendant served notice of motion to vacate the decree, and change the conclusions of law so as to declare that the defendant was entitled to a decree of divorce upon the ground of extreme cruelty. This motion was granted April 15, 1919, the decree denying the divorce was vacated and an interlocutory decree of divorce entered upon the findings theretofore made, and upon the amended conclusions of law. More than a year thereafter, on December 21, 1921, the final decree of divorce was entered. On August 14, 1922, after due notice dated July 27, 1922, the plaintiff moved for the vacation of the interlocutory and final decrees upon the ground that the decree denying a divorce had become final before the application for its vacation was made, and that the court therefore had no jurisdiction to alter that judgment. The motion was denied September 6, 1922, and from this order denying her motion the plaintiff appeals.

At the outset it should be noted that the interlocutory decree of divorce entered April 15, 1919, was an appealable order, whether considered as an order made after final judgment or as an interlocutory decree of divorce. No appeal was taken from this decree, and it had become final long before the application here under consideration was made. The parties were present upon due notice at the time of the application of the defendant for the change of the conclusions of law. They had settled their property rights by contract, executed April 12, 1919, filed April 15, 1919, on the day of the granting of the motion, and approved by the trial judge on that date. This agreement recited that an interlocutory decree of divorce was granted April 9, 1919, although as a matter of fact the interlocutory decree was made April 15 and entered April 17, 1919. Furthermore, a stipulation was signed and filed by the attorneys, dated April 15, 1919, "that the court may immediately upon filing the findings of fact and *amended* conclusions of law enter its judgment in the above-entitled action, and incorporate therein the contract between the parties." (Italics ours.) Under these circumstances it is evident that the amendment to the findings and conclusions was the result of a stipulation of the parties inviting the court to make the order in question.

The order appealed from is not an appealable order because both the interlocutory and final decrees were appealable. De la Montanya v. De la Montanya, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165; Estate of Gregory, 122 Cal. 483, 55 Pac. 144; Estate of Baker, 170 Cal. 578, 150 Pac. 989.

The rule is well stated in 2 California Jurisprudence, § 30, p. 164 as follows:

> "If the grounds upon which the party sought to have a judgment vacated existed before the entry of the judgment and would have been available on an appeal from the judgment, an appeal will not lie from an order refusing the motion. The party aggrieved by a judgment or order must take his appeal from such judgment or order itself, if an appeal therefrom is authorized by statute, and not from a subsequent order refusing to set it aside. The reason for denying an appeal in the latter case is not because the order on the motion to vacate is not

within the terms of section 963 of the Code, allowing appeals, for it may be, and indeed, an order refusing to vacate a final judgment is in its very nature a special order made after judgment, but because it would be virtually allowing two appeals from the same ruling, and would, in some cases, have the effect of extending the time for appealing contrary to the intent of the statute. A further reason is that the order on the motion is merely negative action of the court declining to disturb its first decision. The first decision being reviewable, the refusal to alter it any number of times will not make it less so."

Appeal dismissed.

We concur: LAWLOR, J.; MYERS, J.; WASTE, J.; SEAWELL, J.; KERRIGAN, J.

191 Cal. 388

LEMON v. FIRST NAT. BANK OF PASADENA. (L. A. 6967.)

(Supreme Court of California. July 5, 1923.)

1. Appeal and error ⚷1041(4)—Permitting filing of amended complaint at close of trial held not prejudicial.

Permitting the filing of an amended complaint at the close of trial in order to make the pleadings conform to the proof, which amended complaint was identical with the one already filed, except that it contained two additional counts, *held* not prejudicial.

2. Banks and banking ⚷227(3)—Evidence held to show agreement for investment of money in Russian rubles.

In an action against a bank to recover money paid by plaintiff to defendant in consideration of defendant's securing for plaintiff 6,000 Russian rubles, evidence *held* to establish that the parties in their negotiations had contemplated an investment by plaintiff of a sum sufficient at the current rate of exchange to purchase 6,000 Russian rubles and not an actual delivery of such currency to him, so that after defendant, through its correspondent, had secured plaintiff a credit or deposit of 6,000 rubles in a Petrograd bank payable on demand, a recovery of the money so expended was unwarranted.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by F. H. Lemon against the First National Bank of Pasadena. Judgment for plaintiff, and defendant appeals. Reversed.

Porter & Sutton, of Los Angeles, for appellant.

Haas & Dunnigan, of Los Angeles, for respondent.

RICHARDS, Judge pro tem. The plaintiff in this action sought to recover from the defendant herein the sum of $1,962 with interest from September 14, 1916. His first amended complaint consisted of two counts, in the first of which he alleged that on the 14th day of September, 1916, he entered into an oral contract with the defendant, whereby the latter agreed that for and in consideration of the sum of $1,962 then and there paid by plaintiff it would deliver to plaintiff 6,000 Russian rubles, Petrograd, to wit, 6,000 rubles of Russian money; that said defendant then and there gave to plaintiff the following memorandum in writing of said transaction, viz.:

"The First National Bank of Pasadena, California.

"September 14, 1916.

"Mr. F. H. Lemon, 815 No. Holliston St., Pasadena, California—Dear Sir: This is to certify that we have purchased and have had forwarded for your account the sum of 6,000 rubles, Petrograd, which amount will be held for you against further instructions. We have charged your account as instructed $1,962.00 to cover.

"Yours truly, Jack Miller, Cashier."

The plaintiff then proceeds to allege that within a few days thereafter he was informed by said defendant through its said cashier that the defendant had purchased said rubles for plaintiff at $.324 each, charging as its commission therefor the sum of $18; that at the time of said transaction said rubles were reasonably worth the sum of $1,962 and so continued to be for a brief period, viz. for about one month thereafter; that at a later period the defendant informed plaintiff that it was unable to obtain said rubles by reason of the fact that there was no longer a recognized form of government in Russia; that thereafter and on or about October 3, 1919, plaintiff made an oral demand upon defendant for the return of said money so paid by him to it, but the said defendant failed and refused to comply with said demand; that thereafter and on December 19, 1919, said plaintiff gave notice of rescission and cancellation of said agreement, based upon the ground that the market value of said rubles had depreciated since the date of said agreement for their purchase, and on the further ground of the defendant's delay in the delivery of the same to the plaintiff. A copy of said notice of rescission is appended to said complaint.

The second count in plaintiff's said first amended complaint contains a recital in substance of the same transaction, but is based upon an alleged agency of the defendant for the plaintiff in making the purchase of said rubles and upon the failure and neglect of the defendant to comply with the terms of its said agency by making the purchase of said rubles within a reasonable time, by which said failure and neglect on the part of said defendant the plaintiff had suffered damages in the sum of $1,962.

The answer of the defendant, while denying the existence of said contract, written or oral, to deliver to plaintiff 6,000 rubles of Russian money, admits the making and delivery to the plaintiff of the memorandum of the transaction as above set forth, except as to the signature thereof, which it avers was by another of its officials, and denies that it has failed in any respect to perform the obligations of its agreement as embodied in said written memorandum, and avers that the transaction between the plaintiff and the defendant as evidenced thereby was one for the purchase by it for the plaintiff of Russian exchange, to wit, a draft on Petrograd for 6,000 Russian rubles, and that in pursuance thereof it purchased from the Anglo & London Paris National Bank of San Francisco Russian exchange for 6,000 rubles, receiving from the latter a certificate showing such purchase in the following form:

"The Anglo & London Paris National Bank of San Francisco.

"Sept. 12, 1916.

"This is to certify that we have purchased and forwarded for your account the sum of six thousand (R. 6,000) rubles, to our correspondent in Petrograd. This receipt is returnable against issue of formal certificate of deposit upon receipt of advice from our correspondents that same has been collected and placed to our credit.

"The Anglo & London Paris Nat'l Bank,
"H. Choynski, Asst. Cashier."

The defendant further avers that shortly thereafter and in pursuance of the foregoing document it received the following further certificate from the Anglo & London Paris National Bank of San Francisco, to wit:

"The Anglo & London Paris National Bank of San Francisco.

"December 18, 1916.

"Mr. F. H. Lemon has deposited with this bank rubles six thousand (6,000) held at the Russian Commercial & Industrial Bank, Petrograd, and payable on demand by our check on the Russian Commercial & Industrial Bank, Petrograd.

"The Anglo & London Paris National Bank,
"By Harry Choynski, Assistant Cashier."

It then alleges that the defendant fully informed plaintiff of the receipt of said certificate and offered to deliver the same to him, who made no objection to the same, but requested said defendant to hold the same for the time being for plaintiff, which the defendant has ever since done, and that it now holds and offers to deliver to plaintiff said certificate. The answer admits the plaintiff's alleged acts in his attempted rescission of said agreement, but denies that he was at any time entitled to rescind the same. The defendant further pleads that as to both alleged causes of action they are barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure and also by subdivision 1 of section 1691 of the Civil Code, by reason of the plaintiff's laches in the institution of said actions. The cause came to trial upon the issues thus framed.

The plaintiff on his own behalf and the defendant through its official who conducted the transaction each gave testimony as to the oral conference leading up to the investment of the plaintiff's money in Russian rubles. These witnesses do not, in the main, disagree as to the details of that oral conference, except that the witness for the defendant asserts, and the plaintiff denies, that the term "exchange" was used during said conference as indicating the nature of the transaction to be entered into by the defendant on the plaintiff's behalf. In the course of the trial there was also some disagreement between these witnesses as to whether the plaintiff was shown the certificate received by the defendant from the Anglo & London Paris National Bank, but there is substantially no dispute as to the fact that the defendant had proceeded to consummate some transaction in Russian rubles for the plaintiff's benefit and that the plaintiff understood this to be the fact and from time to time made inquiries as to the varying value of rubles down to the time in the year 1919 when the value of Russian rubles fell to practically nothing, due to the collapse of Russia. It was then for the first time that the plaintiff began making inquiries as to the nature of the transaction through the San Francisco bank, which resulted in his attempted rescission of the contract and transaction between himself and the defendant, and in this action for the recovery of the money originally paid by him on account thereof.

At the conclusion of the trial the plaintiff asked and was granted leave to file a further amended complaint for the avowed purpose of conforming the pleadings with the proofs; and in accordance with such leave he presently served and filed his second amended complaint, embracing four counts, the first two of which embodied in identical form the averments of the two counts in the former amended complaint, the third of which was in the form of a common count for money had and received, and the fourth of which was a substantial repetition of the first two counts with an added averment alleging the plaintiff's understanding or interpretation of the agreement between the parties. It was stipulated between the parties that no answer need be filed to this second amended complaint, and in fact no answer was filed thereto. The cause being submitted for decision, the trial court presently filed its findings of fact and conclusions of law in the case, wherein the court found:

"That heretofore, to wit, on the 14th day of September, 1916, said plaintiff, F. H. Lemon, employed said defendant the First National Bank of Pasadena, California, a corporation, as a broker for a consideration, to wit, the sum of $18, to be paid said defendant to purchase for said plaintiff 6,000 Russian rubles, Petrograd, at and for the sum of $.324 each, to wit, $1,844; that the said plaintiff then and there understood by said term '6,000 Russian rubles, Petrograd,' that said Russian rubles would be represented by currency of the Russian Empire or bond or bonds of the Russian Empire equal to the value of 6,000 Russian rubles, to wit, Russian money; that said defendant meant and intended thereby to procure for said plaintiff exchange on some Russian bank or banking institution for 6,000 Russian rubles to wit, Russian money; that said plaintiff did not state to said defendant the fact that said plaintiff understood by said terms that he was to receive currency of the Russian Empire or a bond or bonds of the Russian Empire equal to the value of 6,000 Russian rubles; that said defendant did not state to said plaintiff that it meant and intended to procure for plaintiff exchange on some bank or banking institution in Russia for 6,000 rubles; that the minds of plaintiff and the officers representing said defendant corporation in said transaction did not meet relative to the meaning of said term '6,000 Russian rubles, Petrograd,' and did not meet relative to the subject-matter of said transaction; that said plaintiff paid to said defendant the said $1,962 under belief that he, the said plaintiff, would procure, through the said defendant acting as the broker of said plaintiff, currency of the Russian Empire for said $1,844, or a bond or bonds of the Russian Empire equal to the value of said 6,000 Russian rubles, for the said $1,844; that the defendant did not procure for said plaintiff or deliver to said plaintiff at any time, or offer or tender to said plaintiff, currency of the Russian Empire equal to said 6,000 Russian rubles, or a bond or bonds of the Russian Empire equal to said 6,000 Russian rubles, or the value thereof; that the said defendant did not procure for the said plaintiff or tender to the said plaintiff exchange on any bank or banking institution in, or doing business in, the Russian Empire, or any exchange whatsoever for said 6,000 rubles, or any rubles."

After making the foregoing finding the trial court proceeded to find that the defendant did, on September 14, 1916, make and deliver to the plaintiff the memorandum first above set forth herein, but it further found that as to the transactions between the defendant and the Anglo & London Paris National Bank of San Francisco the plaintiff never authorized nor directed such transaction and that the defendant never delivered to the plaintiff the certificate issued on December 18, 1916, by said San Francisco institution showing that the transaction in Russian rubles exchange had been consummated. The court does not find that the plaintiff was not substantially informed by the defendant as to the consummation of said transaction in the manner indicated by said certificate or of the fact that it was holding the same subject to the plaintiff's direction during the several years that the plaintiff allowed to pass before repudiating said transaction. As conclusions of law the court found that the plaintiff was entitled to recover from the defendant the sum of $1,962 with interest thereon from September 14, 1916, at the legal rate, and that his cause of action therefor was not barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure nor by subdivision 1 of section 1691 of the Civil Code. Judgment was accordingly ordered and entered in the plaintiff's favor, and from such judgment the defendant prosecutes this appeal.

[1] The first contention of the appellant is that the trial court was in error in granting the plaintiff permission to file a further amended complaint at the close of the trial in order to make the pleadings conform to the proofs. This contention is predicated upon the appellant's claim that the plaintiff under said permission has filed an amended complaint containing two additional counts, in the fourth or last of which he has a new and distinct cause of action. The record does not, however, support this claim. All four counts in the plaintiff's last amended complaint relate to the same transaction and apply for the same relief. As to the two added counts the first of these is in form an action under the common count for money had and received, while the second of these is a restatement of the plaintiff's cause of action as set forth in the first count of his first amended complaint, with an added averment setting forth the plaintiff's interpretation or understanding of the agreement between the parties, the terms and conditions of which it is alleged the defendant violated. The addition of these two latter counts may not have been necessary, but it does not appear that the appellant was prejudiced by their insertion in the complaint upon which the plaintiff had proceeded to trial. The point therefore has no merit.

The appellant's next contention is that the trial court was in error in its finding that the minds of the parties had never met regarding the substance of the transaction between them, and that in the absence of such a meeting of the minds of the parties there was no valid agreement between them, and hence that the plaintiff was entitled to recover back his money. As to this finding of the trial court the record discloses neither pleading nor proof to support it. The plaintiff has not, in any of the counts of his complaint as amended, either before or after the trial, pleaded mistake of either law or fact as a ground for avoiding his agreement, nor does he seek to avoid his said agreement upon any such ground. It is true that he undertakes to set forth in the first, second, and fourth counts of his complaint his understanding or interpretation of the agreement between himself and the defendant, which, as he claims, the defendant violated, but if the proven facts in the case do not justify or support said interpretation, but rather negative it, the plaintiff would not be entitled to relief because of such misunderstanding of the terms and effect of his agreement in the absence of a showing by both pleading and proof that his consent to it had been obtained through that form of fraud defined and treated in sections 1565 to 1578, inclusive, of the Civil Code. In the absence of such showing the rules for the interpretation of contracts are those set forth in title three of the Civil Code. Had the trial court applied these ordinary and familiar rules to the transaction between these parties upon which this action is founded, it would not have found it necessary to make said finding, which has neither pleading nor proof to support it.

[2] As to the facts of this case, rightly interpreted, there is no material dispute. The plaintiff was a customer and depositor of the First National Bank of Pasadena, the defendant herein. On or about September 12, 1916, he entered said bank and there held an oral conference with its cashier. The purport of that conference was that the plaintiff desired to invest some of the money he then had on deposit in said bank in some safe securities. He was advised by said official of the bank to buy Russian rubles, and after some talk about the state of things in Russia he instructed the bank to make the investment for him. What the bank immediately proceeded to do as a result of that conference serves to indicate what the understanding of the parties was as to what it should do in conformity with the plaintiff's said direction, since it immediately instructed its correspondent, the Anglo & London Paris National Bank of San Francisco, having as its correspondent the Russian Commercial & Industrial Bank, Petrograd, Russia, to invest for said plaintiff the requisite sum of money at the then current rate of exchange and purchase 6,000 Russian rubles. In response to this instruction the said San Francisco bank transmitted to said defendant its above-quoted certificate under date of September 12, 1916, showing the nature of the transaction in so far as it was concerned. Upon the receipt of said certificate from its San Francisco correspondent the defendant executed and delivered to the plaintiff its own written memorandum of the transaction under date of September 14, 1916, which is also above quoted, and of which the plaintiff acknowledges the receipt. These written documents prevail over the uncertain recollection of the parties as to oral understandings and fix the nature of the transaction to be that of an investment in exchange. No other interpretation is in fact conceivable or consistent with the conduct of the parties throughout. The ruble is the gold monetary unit of Russia, worth at par about 51.5 cents. It would be valueless to use as money in Pasadena or to invest in as money for use there or elsewhere outside of Russia itself. The sole desirability of the Russian ruble for American investors in 1916 consisted in the fact that its exchange value in the money markets of the world was then 32.4 cents and that its said exchange value was fluctuating with the fortunes of Russia in the then impending European war. The fortunes of Russia were at the peak of their expectancy in September, 1916, as the undisputed evidence herein discloses, and the Pasadena bank, on its own behalf and on behalf of such of its customers as were seeking profitable investments, was dealing in Russian exchange. The use of the word "Petrograd," then the political capital and financial center of the Russian empire, in these several documents, is significant as indicating the place upon which bills of exchange were to be drawn, just as the use of the words "London" or "Paris" or "Vienna" are similarly significant according to common knowledge in similar dealings in exchange. The document received by the plaintiff from the defendant on September 14, 1916, informed the plaintiff in unmistakable terms that the proposed transaction in Russian rubles exchange on Petrograd had been consummated and his account charged with the sum of $1,962 to cover the investment.

The testimony of the plaintiff and the cashier of the defendant who conducted the transaction is in entire accord as to what occurred upon that and later occasions with relation to the investment. The plaintiff inquired as to the rate at which his investment in Russian rubles, Petrograd, had been made, and was informed that it was 32.4 cents, and that he should put his certificate away in his box and forget it till the war was over. He says that he inquired for the rubles, but it is too great a tax upon credence to believe that the plaintiff expected the bank to have at hand 6,000 Russian rubles which he had ordered purchased in Petrograd but two or three days before. From time to time thereafter for three years the plaintiff made occasional inquiries of the various bank officials as to what rubles were worth. In the meantime the bank, as his agent, had further consummated the transaction through the receipt in December, 1916, of a formal certificate of deposit from its San Francisco correspondent, which is also above set forth, showing the plaintiff was credited with a deposit of 6,000 Russian rubles held at the Russian Commercial & Industrial Bank, Petrograd, and payable on demand. The evidence is somewhat conflicting as to whether this certificate of deposit was ever actually inspected by the plaintiff, but there is no dispute as to the fact that the defendant received and held this certificate of deposit as the plaintiff's agent in the transaction and subject all times to his instructions; that it tendered the same to the plaintiff in 1919, when he made, for the first time, a demand for the return of his money; and that it has ever since held and still holds the same, subject to the plaintiff's order. It is true that the plaintiff testified that from time to time during these years he requested the delivery of his Russian rubles to him, but it is also true that the two documents above referred to; one of which he held and the other of which his bank and agent in the transaction held for him, afforded the most immediate and only practical means of obtaining possession of 6,000 Russian rubles, viz. converting said documents into the form of a draft upon the Russian bank for 6,000 rubles in identical form or in the form of American money at the then ruling rate of exchange.

Taking, therefore, the plaintiff's testimony as to his understanding of the transaction at its utmost value, it amounts to nothing more than that he had invested his money in 6,000 Russian rubles, and that, whether he had received or been entitled to receive them in the actual form of Russian money or in a certificate of deposit convertible into Russian or American money on demand, the status of his investment would be precisely the same, and his Russian rubles, whether in the hands of himself or his banking agent as actual money, or in the form of the certificate of deposit which had been issued to him, would be worth no more to him than their exchange value in the money markets of the world. The plaintiff at one point in his testimony speaks of his expectation that his money would be invested in some other form of Russian securities, but he offers no evidence showing either that the defendant was dealing in any other form of Russian securities or that any such investment was discussed, or that there were actually in existence in Pasadena or elsewhere any other form of Russian securities available for investment, or that any other investment was in the contemplation of the parties than that in Russian rubles which was actually made. Viewing the testimony in the case as a whole, the conclusion is irresistible that the transaction between the parties to this action was in the nature of an investment in Russian exchange; that the plaintiff at all times since the making of said investment was in a position, through the documents held by him or the defendant as his agent, to have taken advantage of any rise in the money market value of Russian rubles which would have rendered his investment profitable, and that having this advantage in his favor he was also at all times subjected to the disadvantage and liability of a further depreciation in the money market value of Russian rubles; and that, having suffered the loss of his money through such depreciation of Russian rubles to the point of a negligible valuation, he is endeavoring through this action to cast his loss upon the defendant, who was merely acting as his agent in good faith in the transaction. The finding of the trial court being predicated upon a misconception of the issues and being thus at variance with the proofs in the case as thus reviewed and interpreted, its judgment based upon such findings cannot be upheld.

We do not deem it necessary to discuss the question as to the effect of the defendant's plea of the bar of the statute of limitations.

Judgment reversed.

We concur: WILBUR, C. J.; LAWLOR, J.; LENNON, J.; WASTE, J.; KERRIGAN, J.; MYERS, J.

(62 Cal. App. 192)

PEOPLE v. SCHMAH. (Cr. 1107.)

(District Court of Appeal, First District, Division 1. California. May 14, 1923. Hearing Denied by Supreme Court July 12, 1923.)

1. Homicide 🔑180—Evidence as to defendant's sobriety and circumstances attending driving of automobile on public highway at time of fatality held admissible.

In view of Motor Vehicle Act, §§ 17, 20, and 22, providing that no person under the influence of intoxicating liquor shall drive a motor vehicle on any public highway, in a prosecution for manslaughter for driving over a child while the question of intent was immaterial, evidence as to defendant's sobriety and the circumstances attending his driving at the time of the fatality were admissible.

2. Criminal law 🔑822(1)—Instructions reviewed as a whole.

To declare whether the law was properly given for the jury's guidance, the appellate court looks, not to an isolated excerpt from instructions, but to the charge as a whole.

3. Criminal law 🔑761(6, 11)—Instruction held not to assume commission of crime nor defendant's intoxication.

In manslaughter prosecution wherein charge was driving automobile over child while intoxicated, an instruction that no act committed by one while voluntarily intoxicated is less criminal because of his having been in such condition, but whenever motive or intent is a necessary element to constitute any particular crime the jury may consider accused's intoxication in determining motive or intent, did not assume that a crime had been committed and that defendant was intoxicated.

4. Criminal law 🔑1186(4)—Instruction injecting possible immaterial element did not prejudice defendant.

In a prosecution for manslaughter for running down a child on the highway, the possible injecting into the case of an immaterial element verging on error, by instructing that no act committed by a person while in a state of voluntary intoxication is less criminal because of his having been in such condition, did not prejudice defendant in respect to a substantial right (Pen. Code, § 1404).

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

5. Criminal law ⚷822(9)—Instruction on acts committed in state of voluntary intoxication held not misleading in view of other instructions.

Where a drunken driver drove his automobile over a child in the highway, in prosecution for manslaughter thereof, an instruction that no act committed by one in a state of voluntary intoxication is less criminal by reason of his having been in such a condition, but, whenever existence of a motive or intent is a necessary element to constitute crime, then to take into consideration the fact that defendant was intoxicated at the time in determining motive or intent with which he committed the act, when taken in connection with other proper instructions given, was not misleading or confusing.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Xavier Schmah was convicted of manslaughter, and he appeals. Affirmed.

Jos. McInerney and R. P. Henshall, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

ST. SURE, J. Defendant drove his automobile over Carl Grove, eight years of age, fracturing the boy's skull, as a result of which he died. The jury found a verdict of guilty of manslaughter as charged, and defendant appeals from the judgment of conviction and the order denying his motion for a new trial.

Counsel for defendant, in their opening brief, state the points as follows:

"There are two questions involved on this appeal. The first arises in connection with the meaning of an instruction to the jury concerning the intent of the defendant. In this regard the court gave section 22 of the Penal Code, which provides, in substance, that intoxication is no excuse for crime, but where a particular intent is necessary for the commission of a particular crime the jury may take into consideration the fact of intoxication. The other concerns the sufficiency of the evidence to justify the verdict in view of this instruction; that is, where malice is no element of the crime, as here, and the act is made criminal because of the statute concerning negligence, is the evidence sufficient to justify the verdict where the court erroneously introduced into the case the issue:

"(a) That the act was not less criminal because the defendant was intoxicated; and

"(b) That they could look to the fact of his intoxication for the purpose of determining what his intent was when the question of his intent was entirely immaterial."

The instruction complained of reads as follows:

"The court instructs you that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition, but whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive, or intent with which he committed the act."

The evidence shows that on the afternoon of April 15, 1922, the defendant, accompanied by another person, was driving his automobile northerly along Nineteenth avenue, San Francisco. His automobile was "zigzagging down the street," at a rate of speed in excess of 30 miles an hour. Driving northerly he should have been on the right-hand side of the street, but it was shown that his automobile cut through some sand piled on the left-hand side of the street, in front of a building in course of construction. A short distance north of the sand pile, the deceased and his older brother were crossing the street. The older brother stepped back in time to avoid being struck by the automobile, but the younger one was struck down and run over, in the presence of his brother; his mother being but a few feet distant.

The following epitome of the evidence on the question of defendant's intoxication is mainly gathered from the briefs filed on behalf of defendant, and is fully supported by the record:

Dr. John E. Bohm testified that when the defendant was brought to the emergency hospital he was "diagnosed as being slightly intoxicated," but that he carried on a conversation intelligently; that he did not stagger; that his conversation was coherent, but his mentality slow, and he admitted that he had been drinking; that he could smell the odor of alcohol on his breath.

M. A. Klein testified that he saw the defendant coming down the street, that he was exceeding the 30-mile speed limit and was "zigzagging down the street," and that he saw the boy hit by the automobile. This witness also testified that the defendant spoke incoherently, was irrational, and that he was drunk.

Mrs. Mary U. Klein described seeing the preliminary incidents to the accident. She saw the defendant drive down the sidewalk, then into the middle of the street, "zigzagging down the street." She said the defendant was drunk.

Andrew Hinsch testified that he did not detect the odor of any particular liquor on the breath of defendant, but that his appearance was that he was intoxicated.

Richard L. Ingham, a retired police officer, was in the vicinity at the time of the accident, and he observed the condition of the defendant and testified that he was drunk.

William C. Pennycook testified that he saw the defendant at the time of the accident and that he was very much under the influence of liquor.

Hezekiah Coombs, police officer, testified that he saw the defendant at the wheel of the automobile and placed him under arrest, and that the defendant was drunk.

A. A. Sutton, a police officer, stated that he saw the defendant on the date in question, that he observed his demeanor, and that, while he would say the defendant was under the influence of liquor, he would not say he was drunk.

Daniel A. Fogarty, a police officer, testified that he received a certain flask from Officer Coombs in the condition the officer testified he found it in the possession of the defendant. Clinton G. Davis, city chemist, testified to analyzing the liquor contained in the flask and found it to contain alcohol 43.32 per cent. He described the liquor as "bootleg whisky," about 86 per cent. proof.

Nicholas Delaney, defendant's companion in the automobile, testified that defendant and himself had drunk together two or three bottles of home-brew beer; that the defendant, while in the machine, partook of no liquor, nor did he see any liquor in the car or elsewhere; and that the defendant was not drunk. Defendant testified that he drank three bottles of beer and nothing else; that he was not a drinking man; that he does not drink hard liquor at all; that he was not intoxicated.

[1, 2] The Motor Vehicle Act (St. 1915, p. 397, as amended by St. 1917, p. 382) § 17, provides that no person who is under the influence of intoxicating liquor shall drive or operate a motor vehicle on any public highway within this state. Section 20 of said act further provides that "the driver or operator of any vehicle in or upon any public highway shall drive such vehicle in a careful manner with due regard for the safety and convenience of pedestrians"; and this inhibition is repeated in another form in section 22. While it is true that in a case of manslaughter the question of intent is immaterial, yet, under the law in the instant case, evidence as to defendant's sobriety, and the circumstances attending his driving a motor vehicle upon the public highway at the time of the fatality, were clearly admissible. The atmosphere of the case evidencing intoxication on the part of the defendant was the result of his own condition and acts. It is unquestioned that the defendant had been drinking. The instructions given by the court told the jury that they were the exclusive judges of the facts, the weight of the evidence, and the credibility of the witnesses. The Code definition of "murder" and "manslaughter" were given, and the distinction between these crimes and the elements composing and appertaining to each were properly defined. The instructions further told the jury that before they could convict the defendant they "must be satisfied beyond all reasonable doubt that the death of the deceased ensued as a direct and proximate result of the reckless or gross neglect of the defendant." "Reasonable doubt" was defined, likewise "criminal negligence." Appropriate sections of the Motor Vehicle Act were quoted. Several instructions were given on the subject of intoxication which preceded and followed the language of section 22 of the Penal Code. The instructions further told the jury that the death of the decedent might have been accidental or caused by mistake, in which event their verdict should be not guilty. Again and again the jury were admonished that they were the sole and exclusive judges of the evidence, and that they could not find the defendant guilty unless they were satisfied of his guilt beyond a reasonable doubt. The instructions further told the jury of the presumption of innocence, and how the law clothes the defendant with an ordinary good character for the traits involved in the accusation. To declare whether or not the law was properly given for the guidance of the jury, we are to look, not to an isolated excerpt from the instructions, but to the charge as a whole. People v. Besold, 154 Cal. 363, 370, 97 Pac. 871, and cases cited therein. The instructions were quite comprehensive, being such as are usually given in manslaughter cases, and were fair to the defendant.

[3, 4] Counsel for defendant assert that the instruction complained of "without any qualification assumed, first, that a crime had been committed, and, secondly, that the defendant was intoxicated." We do not agree with this contention. Nowhere in the instructions do we find that the court either assumes that a crime was committed or that defendant was intoxicated. We agree with the Attorney General that because the court gives an instruction upon the law appertaining to murder, it cannot be said that the court thereby assumes or suggests that the defendant is guilty of murder. If the court gives a general instruction upon the law of accomplices, it cannot be said that the court assumes that the defendant was guilty of participation in the crime; and where, under the law and under the circumstances of a case such as this, a court gives a general instruction upon the question of intoxication, it does not thereby instruct the jury as a matter of fact that the defendant was intoxicated. It may be that the court, in the instant case, by the instruction complained of, injected into the case an immaterial element verging on error; but even so, we are wholly unable to see how such instruction in any way actually prejudiced the defendant or tended to his prejudice, in respect to a substantial right. Section 1404, Pen. Code. The practical administration of justice should not be defeated by a too rigid adherence to a close and technical analysis of the instruc-

tions to the jury. People v. Bruggy, 93 Cal. 476, 483, 29 Pac. 26.

[5] We have seen that the language of the instruction is contained in section 22 of the Penal Code. Whether an abstract instruction will call for a reversal of a case depends on the determination of the question whether, as a result of the instruction, prejudice resulted to the complaining party. It is generally agreed that legal abstractions in a charge are not always hurtful, and, unless it appears that they have been made so, the giving of them, while never to be approved, is not reversible error. 14 R. C. L. § 49, p. 783. There may, and no doubt do, arise cases in which an abstract proposition of law would be and is harmful to the accused. But this is not one of them. People v. Rowland, 12 Cal. App. 6, 24, 106 Pac. 428. We think the instruction, when taken in connection with the other instructions given, did not mislead or confuse the jury, and that the defendant had a fair trial.

The judgment and order appealed from are affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

(62 Cal. App. 276)

PEOPLE v. LA RUE et al. (Cr. 684.)

(District Court of Appeal, Third District, California. May 23, 1923. Rehearing Denied June 22, 1923. Hearing Denied by Supreme Court July 19, 1923.)

1. Criminal law 🔑409—Corpus delicti not provable by defendant's extrajudicial statements and admissions.

The corpus delicti cannot be established by defendant's extrajudicial statements and admissions, though made under oath in the trial of another action.

2. Criminal law 🔑409—Insurrection and sedition 🔑2—Membership in organization promoting criminal syndicalism may be shown by defendants' extrajudicial admissions; "conspiracy."

Membership in an organization, "organized and assembled to advocate, teach, and aid and abet criminal syndicalism" is not an essential element of the corpus delicti of the crime, as defined by Criminal Syndicalism Act, § 2, subd. 4, and hence may be established by defendants' extrajudicial statements and admissions; the organization itself, which is a criminal "conspiracy" or partnership, constituting the corpus delicti, and proof of membership therein being necessary merely to connect defendants with the crime.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

3. Criminal law 🔑780(1)—Instruction as to necessity of corroboration of accomplice's testimony should be given, though testimony is corroborated.

Where the prosecution relies for conviction on the testimony of an accomplice, an instruction, in the language of Pen. Code, § 1111, that a conviction cannot be had on such testimony unless corroborated by other evidence connecting defendant with the commission of the offense, should be given, though the testimony is corroborated, as the jury may reject the corroborating evidence as unworthy of belief.

4. Criminal law 🔑1186(4)—Refusal to instruct as to necessity of corroboration of accomplice's testimony held not reversible error.

Refusal to instruct as to the necessity of corroboration of an accomplice's testimony *held* not reversible error, in view of defendants' admissions and other corroborative evidence as to the corpus delicti; no miscarriage of justice having resulted, as required by Const. art. 6, § 4½.

5. Criminal law 🔑369(2)—Evidence of crimes by former members of organization of which defendants were members held admissible to establish character thereof in prosecution for criminal syndicalism.

In a prosecution for criminal syndicalism, evidence of crimes committed by former members of an organization, of which defendants were members, *held* admissible to establish the character of the organization as one organized and assembled to advocate, teach, aid, and abet criminal syndicalism, in violation of Criminal Syndicalism Act.

6. Criminal law 🔑1169(2)—Admission of hearsay testimony as to unlawful acts by members of organization of which defendants were members held harmless error.

In a prosecution for criminal syndicalism, admission of hearsay testimony that a member of an organization, of which defendants were members, said, in its hall, in the presence of the local secretary and other members, including the witness, that he had placed acid in several men's shoes because they would not quit their employment, and that members who had gone with him to start fires said that they had done so, *held* harmless error, in view of other evidence of such acts and other unlawful acts by members of such organization.

7. Criminal law 🔑1129(3)—Appellate court will not search record for errors not specifically pointed out by appellant.

The appellate court will not search the record for errors to which particular attention has not been called by appellant.

8. Criminal law 🔑1169(1)—Admission of hearsay evidence not reversible error, if so inconsiderable as not to injure defendants.

While a court should carefully guard against admission of hearsay evidence, admission thereof, where a wide range of evidence is permissible to prove a fact, is not reversible error, if so inconsiderable that it could not have injured defendants.

9. Witnesses 🔑327—Proof that witness was or is subject to insane delusions admissible to affect credibility.

Proof that a witness was or is subject to insane delusions, or that his mind and memory are impaired by disease, is admissible to affect his credibility.

10. Criminal law 🔑1170½(5)—Refusal to permit cross-examination of witness as to former confinement in hospital with general paresis held not reversible error.

Refusal to permit cross-examination of a witness as to whether he had been in a hospital undergoing treatment for general paresis, *held* not reversible error, where he displayed no mental weakness throughout a long examination by both parties.

11. Criminal law 🔑829(3)—Instruction held substantially covered by instruction given.

In a criminal syndicalism prosecution, refusal of an instruction that persons may advocate peaceable changes in our Constitution, laws, or form of government, *held* not error, where the court instructed the jury that it is proper to seek desired changes in political and industrial control, but that criminal or unlawful means are punishable under the act prohibiting criminal syndicalism; such instruction substantially embracing the proposition contained in the one refused.

12. Criminal law 🔑1169(2)—No reversal for errors relating to proof of fact so overwhelmingly proved as to show no miscarriage of justice.

A judgment of conviction will not be reversed for errors relating to proof of a fact so overwhelmingly proved as to show no miscarriage of justice.

Appeals from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Charles B. La Rue, Pete Beazley, William Rutherford, Thomas O'Mara, John Francis Nash, H. B. Edwards, Andrew E. Anderson, B. Kyler, Thomas Zangar, and Walter Smith, were convicted of criminal syndicalism, and they appeal. Affirmed.

W. F. Herron and S. Luke Howe, both of Sacramento, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The indictment charges that the defendants were members of the Industrial Workers of the World, "organized and assembled to advocate, teach, and aid and abet criminal syndicalism." They were tried jointly and found guilty as charged. Their motion for a new trial was denied, and separate judgments of conviction were entered. From such judgments and the order denying their motion for a new trial the defendants have appealed. The appeals are prosecuted jointly on a single record.

During the latter part of March and the early part of April, 1922, J. A. Casdorf and Earl Firey were on trial in the superior court of Sacramento county on a charge of criminal syndicalism. All of the defendants herein were called as witnesses by the defendants in that case, and respectively testified that they were then and, for periods of time ranging from a few months to several years prior thereto, had been members of the Industrial Workers of the World. The indictment herein was thereafter returned against them, based apparently upon such testimony. Their testimony so given was introduced in evidence by the people at the trial herein. When such evidence was offered, counsel for the defendants admitted that they had so testified, but objected to its introduction on other grounds. The only other testimony bearing upon the question of membership is that of William E. Townsend, a witness for the prosecution, who testified to facts tending to show that defendants Smith, O'Mara, and Zangar were members of the organization.

[1] Appellants contend that their membership in the organization is an essential element of the corpus delicti. If this contention be well founded then the judgments against seven of the defendants must be reversed, because few propositions of law are better settled than that the corpus delicti cannot be established by the extrajudicial statements and admissions of a defendant, without other and independent proof of the substance of the crime charged. People v. Vertrees, 169 Cal. 404, 408, 146 Pac. 890. The fact that the admissions were made under oath in the trial of another action does not render them the less extrajudicial. Wharton's Criminal Evidence (10th Ed.) p. 1277; People v. Chadwick, 4 Cal. App. 63, 87 Pac. 384, 389. It is necessary then to determine what constitutes the corpus delicti in this case.

[2] Section 2 of the Criminal Syndicalism Act (Stats. 1919, p. 281) defines five offenses in as many subdivisions. All but the fourth relate to individual acts which are made unlawful in themselves without reference to any organization, society, group, or assemblage of persons. The fourth subdivision provides that any person is guilty of a felony who "organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism." If the word "conspiracy" were substituted for the words "organization, society, group or assemblage," the meaning of subdivision 4 would be in no wise changed. It has been said:

> "A conspiracy is constituted by an agreement, * * * but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but is a result of it. The contract is instantaneous, the partner-

ship may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act." United States v. Kissel, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168.

The organization here in question is clearly embraced in the foregoing definition of conspiracy, and that it constitutes a conspiracy would hardly be questioned. In People v. Steelik, 187 Cal. 361, 376, 203 Pac. 78, 84, the organization is referred to as "an organization which in its nature was a criminal conspiracy." To conspire to do a forbidden act is the equivalent of becoming a member of a conspiracy to do the act.

> "It is the nature of the purpose or the nature of the means to obtain the purpose, as the case may be, which imports to the combination, agreement or confederacy its criminal character." 5 R. C. L. 1066.

The gist of the offense denounced by subdivision 4 is the criminal confederacy. The mere phraseology of the statute is unimportant. Several of the defendants were members when the statute was enacted. Each of them is punishable "because after the statute was passed he violated the terms thereof by knowingly remaining a member." People v. Steelik, supra. In other words, he continued a member of the criminal partnership and is liable as a partner for its continued criminal character. It seems clear that the criminal organization constitutes the corpus delicti. Proof of membership therein serves only to connect the defendants with the crime. Proof of the killing of a human being by a criminal agency establishes the corpus delicti in homicide, without any evidence tending to show who committed the act. After such proof has been made, the fact that the defendant struck the fatal blow may be shown by his extrajudicial admissions alone. No reason is perceived why the same rule is not applicable here. The admissions of the defendants were not confessions. No inference that a crime had been committed arose from them alone. They were of no value as evidence until criminality was established by other independent evidence. That which such other evidence established, therefore, must constitute the corpus delicti, the substance of the crime. The necessity of proving the membership of the defendants in order to justify a conviction does not show that such membership is an element of the corpus delicti. Proof that a defendant entered the building alleged in a charge of burglary is necessary to sustain a conviction, yet the fact that the particular person charged made the entry is not an element of the corpus delicti, which may be established by proof that an unknown person made the burglarious entry. Proof that the person charged made such entry is necessary only for the purpose of connecting him with the crime. The admissions in this case are in no manner discredited by the uncertainties and doubts which often attend proof of this character. It is admitted that they were made voluntarily under oath in the trial of a criminal action of a like nature to that for which the defendants were tried. Relative to the value of confessions, it is said:

> "Assuming the making of a confession to be a completely proved fact—its authenticity beyond question and conceded—then it is certainly true that we have before us the highest sort of evidence. The confession of a crime is usually as much against a man's permanent interests as anything well can be; and, in Mr. Starkie's phrase, no innocent man can be supposed ordinarily to be willing to risk life, liberty, or property by a false confession. Assuming the confession as an undoubted fact, it carries a persuasion which nothing else does, because a fundamental instinct of human nature teaches each one of us its significance." Wigmore on Evidence, § 866.

To hold that the admissions of the defendants admitted in evidence in this case are not sufficient proof of their membership would be to carry an overworked doctrine to the extreme of absurdity.

[3, 4] Such admissions, as stated, did not tend in any degree to show the criminal character of the organization. The people attempted to show such character by the testimony of former members thereof, corroborated by other evidence. The court refused to give an instruction proposed by the defendants in the language of section 1111 of the Penal Code, which provides that "a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense." Where the prosecution relies for a conviction upon the testimony of an accomplice, even though corroborated, the proposed instruction should be given, because the jury may reject the corroborating evidence as unworthy of belief, and in such case the instruction would be vital. It remains to be determined whether the refusal to give the instruction has resulted in a miscarriage of justice, because the Constitution forbids the reversal of a judgment "on the ground of misdirection of the jury, * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Article 6, § 4½. As pointed out, the evidence tending to connect the defendants with the commission of the offense is of the most trustworthy and positive character, being their own deliberate admissions. The evidence corroborating the testimony of the accomplices as to the corpus delicti is overwhelming. In addition to a large quantity of lit-

erature which in itself conclusively shows the criminal character of the organization, the testimony of the witness Coutts, a former member, was corroborated in many important particulars. He testified that in the summer of 1917, on a houseboat near Stockton, he was associated with a member of the organization, known as Robert Connellan, in preparing various contrivances for the purpose of injuring and destroying property. The then chief of police of Stockton, Wm. M. Simpson, testified that during that summer he saw Connellan selling I. W. W. literature in Stockton, and that he saw Connellan and Coutts together on the houseboat, where they had many tools and chemicals, which he later took into his possession. The chemicals and other articles were identified by Simpson and admitted in evidence. L. E. Happell, a chemist, testified that among such exhibits there were powdered emery, phosphorous, sulphuric acid, potassium nitrate, potassium chlorate, sulphuric acid added to potassium ferrocyanide, and a 20 per cent. solution of potassium hydroxide. Coutts testified that these substances were prepared and kept for various uses, such as injuring the bearings on machinery, starting incendiary fires, poisoning live stock, and putting the last-named chemical in the shoes of laboring men who refused to join the I. W. W. He testified that at a meeting of the organization held in its hall in Stockton, about October 1, 1917, a motion was made to send a committee to Modesto "to smoke up the town," because a delegate had been arrested there for selling I. W. W. literature; that the chairman of the meeting stated that such a motion could not appear upon the minutes "but if had to be done * * * that there was men there that knew how to do it"; that the witness and three others, one apparently the chairman of the meeting, immediately after the adjournment thereof, prepared some phosphorous "kitties" for the purpose of starting fires, and later went to Modesto, where they placed the kitties in various barns, causing several fires. G. J. Davis, who was then a deputy sheriff at Modesto, testified that between the hours of 10:10 p. m. on the 6th of October, 1917, and 3:05 the next morning eight different fires started in Modesto. He also testified that numerous isolated stacks of hay were burned during the summer of 1917. Other corroborative evidence was introduced, but space forbids the enumeration of any considerable number of the crimes concerning which the former members testified or the corroboration thereof. It is sufficient to say that there is ample corroboration of much of the testimony of at least two of the accomplices. In view of the conclusive character of the evidence, it cannot be said that the refusal to give the proposed instruction has resulted in a miscarriage of justice.

[5] Appellants contend that it was error to admit evidence of the crimes committed by the former members. Such evidence was admissible to establish the character of the organization. People v. Steelik, supra. The evidence was very similar to and much of it identical with that in the case of People v. Roe (Cal. App.) 209 Pac. 381, in which the judgment was affirmed.

[6] It is contended that the court erred in admitting hearsay declarations. Coutts was permitted to testify that in the I. W. W. hall in Stockton, in the presence of the local secretary and other members, including the witness, Connellan said that he had placed potassium hydroxide in several men's shoes, including those of Joe Arada, on one occasion, because they would not quit their employment. Arada testified that on the occasion referred to 14 or 15 men came to the place where Arada and others were employed and worked during one afternoon; that they slept that night in the same room which the other men occupied, and all the newcomers left the next morning before breakfast, leaving some I. W. W. literature on the floor where they had slept; that the feet of himself and the other men were injured by some acid which had been placed in their shoes, those of witness seriously. It is clear that the testimony as to what Connellan said he had done was hearsay, in so far as proof of the fact stated by him is concerned. It does not clearly appear whether such statement was made at an authorized meeting of the organization. If made at an authorized meeting, then the testimony was admissible, not as proof of the fact stated, but in connection with any action or omission to take action by the organization relative thereto, as showing its attitude toward the commission of such crimes by its members. In any event, there was other evidence which justified the inference that members of the organization had placed acid in the men's shoes on the occasion mentioned, and, in view of the innumerable unlawful acts committed by members thereof, as shown by the evidence, it is not believed that the admission of the evidence of which complaint is made could have prejudiced the rights of the defendants.

[7, 8] Coutts testified that on two occasions he went out with other members to place kitties for the purpose of starting fires, and that a number of fires occurred immediately thereafter. He was then permitted to testify that after the fires had started some of the members who had gone with him said they had placed some of the kitties. The testimony as to what the other men said, being a statement of a past event, was purely hearsay and should have been excluded. From the testimony properly admitted, however, to the effect that the members went out for the purpose of setting fires and that fires immediately thereafter occurred at the places where they had gone, the inference

naturally arises that they had started them, and the admission in evidence of their subsequent declarations that they had done so was harmless error. Counsel for appellants say that there are "many other instances in which the trial judge allowed witnesses to testify as to unsworn statements of others which were a mere narration of past events," but they fail to point them out. It is incumbent upon an appellant to point out specifically the errors relied on. The testimony covers more than 700 pages of the transcript, and this court must not be expected to search through the long record for errors to which particular attention has not been called. A few minor errors similar to those discussed have been discovered, but it is sufficient to say that none of them are prejudicial. While a court should carefully guard against the admission of hearsay evidence, in a case where so wide a range of evidence is permissible for the purpose of proving the character of an organization, some improper evidence usually creeps into the record, but in this case the hearsay evidence admitted is comparatively, as said in the anarchists' case (Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320), "so inconsiderable that it could not have in any way injured" the defendants.

[9] The testimony of the witness Townsend embraced his criminal activities as a member of the I. W. W. in a large number of states. He testified that during March, April, May, and June, 1921, he was in the employ of the Citizens' Alliance of Minneapolis. The court sustained the people's objection to the following question:

> "During the period of time that you say you were in the employ of the Citizens' Alliance in Minneapolis, isn't it the fact that you were in the Minneapolis General Hospital undergoing treatment for general paresis?"

Counsel for defendants explain the purpose of the question to the trial court as an effort to prove by the witness that at the time stated he was "suffering from incipient general paresis, which of course produces insanity, and it is incipient insanity." The objection should have been overruled.

> "It is admissible * * * in order to affect the credibility of the witness, to prove that he was or is subject to insane delusions; that his mind and memory are impaired by disease." Wharton's Criminal Evidence (10th Ed.) § 370a.

[10] Such proof may be made by examining the witness himself. Id., 370b; People v. Haydon, 18 Cal. App. 543, 123 Pac. 1102, 1114; People v. Salladay, 22 Cal. App. 552, 135 Pac. 508. While it must be conceded that the ruling of the court was erroneous, it is extremely doubtful whether defendants suffered any prejudice thereby. Whatever may be said of the character or trustworthiness of the witness, he endured the ordeal of a long examination on the witness stand by both parties without any apparent display of mental weakness. From the nature of general paresis, it is highly improbable that one who was in a stage of the disease requiring his confinement in a hospital at a given time would have the mental capacity, 18 months later, to undergo a long examination in court with the intelligence which the witness displayed.

[11] The court refused to give an instruction proposed by the defendants to the effect that persons have "the right to advocate peaceable changes in our Constitution, laws or form of government." At defendant's request the court instructed the jury:

> "It is proper to seek desired changes in political and industrial control but when criminal or unlawful means are used to effect political control the means are punishable under the act defining and prohibiting criminal syndicalism."

The instruction given substantially embraces the proposition of law contained in the one refused.

[12] All the errors committed relate to the proof of the unlawful character of the organization. The proof thereof is so overwhelming that an examination of the whole case, not only fails to show a miscarriage of justice, but affirmatively shows that a reversal would constitute a miscarriage of justice.

The judgments and orders are affirmed.

We concur: PLUMMER, Justice pro tem.; BURNETT, J.

---

62 Cal. App. 297

GLOBE GRAIN & MILLING CO. v. LOS ANGELES COUNTY. (Civ. 4167.)

(District Court of Appeal, Second District. Division 1, California. May 25, 1923.)

1. Taxation 🔑490—On application for reduction of valuation, decision of board of equalization within limits of reasonable discretion is conclusive.

Where the issue is solely one of correct valuation in assessing property subject to taxation, a dissatisfied taxpayer must rely on his right to apply to the board of equalization for a reduction, and the board's decision within limits of reasonable discretion, after due hearing, is final and conclusive.

2. Taxation 🔑543(6)—Taxpayer not within rule applying to recovery of taxes paid, unless facts alleged exhibit a void assessment.

Though a taxpayer may have relief under Pol. Code, § 3819, where he claims an assessment void, by paying under protest the tax assessed, and within 6 months thereafter bringing action to recover it back he cannot bring himself under the rule by a mere statement in the complaint that the assessment was void unless the fact alleged in support of that conclusion exhibit a void assessment.

3. Taxation ⚷543(6)—Complaint by corporation to recover taxes paid held not to show void assessment, so as to entitle it to recover.

Where a corporation had large solvent credits primarily subject to taxation, though in the valuation thereof it was entitled on proper application to reduction by debts due to bona fide residents pursuant to Const. art. 13, § 1 (Pol. Code, §§ 3628, 3629), a claim in a complaint by it to recover taxes paid under protest on such credits that their valuation thereof should have been reduced to nothing by debts due is the same as a claim for a reduction to any other amount less than that shown by the valuation of the assessment, and the complaint only shows a claim based on an alleged excessive valuation of such credits owned by it, and does not show a void assessment, so as to entitle it to recover the taxes paid under protest as provided by section 3819, where the taxpayer claims the assessment void.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Globe Grain & Milling Company against the County of Los Angeles. Judgment for defendant, and plaintiff appeals. Affirmed.

W. G. Van Pelt, of Los Angeles, for appellant.

A. J. Hill, County Counsel, and Gordon Boller, Deputy County Counsel, both of Los Angeles, for respondent.

CONREY, P. J. Plaintiff paid under protest a tax levied against it on solvent credits assessed as property of the plaintiff. Plaintiff's demand for repayment of this tax having been refused, it brought this action. The defendant's demurrer to the second amended complaint was sustained, and the plaintiff failed to make any further amendment. Thereupon judgment was entered in favor of the defendant. From this judgment the plaintiff appeals.

In the complaint it is alleged that in the assessment of plaintiff's property for the year 1919 by the county assessor of the county of Los Angeles there were wrongfully and unlawfully included as property belonging to the plaintiff solvent credits amounting to $1,559,850; that said assessment so set down was illegal and void in that plaintiff, at 12 o'clock m. of the first Monday of March, 1919, owed debts and unsecured liabilities to bona fide residents of the state of California and firms, associates, and corporations doing business in said state in excess of said sum, "which said debts and liabilities had been claimed as a deduction from said assessment by plaintiff"; that thereafter, in July, 1919, plaintiff duly appeared before the board of equalization of said county and requested that said assessment be changed by reducing said assessment of solvent credits to nothing; that said board of equalization upon a hearing of said request did reduce said assessment of solvent credits to $798,780, but failed and refused to reduce said solvent credits to nothing. The assessment and levy having followed in due course, the tax was paid under written protest duly filed.

It is alleged that the assessment and levy and the tax so paid were illegal and void by reason of the failure to allow for and deduct from the amount of solvent credits returned by the plaintiff said debts and deductions allowed by law and claimed by the plaintiff, which consisted of unsecured liabilities owing by the plaintiff to bona fide residents of the state of California and to firms, associations, and corporations doing business therein, and that there were not at 12 o'clock m. on the first Monday of March, 1919, in the state of California, or subject to the jurisdiction of said county or state, any solvent credits owned by plaintiff subject to assessment or tax for said tax year 1919, had said debts and deductions allowed by law and claimed by plaintiff been allowed by said assessor and by said board of equalization.

[1] It is conceded by appellant to be the law that, where the question at issue is solely a question of correct valuation in the assessment of property subject to taxation, the taxpayer who is dissatisfied with the assessor's valuation of his property must rely upon his right to apply to the board of equalization for a proper reduction thereof, and that the decision of the board of equalization, within the limits of a reasonable discretion, after a due hearing upon such application, is final and conclusive. Los Angeles Gas & Electric Corporation v. County of Los Angeles, 162 Cal. 164, 121 Pac. 384, 9 A. L. R. 1277; Birch v. Orange County (Cal. App.) 210 Pac. 57; Southern California Hardwood & Mfg. Co. v. County of Los Angeles, 49 Cal. App. 712, 194 Pac. 62. But appellant contends that the situation presented by the complaint in this case excludes it from the scope of those decisions, for the reason that, on account of the facts alleged, the assessment was illegal and void, in that, if the said debts and deductions had been allowed, there would have been no solvent credits to assess. He contends that by reason of this fact his right of action should be sustained, and that this contention is supported by the decision of the Supreme Court in Columbia Savings Bank v. County of Los Angeles, 137 Cal. 467, 70 Pac. 308.

[2, 3] We are of the opinion that the decision in the Columbia Savings Bank case is not applicable here. In that case the plaintiff in February purchased certain United States bonds which were exempt from taxation. In the following April it sold them. The assessor claimed that the bonds had

been purchased with intent to evade taxation, and that for that reason he had a right to ignore the purchase and assess the money as if such purchase had not been made. The court found that the purchase had not been made with intent to evade taxation, and the right to recover the tax paid under protest was sustained. Referring to the contention of the county that the decision of the county board of equalization refusing to strike out of the assessment as made by the assessor the amount added by him to cover said investment in United States bonds was final and conclusive against the plaintiff, the court declared that this contention is unsound.

> "The taxpayer may have relief under the provisions of section 3819 of the Political Code, in cases where he claims the assessment, or any part of it, is void, by paying under protest the full amount of the tax as assessed, and within six months thereafter bringing an action to recover back such part of the tax paid as he claims to be void, as is done in this case."

Appellant herein cannot bring itself under the rule which applies to a void assessment by the mere statement in its complaint that the assessment is void, unless the facts alleged in support of that conclusion exhibit a void assessment. But in this case, on the contrary, we think that the facts stated in the complaint show nothing other than a claim based upon an alleged excessive valuation of the solvent credits owned by appellant. The nature of appellant's claim wherein it insists that the valuation should have been reduced to nothing is the same as if it had claimed that it should have been reduced to any other stated amount less than that shown by the valuation of the assessment. Appellant did have large solvent credits which primarily were subject to assessment, although in the valuation thereof it was entitled (on a proper application therefor) to a reduction measured by the amount of any debts due from it to bona fide residents of this state. Cal. Const. art. 13, § 1; Pol. Code, §§ 3628, 3629.

In Southern California Hardwood & Manufacturing Co. v. County of Los Angeles, 49 Cal. App. 712, 194 Pac. 62, the action was one to recover a tax paid on unsecured credits and solvent debts due from others, notwithstanding that the plaintiff claimed that its debts due to bona fide residents of the state were equal to said items of credits which it was proposed to assess. The assessor found and assessed a balance obtained by valuing the debts due to bona fide residents of this state at less than the valuation of the assessable assets of the plaintiff. Plaintiff did not make any objection or any application for a revaluation before the board of equalization, but paid the tax under protest and brought its action to recover. It was found by the court that the changes in the plaintiff's statement were made by the county assessor under a mistaken belief that the plaintiff was not entitled to the deduction claimed by it; that, in consequence of this mistake, the plaintiff's assessable properties were overvalued to the full extent of said assessment, and that in fact there was no balance of assessable assets upon which a tax should be levied. Nevertheless judgment was entered in favor of the defendant, and this judgment was affirmed. It was held that "the result of this mistake amounted merely to an overvaluation of the plaintiff's properties, or—which amounted to the same thing in effect—an undervaluation of the appellant's deductible debts." It was further held that an overvaluation of assessable properties on the part of the assessor is not such an error as will entitle the owner of such properties to the remedy provided in section 3804 of the Political Code, "but, on the contrary, our attention has been called to a consistent line of decisions by the Supreme Court and District Courts of Appeal of this state, holding that the remedy of the property owner in the event of an overvaluation of his property by the assessor is by application to the board of supervisors of the county sitting as a board of equalization for a revaluation of his property."

Respondent further calls attention to the fact that the complaint in this action does not allege that the debts and liabilities by reason of which it claimed a deduction from its assessment were solely owing "to bona fide residents of the state of California." The claim made was and is that those debts and liabilities were owing "to bona fide residents of the state of California and firms, associates, and corporation doing business in said state." Said firms, associates, or corporations may have been resident outside of the state of California. In that event debts or liabilities owing to them could not be used in reduction of the assessment of solvent credits belonging to the plaintiff, unless, perhaps, such right might be established by proving that the debt was incurred in favor of a creditor who, though domiciled elsewhere, had established an independent "business domicile" (as it is sometimes called) in California. As to this possible exception, we express no opinion, merely noting that in Westinghouse, etc., Co. v. Los Angeles County (Cal. Sup.) 205 Pac. 1076, it was held that a Pennsylvania corporation, doing business in this state, did not subject its solvent credits (resulting from that business) to taxation here by transacting business through an agency established here, where such agency was not an independent business, nor an independent branch of the principal business of the corporation.

Respondent relies upon some other propositions to sustain the judgment, but we think it unnecessary to give them particular consideration at this time.

The judgment is affirmed.

We concur: HOUSER, J.; CURTIS, J.

62 Cal. App. 121

GROSSMAN v. YIP WING et al. (Civ. 2544.)

(District Court of Appeal, Third District, California. May 5, 1923. Rehearing Denied June 4, 1923. Hearing Denied by Supreme Court July 3, 1923.)

1. Replevin 🔑86—Title to land cannot be litigated in action to recover growing crops as against one in adverse possession under claim of right.

Title to land cannot be litigated and adjudicated in a personal action, as claim and delivery, to recover growing crops or emblements, as against one actually seized or in possession in good faith under claim of right or color of title.

2. Crops 🔑2—Adverse possessor owns crops, whether severed from or attached to land.

Crops growing on land by one in adverse possession under a claim of right are his property, whether severed from or attached to the land.

3. Adverse possession 🔑70—"Color of title" defined.

"Color of title" means that which in appearance is title, but in fact is not a good title.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Color of Title.]

4. Crops 🔑2—One taking possession in good faith under lease from purported owner and holding adversely is owner of crop grown by him, even as against true owner of land.

Under Code Civ. Proc. §§ 322, 323, one taking possession of land in good faith under a lease purporting to have been executed by one supporting his title by certain deeds, etc., or muniments of title, without knowledge that lessor's title was questioned or doubtful, and holding possession openly, notoriously, and in hostility to any other claimant, is the owner of crops grown thereon by him, even as against the true owner of the land.

5. Ejectment 🔑1—Use and occupation 🔑1—Remedy of owner of land, on which crop is grown by one in adverse possession, is in ejectment and to recover value of use and occupation.

The remedy of the true owner of land, on which a crop is grown by one in possession in good faith under a lease from one claiming title, is in an action in ejectment against such tenant and his lessor, and to recover, not the crop, but the value of the use and occupation of the land.

On Petition for Rehearing.

6. Appeal and error 🔑169—Point not made at trial not reviewed.

A point not made at the trial need not be reviewed.

7. Evidence 🔑69, 88—Property 🔑10—Tenants in possession presumed to have entered under lease, notwithstanding conflicting presumptions.

In claim and delivery for a crop by plaintiff claiming as owner against one who entered under lease from another, *held* that, in view of the presumptions under Code Civ. Proc. § 1963, subds. 11, 19, 20, 33, that things possessed are owned by the possessor, that private transactions are fair and regular, that the ordinary course of business has been followed, and that the law had been obeyed, the presumption is that persons in possession of land leased to them entered thereon under the lease, though the day of the month in which it was executed was omitted and not shown by extrinsic evidence, and the lease was not acknowledged or recorded, and there was no positive testimony as to whether they entered under it or under prior parol authority from lessor; the presumption that it was executed on the last day of the month being inapplicable.

8. Crops 🔑2—One holding adversely under lease held entitled to potato crop, though he originally took possession without authority.

One in actual adverse possession under a lease from one claiming title, when an action in replevin was instituted, and potatoes grown by him seized, by one claiming to be the true owner, may recover the potatoes or the value thereof, though he originally took possession without authority from any one, and thereby became a trespasser as against either lessor or plaintiff.

9. Replevin 🔑72—Finding that land on which potatoes seized were grown was embraced in tract leased to defendant sustained.

In claim and delivery to recover a potato crop growing on land claimed by plaintiff, evidence *held* sufficient to sustain a finding that the land was embraced in a tract leased to defendants by one claiming title, notwithstanding the absence of direct or positive testimony to such effect; the burden being on plaintiff to rebut the presumption that such was the fact.

10. Replevin 🔑72—Growers of potato crop held not shown to have taken possession of land by force.

In claim and delivery to recover a potato crop grown on land claimed by plaintiff, evidence *held* not to show that defendants, holding adversely under a lease from one claiming title, took possession by force and violence.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Leonard J. Grossman against Yip Wing and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, and Nat. A. Brown, of Stockton, for appellant.

Louttit & Stewart, of Stockton, for respondents.

HART, J. This is an action in claim and delivery, whereby the plaintiff demands the recovery of a certain crop of potatoes growing, at the time of the commencement of this action, on approximately 6 acres of land, situate on Mildred Island, San Joaquin county. It appears that the plaintiff, upon the issuance of summons in the action, which was commenced on September 12, 1921, claimed delivery of the potatoes to him (section 509, Code Civ. Proc.), and, in pursuance of sections 510, 511, and 512 of said Code, the same were seized and taken by the sheriff. It was stipulated that the quantity of potatoes taken from the ground by the sheriff under the writ of replevin consisted of 818 sacks, of the aggregate value of $1,249.66, and that of the 818 sacks so taken 370 sacks were sold by the plaintiff.

Plaintiff was at the several times referred to in the pleadings and the evidence a resident of the city of Atlanta, in the state of Georgia. On the 15th day of April, 1919, he duly appointed one Harry B. Barker, of the city of Gary, county of Lake, state of Indiana, his attorney in fact, with authority "to buy, lease, sell, mortgage, deed, take, convey in trust or otherwise, and to do all other things that I might do if personally present with regard to real property everywhere and likewise." This power, in short, is in all respects sufficient to vest Barker with the authority to carry on any transaction with regard to the real property of the plaintiff, wherever situated, that he himself could or might do. On the 4th day of December, 1918, one Joseph Basile, Jr., and Genevieve Basile, his wife, by a deed of said date, granted and conveyed to the plaintiff certain lands in San Joaquin county which comprised surveys Nos. 593, 628, 629, and 1184, swamp and overflowed lands, in township 2 north, range 4 east, Mt. Diablo meridian, which lands are described by metes and bounds in the instrument of conveyance. The plaintiff claims that these lands embrace all of said Mildred Island.

In the month of March, 1921, the defendant Seid Pak Yuen, under what purported to be a lease from one Joseph Pavliger and dated "March, 1921," the day of said month not appearing in the lease, entered into the possession of 110 acres of land situated on said Mildred Island. Said lease comprised four different parcels of land; the same having come down to Pavliger through one Louis Sanders from as many different grantors.

The amended complaint alleges that on or before the 8th day of March, 1921, plaintiff was the owner and in actual possession of the lands comprising the whole of Mildred Island, and that on the 8th day of March, 1921, the defendants entered upon the 6 acres in question "against the will and without the consent of plaintiff and without claim or color of title on the part of defendants or either of them; that thereafter defendants planted thereon a crop of potatoes, which is now in said ground and in a condition to be harvested"; that plaintiff is the owner of and entitled to the possession of all of said potatoes now growing on said tract of land, and that the same is wrongfully detained by the defendants.

The answer specifically denies the allegations of the amended complaint, and as an affirmative defense alleges that the 6 acres of land upon which the crop of potatoes was growing at the time said potatoes were seized under the writ of replevin were situated within the exterior lines of the 110 acres above referred to as being the property of Joseph Pavliger, and that the said Seid Pak Yuen entered into the possession of said 6 acres under the lease from Pavliger to him. There are two other special defenses set up in the answer of Seid Pak Yuen, but these are of no special consequence in the determination of the question presented here. The defendant Yip Wing filed a disclaimer, in which he declared that he has and claims no right, title, or interest in and to the real property in dispute.

The court found that the said defendant entered into and took possession of the 6 acres of land in question—

> "in good faith and as the tenant of one Joseph Pavliger, under a claim of right and color of title, and that he thereupon planted thereon a crop of potatoes, raised said crop of potatoes, and the same was in condition to be harvested at the time of the commencement of plaintiff's action on the 12th day of September, 1921, and that at the time of the commencement of plaintiff's action the defendant was, ever since has been, and he now is, in possession of said tract of 6 acres under a claim of right and color of title and in good faith and adverse to the claims of the plaintiff; * * * that the plaintiff is not, nor at the time of said seizure was, the owner of or entitled to the possession of all or any part of said 818 sacks of potatoes grown upon said tract"; and that "it is not true that the whole or any part of said potatoes is or was wrongfully detained by the defendants, or either of them, from the plaintiff."

The judgment was that the plaintiff return to the defendant said 818 sacks of potatoes or the value thereof, "and as said potatoes cannot be returned on account of sales made by the plaintiff, defendant Seid Pak Yuen is entitled to recover the value thereof, to wit, the sum of $1,249.66, together with interest on said sum of $1,249.66 from the 12th day of September, 1921." The appeal is by the plaintiff from said judgment.

The only evidence produced by the plaintiff in support of his claim of title to the land in dispute was the deed by Basile and his wife to him. The defendant introduced in evidence a number of deeds purporting to convey title to the 110 acres, of which the defendant Seid Pak Yuen claims to hold possession under the lease from Pavliger. These instruments purported to be conveyances of the four parcels constituting said 110 acres to the predecessors in title of Louis Sanders and conveyances to Louis Sanders. There was also introduced in evidence a letter referring to a contract of sale between the purported owner of one of the parcels constituting the 110 acres and Louis Sanders, whereby the former agreed to sell and the latter agreed to purchase said parcel of land for a certain specified amount, payable in certain specified monthly installments. The instruments so referred to constituted the only record evidence introduced by the defendant for the purpose of supporting the title of his lessor to the land in dispute.

It will be noted from the foregoing that neither the plaintiff nor the defendant deraigned title to the property in controversy from the paramount source of title. They did not connect their respective grantors with any prior title whatsoever. The court, if required to pass upon the question of title in this case, could not determine in whom the title to the 110 acres claimed by Pavliger, or, for that matter, title to any other part of Mildred Island, is vested.

As to the possession of Mildred Island by the plaintiff, the evidence was to the effect that the plaintiff's agent, said Barker, entered into possession of the island in the year 1920. The island at that time was entirely covered with water, and Barker, so he testified, proceeded with necessary steps for the reclamation of the island so as to put it in a condition for farming purposes. He stated that his operations extended over the entire island, including the 6 acres in dispute. He said:

> "We protected the banks with piling, built levees with dredgers, dug ditches, and cleaned out and ran canals. We worked on the entire island. During the year 1920 we were the only people on the island."

Referring to the fact that the defendant was in the occupation of a portion of the lands claimed by the plaintiff, he testified:

> "Around the 8th of March, 1921, I heard that the Chinamen, these people we have the suit with, were on the island. I immediately hired a speed boat, and in company with Kelly, the operator of the boat, went to the place where the Chinamen were on the island. There were several Chinamen there together on the levee, and I went up to them and asked who was in charge, and defendant Frank Yip, or Young Yip, said he was. I told him that they, the Chinamen, had no right on the island and ordered him off."

He further stated that in reply "Frank Yip," as the witness named him, called him an opprobrious name and ordered him "to get off or he would kill me. At that time," proceeded the witness, "there were four or five Chinamen present with him, and I noticed a couple of shotguns on the premises; one lying on the ground and one leaning against the shed. When the Chinamen threatened to kill me I left the island and returned to Stockton. These Chinamen remained in possession of certain portions of the island. I never gave them permission to remain, and they have remained against my will. They planted a crop of potatoes, and this crop is still in the ground and was at the time of the commencement of this action."

As to the exact location of the 6 acres of land in dispute, the evidence appears to be rather vague and uncertain. There were two witnesses, civil engineers by profession, who testified that the deeds and contract whereby Louis Sanders became the owner of the four parcels of land above referred to, and which are relied upon by the defendants as constituting color of title in him, described the lands sufficiently to enable them to be identified as the lands constituting the 110 acres within the exterior boundaries of which it is claimed the 6 acres in question are embraced. There was some other testimony regarding the location of said 6 acres and which tended to locate them within the boundaries of the 110 acres. The trial court, while declaring in a written opinion, filed in the case and which is incorporated in the brief of counsel for the defendant, that the 6 acres were not located with absolute clearness, nevertheless held that there was sufficient testimony to warrant it in concluding that said 6 acres was a narrow strip overlapping the four parcels described in the instruments purporting to convey the 110 acres to the defendant's lessor. We are satisfied that the court was justified in reaching this conclusion and making its finding as to that matter accordingly.

We may assume that the plaintiff's testimony, as above related, taken without regard to any adverse showing, is sufficient to show that the plaintiff was, through his attorney in fact, in actual possession of the entire island. It also must be conceded that actual possession of property is good as against a stranger or a trespasser, that is, one who is a mere intruder or "squatter," and not holding possession adversely in good faith under claim of right or color of title.

[1] Plaintiff, however, attempted to support his right to the recovery of the crop of potatoes upon the theory that he is the owner and entitled to the possession of the 6 acres of land upon which the potatoes were grown and that the defendant was a trespasser and in occupation of said land without any right whatsoever. This cannot be done as against one in possession of the premises under a claim of right; for it is well settled in this state that the question of title cannot be litigated and adjudicated in a personal action to recover the crops or emblements growing upon land as against the party who is actually seized or in possession of such land in good faith and under claim of right or color of title. Halleck v. Mixer, 16 Cal. 579; Kimball v. Lohmas, 31 Cal. 154; Page v. Fowler, 39 Cal. 415, 2 Am. Rep. 462; Pennybecker v. McDougal, 46 Cal. 661; Martin v. Thompson, 62 Cal. 618, 45 Am. Rep. 663; Smith v. Cunningham, 67 Cal. 262, 7 Pac.

679; Wilson v. Atkinson, 77 Cal. 485, 20 Pac. 66, 11 Am. St. Rep. 299; Emerson v. Whitaker, 83 Cal. 147, 23 Pac. 285; Groome v. Almstead, 101 Cal. 425, 35 Pac. 1021; Johnston v. Fish, 105 Cal. 420, 38 Pac. 979, 45 Am. St. Rep. 53; Hines v. Good, 128 Cal. 38, 60 Pac. 527, 79 Am. St. Rep. 22. In Halleck v. Mixer, Judge Field states the rule as follows, quoting from the syllabi:

> "In suits for timber cut and removed, as in this case, the true rule, so far as the title to the land is concerned, is this: The plaintiff out of possession cannot sue for the property severed from the freehold, when the defendant is in possession of the premises from which the property was severed, holding them adversely, in good faith, under claim and color of title. In other words, the personal action cannot be made the means of litigating and determining the title to real property as between conflicting claimants."

The above rule has been uniformly followed in California, and is expounded and applied in the cases above mentioned in connection with the case of Halleck v. Mixer, supra.

[2, 3] We are satisfied that where one is in possession of land under a claim of right, holding the same adversely to all others, the crops grown by him on the land so held, whether severed from the land or still attached thereto, are his property. In this case the plaintiff, as the purported owner of the land, was not dealing with a trespasser, since the record clearly shows that Seid Pak Yuen entered into, took possession of, and occupied the premises in controversy in good faith under a claim of right and adversely to all other persons claiming any interest in said premises. Color of title means that which in appearance is title, but in fact is not a good title. U. S. v. Casterlin (C. C.) 164 Fed. 437, 439; Whitney Lumber & Grain Co. v. Crabtree, 166 Fed. 738, 740, 92 C. C. A. 400; Knight v. Grim, 110 Va. 400, 66 S. E. 42, 43, 19 Ann. Cas. 400; Montoya v. Unknown Heirs of Vigil, 16 N. M. 349, 120 Pac. 676, 688.

[4] Under section 322 of our Code of Civil Procedure land is deemed to be held adversely, except in certain particulars not material here—

> "when it appears that the occupant or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property under such claim."

And section 323 of said Code provides that—

> "For the purpose of constituting an adverse possession" by a person claiming under such deed or judgment, the "land is deemed to have been possessed and occupied * * * where it has been usually cultivated or improved, or "where, although not inclosed, it has been used for the supply of fuel, or of fencing timber for the purpose of husbandry, or for pasturage, or for the ordinary use of the occupant."

See Owsley v. Matson, 156 Cal. 401, 403, 104 Pac. 983; wherein is cited the case of Wilson v. Atkinson, 77 Cal. 485, 20 Pac. 66, 11 Am. St. Rep. 299, supra.

It has even been held that—

> "A tax deed, though void on its face, if containing a proper description of the land, is sufficient to give color of title, under which a claimant of title in good faith may found an adverse possession, so as to set the statutes of limitations in motion. It is a written instrument, upon which a claim of title may be founded as being a conveyance of the property in question, within the meaning of section 322 of the Civil Code, and is effective as notice of the extent of the possession and claim under it." Wilson v. Atkinson, supra.

In the last-mentioned case it is further said, quoting from the syllabi:

> "In order to begin an adverse possession under a claim of title, within the meaning of section 322 of the Civil Code, the adverse occupant must enter and hold the land in good faith, believing his conveyance to be valid. Knowledge that the instrument is absolutely void will vitiate the claim of title; but such knowledge must be actual, and not such as would arise from the legal construction of the instrument."

In this case, as we have seen, the defendant Seid Pak Yuen entered into the possession of the premises in dispute under a lease purporting to have been executed by a party who supported his title to the property by certain deeds, etc., or muniments of title. The possession of the defendant was open and notorious and hostile to that of any other claimant of the property. There is nothing in the record indicating that the defendant did not enter into the possession of said premises in good faith, believing that his lease from Pavliger vested in him the legal right to take and hold such possession. In other words, there is absolutely no evidence in the record tending in any degree to show that Seid Pak Yuen, when taking the lease from Pavliger and entering into the possession of the land described in said instrument, had any knowledge of the fact, if it was a fact, that Pavliger's title to said land was questioned or of doubtful validity.

[5] Conceding, then, that the plaintiff is the true owner of all of Mildred Island, including the premises in dispute, the defendant, being in possession of said land under a claim of right and color of title, was, under the authorities above cited, the owner of the crop of potatoes involved herein. The situation here, as it is presented by the rec-

ord, is simply this: That neither the plaintiff nor the defendant succeeded in establishing title to the land in dispute. But the defendant proved actual possession under a claim of right, and as against such possession the plaintiff has no standing in an action to recover any crops produced by the defendant upon said premises. If the plaintiff is the true owner of all of Mildred Island, including the land in controversy, his remedy as against the defendant and his lessor is in an action in ejectment and for the recovery of the value of the use and occupation of the land.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

On Petition for a Rehearing.

HART, J. There are two points upon which the application for a rehearing is pressed, to wit: (1) That the evidence fails to show that the defendants entered upon and took possession of the premises in dispute under the written lease from Pavliger to Seid Pak Yuen; (2) that the defendants failed to show, and there is no evidence that does show, that the 6 acres upon which the potatoes were planted and grown are embraced within the 110 acres of which Pavliger claims the ownership and which is described in the lease from said Pavliger to Seid Pak Yuen.

[6] 1. The point first above stated was not made at the trial of the case, but is raised for the first time on this appeal. For that reason we would be justified in refusing to review the point. The case was tried in the court below upon the theory that the defendants went into possession of the premises under the written lease from Pavliger to Seid Pak Yuen. The point should have been raised or made at the trial, so that the defendants could have been given an opportunity to show, as in all probability they could have shown, that they took possession under said lease.

[7] But we will consider briefly the contention of counsel as to this point. Counsel first call attention to the fact that the lease from Pavliger to Seid Pak Yuen does not indicate the exact date of its execution. The lease bears the following date, "March——, 1921," the day on which the instrument was executed being pretermitted. There was no showing, or any attempt to show, by parol or other means extrinsic to the lease itself, what day the writing was executed. It was not acknowledged nor therefore was it recorded. Nor is there any positive testimony as to whether the defendant entered into the possession of the property under said lease, or entered under parol authority from Pavliger prior to the making of the written lease. From these considerations it is argued in the petition that the presumption following from the fact of the omission from the date of the lease the day of its execution, and the failure otherwise to show the day upon which the writing was executed, is that the instrument was executed on the last day of the month in which it is thereby shown that the writing was made and entered into by and between the parties. According to this theory, the lease in question was executed on the 31st day of March, 1921, or a trifle over three weeks after the defendants were found in occupancy of the premises in dispute. In support of this contention, counsel cite Jones on Evidence, § 19, and Graves v. Lebanon National Bank, 10 Bush (Ky.) 23, 19 Am. Rep. 50, 57. Upon all these considerations it is argued that it must be assumed that the defendants in the first instance took possession of the premises without authority from any person; that they were therefore trespassers; and that, as is at least the necessary effect of the argument, they continued as such trespassers, notwithstanding that subsequently to their entry upon the premises they were given a lease of the same by one claiming to be the owner.

We do not think that the presumption invoked and sought to be applied here by counsel for the appellant is applicable to this case. We are of the opinion rather that the presumption should be, and is, that the defendants entered upon and took possession of the premises under the lease. We cannot conceive how it may logically be maintained that a presumption of doing wrong is to follow from facts from which it is naturally to be inferred that a party did right. Here, as seen, the defendant Seid Pak Yuen had written evidence of the right to take possession of said property in the month of March, 1921, and it would seem absurd to say that, rather than to indulge the presumption that he took possession of the property under said authority, it must be presumed that he took possession wrongfully. There are several presumptions of law, disputable, of course, which we think apply to the case here. Subdivision 19 of section 1963 of the Code of Civil Procedure provides that private transactions are presumed to have been fair and regular. Subdivision 33 of the same section provides that it is to be presumed that the law has been obeyed, and subdivision 11 of the same section declares "that things which a person possesses are owned by him." Another presumption applicable here is that stated in subdivision 20 of section 1963 of the Code of Civil Procedure as follows: "That the ordinary course of business has been followed." From these views it follows that, if the point were of any importance whatsoever in the decision of this case, it was the duty of the plaintiff to have overcome the presumption that the taking of possession of the premises by the defendants was under the lease by proof that such taking of possession was neither under said lease nor by the sanction or authority of Pavliger.

[8] But the point, in our opinion, is of no significance or importance in the determination of the appeal herein; for if it were true that Seid Pak Yuen originally took possession of the lands without authority from any one, and that thus for the time he became a trespasser as against the rights either of Pavliger or the plaintiff, yet, at the time this action was instituted (September 12, 1921), and the potatoes were seized by the plaintiff under the writ of replevin thereupon issued, Seid Pak Yuen was unquestionably in actual adverse possession of the premises and holding the same under a lease from one claiming title to the premises, and therefore held such possession under color of title and claim of right. The case of Page v. Fowler, 39 Cal. 415, 2 Am. Rep. 462, cited in the original opinion, and which has been sustained by all the subsequent cases in this state, is, in its general facts, quite similar to the case at bar. Indeed, we perceive no distinction between the two cases as to the general facts, which justifies the conclusion that the principles upon which Page v. Fowler, was decided are less applicable to this case than that. See, also, Rector v. Lewis, 46 Cal. App. 168, 188 Pac. 1018.

[9] 2. Further examination of the evidence since the filing of the petition for rehearing has added strength to the view, expressed in the original opinion, that the finding that the 6 acres upon which the potatoes were planted and grown were embraced within the exterior boundaries of the 110 acres described in the lease from Pavliger to Seid Pak Yuen cannot justly be disturbed. There was introduced in evidence a plat or a map of the island, which shows swamp land surveys of numerous tracts of land embraced within the island. Said tracts are delineated and so identified on said map by metes and bounds. Included within the lands so delineated are the four several tracts comprising the 110 acres described in said lease. The three deeds purporting to vest in Pavliger three of the four parcels of which the 110 acres consist and a contract of sale between Pavliger and the purported owner of the fourth parcel, purporting to vest title to said parcel in Pavliger, correspond, in the description of said parcels, to the description of the same upon said map, as does also the lease from Pavliger to Seid Pak Yuen. As shown in the original opinion, two civil engineers, who had made surveys of the island, including the 110 acres, testified that the lands leased to Seid Pak Yuen were capable of ready identification by a reference to the plat or map referred to. One of the engineers, Widdows, stated that said map follows the description (in distances and acres) contained in the Pavliger lease to Seid Pak Yuen as to the several parcels constituting the 110 acres claimed by Pavliger. It is true that there is no direct or positive testimony that the 6 acres planted to potatoes were embraced within the 110 acres, but, since Seid Pak Yuen had a lease of the 110 acres, it is to be presumed that he took possession of the leased lands and that the 6 acres planted to potatoes were embraced within the lands which under the lease he had the right to take possession of. The burden therefore rested with the plaintiff to show, if it were a fact, that the 6 acres were not embraced within the 110 acres which are described in the lease from Pavliger to Seid Pak Yuen. The plaintiff made no effort at the trial to show that the 6 acres were not situated within the exterior boundaries of the 110 acres described in the said lease.

[10] In conclusion, we may observe that the statement in the petition that Seid Pak Yuen and the other Chinese who were with him upon the premises took possession thereof by means of force and violence is wholly without warrant in the evidence. The only evidence in the record showing the manner in which the defendants had possession of the premises on the 8th day of March, 1921, consisted of the testimony of Barker, the agent of the plaintiff. The substance of all that he testified to as to his visit to the camp of the Chinese on March 8th is set forth in the original opinion; and it will be noted therefrom that all that it amounted to was that, having previously heard that the Chinese were occuping certain portions of the island, he, accompanied by a man by the name of Kelly, went to the camp of the Chinese and said to them that they had no right there and ordered them to vacate the premises; that one of the Chinese (not Seid Pak Yuen) replied in foul language, called Barker a harsh name, and threatened to kill him if he did not leave the premises. It will be noticed that Barker did not even tell the Chinese that he or the plaintiff was the owner or entitled to the possession of the premises or that either claimed such ownership or right of possession. He simply ordered them away from the land.

However, for the reasons stated in the original opinion and those superadded herein, the petition for a rehearing is denied.

We concur: FINCH, P. J.; BURNETT, J.

62 Cal. App. 245

TITLE GUARANTEE & TRUST CO. v. HAMMOND LUMBER CO.

(Civ. 2570.)

(District Court of Appeal, Third District, California. May 21, 1923. Hearing Denied by Supreme Court. July 19, 1923.)

1. Mortgages 🔑280(5)—Findings that defendant in suit for deficiency did not assume mortgage debt sustained by evidence.

In a mortgagee's action to recover a deficiency judgment after foreclosure, evidence *held* to sustain findings that defendant did not assume the mortgage debt.

2. Corporations 🔑397—When corporation bound by act of officers or employees stated.

A corporation is not bound by any acts of its officers or employees unless they are by the corporation vested with general authority to transact any and all of the business falling within the scope of its corporate purposes, or vested with special authority, through formal action of its board of directors, to do some particular act within the limit of its charter powers, or unless the corporation has held such officers or employees out to the public as possessing authority to act for it according to the general usage, practice, and course of its business.

3. Principal and agent 🔑117(4)—Authority of agent to make trust deed must be in writing.

Under Civ. Code, §§ 2309, 2933, the authority of an agent to make a trust deed given as a pledge for the payment of money must be in writing.

4. Corporations 🔑432(12)—Finding that corporation had not given sufficient authority to employee to execute mortgage sustained.

In an action by mortgagee for a deficiency against a corporation alleged in fact to be the mortgagor and giving the mortgage in the name of one of its employees, evidence *held* insufficient to show a sufficient authority conferred upon its employees by the corporation to execute the mortgage upon the foreclosure of which the deficiency arose.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by the Title Guarantee & Trust Company, as executor of the last will and testament of John S. Maltman, deceased, against the Hammond Lumber Company, to recover a deficiency judgment. Judgment for defendant, and plaintiff appeals. Affirmed.

John F. Keogh and C. C. Mishler, both of Los Angeles, and Frank H. Snyder, of Glendale, for appellant.

R. L. Horton, of Los Angeles, for respondent.

HART, J. Since the appeal herein was taken, the original plaintiff and appellant John S. Maltman, passed out of this life, testate, and the above-named corporation, having previously been regularly appointed executor of the last will of the deceased, was thereafter duly substituted as party plaintiff and appellant in the place and stead of said John S. Maltman.

The action is to recover from the defendant a sum of money equal to an alleged deficiency following from the difference between the sum for which a certain promissory note is alleged to have been made and given by defendant to said Maltman and the sum for which certain real property in Los Angeles county was sold by the trustee under a deed of trust, given to secure said note, for the purpose of satisfying the obligation.

Judgment passed to the defendant, and an appeal from said judgment is brought here upon a bill of exceptions.

The principal question presented for decision here is whether the findings derive sufficient evidentiary support.

The facts, as they are alleged in the complaint, may thus be stated: The real property to which the trust deed to secure the payment of the promissory note referred to was made and given consists of lots 22, 23, and 24, in block 8, of Park tract, in the county of Los Angeles. On the 26th day of March, 1913, Walter E. Martin and his wife were the owners of these lots, and on the date first mentioned they executed to John S. Maltman, the original appellant herein, a mortgage covering said property to secure the payment of their promissory note to said Maltman for the sum of $9,000, to mature at the expiration of two years from the date of said note. Said note called for interest at the rate of 7 per cent. per annum, payable quarterly, in default of which payment the interest thus accrued to be added to the principal and draw like interest. It was also provided in said note:

> That, in the event default be made in the payment of any installment of interest when due, then the whole sum of principal and interest "shall become immediately due and payable at the option of the holder of this note."

On the 20th day of November, 1914, Maltman brought suit in the superior court of Los Angeles county to foreclose said mortgage against said real property. In addition to the lien of the mortgage, there also subsisted against said property, at the time of the conveyance hereinafter to be referred to, an assessment lien in the sum of $2,866.56 and interest thereon; said lien arising by reason of the improvement of the street upon which the property abutted. On June 1, 1915, Maltman dismissed said foreclosure suit and satisfied the liens subsisting against the same in consideration of a promise by the defendant, through one of its employees named O'Malley, that it (defendant) would give to Maltman its promissory note in a sum equal in amount to the mortgage indebtedness and the assessment lien and execute a trust deed as security for the payment of said note. That, agreeably to this arrangement, the property was conveyed to one W. H. Elliott, who in turn gave plaintiff his promissory note for the sum of $12,641.79, and at the same time executed and delivered to the Title Guarantee & Trust Company, a corporation, as trustee, a trust deed to secure the payment of said note. That said Elliott was an employee of the defendant, and was in said transaction authorized to act for and did act for the defendant. On March 19, 1917, the defendant caused said Elliott, his wife joining, to convey the said property to H. W. McLeod, who was, at the time of said conveyance, and for some time previously had been, the manager of defendant's business affairs in the city of Los Angeles. That said McLeod took said conveyance for and in behalf of the defendant, and that he was then duly authorized by the defendant so to do.

Prior to February 7, 1919, said note became due and payable, and on said date, while the obligation still remained unsatisfied, the following proposal in writing, purporting to be signed by the defendant through H. W. McLeod, its manager, was addressed to and in due time received by Maltman:

"February 7, 1919.

"Mr. John S. Maltman, Los Angeles, California—Dear Sir: We hold title to lots 22, 23, and 24 in block 8 of the Park tract on Sunset boulevard, on which you hold a trust deed in the amount of $12,641.79, together with accrued interest. If you will allow a new one-year trust deed to be issued to be signed by C. L. Van Deventer in the amount of $11,000 at 7 per cent., we will agree to pay down to that amount together with all accrued interest and taxes. We are to be the owners of the equity in this property.

"Yours very truly,
"Hammond Lumber Company,
"By H. W. McLeod, Manager."

At the end of the above writing, and upon the same sheet of paper, were the following words and figures:

"Accepted: John S. Maltman, 2/8/19.

"Rec'd of Hammond Lumber Company two thousand two hundred seven 98/100 dollars reducing the above-mentioned indebtedness to eleven thousand dollars as of Jan. 7th, 1919.
"John S. Maltman."

In pursuance of the above-alleged proposal by defendant, through said McLeod, and acceptance thereof by Maltman, defendant caused said McLeod to convey said real property to one C. L. Van Deventer, alleged to be an employee of defendant, he (Van Deventer) having taken said conveyance for and in behalf of defendant and authorized by the latter so to do. That "defendant rendered the entire consideration for said conveyance, and that none of the consideration therefor was rendered by the said Van Deventer." Subsequently, and on January 24, 1919, defendant, in the name of C. L. Van Deventer, executed to Maltman a promissory note for the sum of $11,000, payable one year after date, and, as security for the payment of the same, Van Deventer executed a trust deed to the Title Guarantee & Trust Company, as trustee, to the said real property. All these last-mentioned transactions were, it is alleged, carried out for and in behalf of defendant and in pursuance of the proposal and acceptance thereof above quoted herein.

On August 2, 1919, the second quarterly installment of interest on the Van Deventer note having previously fallen due, Maltman, on July 24, 1919, at which time said installment of interest remained unpaid, as were also the taxes on said property for the years 1918–1919, exercised his election, as provided in the note for such defaults, to declare the whole sum of the principal and accrued interest to be due and payable, and caused a notice of said default by the defendant and election by him to be recorded, on August 5, 1919, in the office of the county recorder of Los Angeles county. On the same day, Maltman duly requested the trustee under the said deed of trust to proceed with the sale of said property in accordance with the terms of said deed and as in such cases required by law.

On December 6, 1919, the said trustee duly and regularly exposed said property for sale at public auction, and Maltman submitted at said sale a bid therefor in the sum of $5,000. Said bid being the highest offer made for said property at said sale, the same was "struck off" and sold to Maltman for said sum. Deducting the sum of $320.80 which was expended as costs or expenses for conducting the sale, the balance remaining and credited upon the note was the sum of $4,679.20. The demand is for the sum of $6,320.80, which included said costs and also the taxes for 1918–1919 in the sum of $68.90.

As stated at the beginning hereof, the above statement is gleaned from the complaint.

The defendant, answering the complaint, specifically denies every material allegation thereof except the allegations contained in paragraphs 13 and 14 thereof, as to which he declares that it has no information or belief sufficient to answer the same, "and basing its denial upon that ground, denies each and every allegation in said paragraphs contained." (These paragraphs of the complaint contain allegations as to the falling due of an installment of interest on the principal sum, the failure of the defendant to pay the same and the election of the plaintiff to exercise his option to declare the whole sum of principal and interest of the note then due and payable and also the allegations as to the sale by the trustee under the trust deed given to secure said note of said real property and the result of said sale, etc.)

The answer also sets up a special defense based upon the letter purporting to have been addressed to the plaintiff by the defendant. through "H. W. McLeod, manager," under date of February 7, 1919, and above referred to. As to this letter and the acceptance by Maltman annexed thereto, the answer alleges "that at the time said letter was so signed it was stated to the said plaintiff that the said defendant declined and refused to sign any promissory note or trust deed or agreement of any kind or character that would render it liable for the payment of any sum or amount to the said plaintiff whatsoever, and said defendant has not at any time agreed to pay to the said plaintiff any sum mentioned in any promissory note or trust deed, or any sum whatsoever."

The findings are in accord with the denials of the answer and are, in the main, in the negative form. In substance they are as follows: That the defendant did not, on August 15, 1915, or at any time, own the real property involved herein or take title thereto in the name of W. H. Elliott or any other person; that said Elliott was not at the time mentioned, or at any time, acting for or on behalf of the defendant, nor was he authorized by the defendant so to do; that, while not taking title to the property through said Elliott on the date mentioned, it nevertheless rendered the consideration for the conveyance to Elliott; that the plaintiff did not dismiss the foreclosure suit in consideration of a promise by the defendant that it would execute in favor of plaintiff its promissory note equal to the amount of the mortgage indebtedness and a street assessment lien then existing against the property and also execute a deed of trust to said or any real property to secure the payment of said note; that, while it is true that the defendant did, on the 7th of June, 1915, dismiss said foreclosure suit and paid and satisfied said street assessment and said mortgage upon said property, yet H. F. O'Malley, although an employee of the defendant, did not promise, nor was he duly authorized to promise, for and on behalf of the defendant, that the defendant would execute a note and trust deed, on consideration of the dismissal of said foreclosure suit, etc., nor was any other person or employee of the defendant authorized to make any such promise in consideration of the dismissal of said suit and the payment of said mortgage and assessment; that on March 19, 1917, the defendant did cause said Elliott and his wife to convey said real property to H. W. McLeod, and said McLeod did take said conveyance for and on behalf of the defendant, and he was then and there, and at said time, duly authorized and nominated by defendant so to do; that the defendant did not, on February 7, 1919, at which time said note became due and was unpaid, propose in writing to the plaintiff that if the latter would extend the time of payment of $11,000 of the indebtedness, so due and unpaid, it would reduce its indebtedness to said amount, nor that it would execute its promissory note in favor of plaintiff in the sum of $11,000, or any sum. and would secure the same by a trust deed upon said property, but that upon said date said defendant made its certain proposal in writing to said plaintiff "which said writing is set forth in defendant's special defense in its answer to plaintiff's complaint, and which said written proposal was accepted by said plaintiff on the 8th day of February, 1919;" that on February 10, 1919, the defendant caused said McLeod to convey said real property to C. L. Van Deventer; that the latter was an employee of defendant and did not take said conveyance on behalf of defendant, "but he was then and there agreed upon between the plaintiff and the defendant to act as a dummy in said transaction, and did act as a dummy, with the express purpose of relieving defendant from any obligation on said note or trust deed upon a consideration paid for that purpose by the defendant; that the promissory note executed by said Van Deventer in favor of plaintiff in the sum of $11,000 and the trust deed to said real property executed to the Title Guarantee & Trust Company to secure the payment of said note were not made and executed for or on behalf of the defendant or by its authority, nor was there any promise made by the defendant that it would pay to the plaintiff the sum of $11,000 as evidenced by said note, nor were said note and mortgage executed by the said Van Deventer upon any promise made by the defendant either on January 24, 1919, or at any other time that it would pay said note. The fact of the exercise by the plaintiff of his option to declare the whole of the principal sum of said note due and payable upon default in the payment of the quarterly installment of interest and that the defendant caused a notice of the said default to be recorded on August 5, 1919, in the office of the county recorder of Los Angeles county, and the further fact that the property was, upon request by plaintiff, exposed for sale at public auction, that the same was bid in by the plaintiff for the sum of $5,000 and that the costs and expenses for conducting said sale amounted to the sum of $320.80 which sum was paid by the plaintiff, leaving a balance of $4,679.20 to be credited upon said promissory note, were found to be true.

[1] The whole transaction involved herein, so far as is concerned the part taken therein by the defendant and its employees, if, indeed, we may assume that the defendant, as a matter of fact, did itself take a part or hand therein, seems to be shrouded in more or less of a mystery. If, as the court found to be true, the defendant did not at any time own the property in question or own any interest of any kind or nature therein, then it is strange that the defendant, as the court also found was so, should have rendered the consideration for the transfer of the property by the plaintiff to Elliott, one of its employees. If the defendant at no time owned any interest in the property, it is also strikingly singular that it should have required Elliott to transfer the property to McLeod, its manager. These observations, however, are not decisive of this case, nor are the circumstances which inspire their utterance of any consequence in the decision of the ultimate question presented by this appeal, to wit, whether there is evidence sufficient to support the findings essential to the upholding of the judgment; and we may as well here declare our opinion to be that such findings are sufficiently fortified, evidentially, and that they in turn support the judgment.

The testimony of Maltman is in substantial accord with and supports the averments of the complaint, except as to any facts contained in that pleading which may be regarded or construed as sufficiently setting up an estoppel against the right of the defendant to interpose the plea that the note in suit was not its obligation. And, as to this proposition, it is to be foretold that, conceding that the circumstances under which the complaint declares that the foreclosure suit was dismissed are sufficient to raise such estoppel, even Maltman's own testimony (and his is all the oral testimony presented in support of the complaint) signally fails to support the averments of his pleading in that respect.

Maltman testified that at some time in the year 1915 O'Malley, one of the defendant's employees, called to see him at his office in Los Angeles; that O'Malley said to him that he was an employee of the defendant; that he was negotiating at that time to obtain the title to certain property on which he (Maltman) had a mortgage (being the lots described in the complaint), and that negotiations were pending for securing title to said property by the defendant; that "he understood that I had a mortgage on the property and a suit pending to foreclose the mortgage. He asked whether I would be willing to dismiss the action and have the Hammond Lumber Company assume the debt." Maltman stated that O'Malley a short time thereafter again called on him and urged him to accept the defendant's proposition that it assume the mortgage debt. O'Malley's proposition to Maltman, so the latter stated, was that the defendant would give him a trust deed and note for the entire amount of the principal and interest and also an assessment of over $2,600 that Maltman had paid for street improvement and back taxes and attorneys' fees in his foreclosure suit. O'Malley, proceeded Maltman, said that the defendant would require the dismissal of the foreclosure suit "and that by taking the Hammond Lumber Company I would be getting a responsible party instead of an irresponsible one. I said, in substance, that I would accept the proposition. The matter was placed in escrow; during the time it was in escrow, I learned that one Elliott was to take the title for the Hammond Lumber Company. I called down to the Hammond Lumber Company yard on Alameda street, where I met Mr. Elliott and some members of the company, among whom were Mr. McLeod, the manager, and Mr. O'Malley. They told me, at that time, that Mr. Elliott was an employee of the company. That was in August, 1915, I think, prior to the closing of the escrow. Mr. O'Malley, Mr. McLeod, and Mr. Elliott were the parties present. It was stated to me there that Mr. Elliott was taking the title of this property for the Hammond Lumber Company as a convenience for the company. I said I wanted to know why Elliott was taking the title and not the lumber company. Afterwards the first note and trust deed (the Elliott note and trust deed) was delivered to me."

The above is all the testimony presented by the plaintiff as to the circumstances leading to the dismissal of the foreclosure suit, the conveyance of the property to Elliott, and the latter's execution of a promissory note in favor of the plaintiff for the indebtedness subsisting against the property when the foreclosure suit was dismissed and the execution of a trust deed to secure said note; and it is thus to be observed that it was not shown that the taking over of the property by Elliott and the execution of the note and trust deed by him were authorized by the defendant. There is no evidence in this record disclosing the extent of the authority of the manager of the corporation, nor is there any evidence showing that the board of directors of the defendant corporation formally or otherwise conferred authority upon its manager or its employees, named in connection with the transaction here, to do any act or acts looking to the sale or transfer or acquisition of the property in question, or that its manager or any of its other employees herein named was held out by it as possessing authority to transact for and on its behalf the business of buying real estate. Indeed, conceding that the defendant was a party to the several transactions relating to the real property in question, it is not made to appear that said transactions were within the sphere of its corporate authority or purposes. There is no writing of any character purporting to involve an authorization by the defendant of the Elliott transaction, or, for that matter, of any of the transactions carried out in connection with the real property in question.

[2, 3] It is well settled that a corporation is not bound by any act or acts of its officers or employees unless they are by the corporation vested with general authority to transact any and all of the business falling within the scope of its corporate purposes, or vested with special authority, through formal action of its board of directors, to do some particular act within the limits of its charter powers, or unless the corporation has held such officers or employees out to the public as possessing authority to act for it according to the general usage, practice, and course of its business. Blood v. Marcuse, 38 Cal. 594, 99 Am. Dec. 435; Cal. Winemakers' Corp. v. Sciaroni, 139 Cal. 277, 280, 72 Pac. 990; see, also, on the general subject of the extent of the authority of the manager or the president of a corporation to transact its usual or ordinary business without formal specific action of the board of directors in that regard, Stevens v. Selma Fruit Co., 18 Cal. App. 250, 251, 123 Pac. 212. More important still, however, as applicable to this case, is the rule that the authority of an agent to make any mortgage for his principal (and a trust deed given as a pledge for the payment of money is in legal effect a mortgage) must be in writing. Civ. Code, §§ 2309 and 2933; Blood v. La Serena, etc., Co., 113 Cal. 221, 229, 41 Pac. 1017, 45 Pac. 252; Curtin v. Salmon River, etc., Co., 141 Cal. 309, 311, 74 Pac. 851, 99 Am. St. Rep. 75.

It may here be added that there is no evidence that the defendant at any time ratified or in any manner sanctioned whatever acts were done by its manager or the other employees with reference to said property.

Nor is there any element of estoppel disclosed here, even if it were necessary to concede that the facts stated in the complaint are sufficient to present that issue. The only ground for an estoppel as against the defendant which could have arisen would have been in the fact of its alleged promise to take the property and give its promissory note to the plaintiff for a sum equal to the amount of the aggregate indebtedness subsisting against the property and the giving of the trust deed to secure the same upon the dismissal by plaintiff of the foreclosure suit. But the answer to any claim of an estoppel is to be found in what has been said above, to wit: That there was no competent evidence showing that the defendant itself ever made such promise or had any transaction with plaintiff in regard to the property or that it authorized its manager or any of its employees to enter into or carry out for it any negotiations with reference to said property.

The finding that no part of the consideration for the transfer or conveyance of the property to Elliott "was rendered by said Elliott, but by the defendant," is, so far as we are able to judge from this record, unintelligible. The said finding is a part of the finding that the defendant never at any time became the owner of the lots in question or took title thereto in the name of W. H. Elliott, or any other person, and that neither Elliott nor any other person at any time acted in the matter of the transfer of the property to any person for or on behalf of the defendant. But whether a consideration passed to plaintiff for the conveyance of the lots to Elliott, other than the consideration for which the plaintiff dismissed the foreclosure suit—that is, the alleged proposition of the defendant to purchase the property and to assume the indebtedness for which it had been pledged to the plaintiff by the Martins—is of no material importance in the decision of this case, since the plaintiff testified (and there is no evidence contrary to his testimony as to this matter) that he did not hear of Elliott's connection with the transaction until approximately a month after the foreclosure suit had been dismissed and "the matter had been put in escrow," pending the completion by the defendant of its alleged part of the agreement with regard to the property. Thus it would appear that the transfer of the property to Elliott was not, so far as the plaintiff was advised, a part of the transaction resulting in the dismissal by him of the foreclosure suit.

[4] We now come to the matter of the transfer of the land to Van Deventer, a consideration which is itself really decisive of this case. Raymond Johnson testified that he was an employee of the defendant in the months of January and February, 1919; that Maltman came to his office in the month of January, 1919, and opened up the discussion of the matter of the property in question and asked the witness if the defendant intended to pay the note executed by Van Deventer, to which the witness replied in the negative. Maltman said that he would not want the full amount but would like to have $10,000 of the indebtedness paid, and said that the defendant "was responsible for the indebtedness, and I told him if we were it would have been paid before now." A few days thereafter, so Johnson proceeded, Maltman again called on him, and the witness stated to him that he (witness) had talked with those in authority over the defendant, and that they said that they would not be responsible for the Van Deventer note. Thereupon Maltman asked the witness if he would request the defendant to sign the following memorandum which Maltman had prepared:

> "Referring to your note and trust deed bearing date June 7, 1915, covering our lots 22, 23, and 24, block 8, Park tract, we have decided to issue a new note and trust deed, reducing the principal sum from 126 (?) to $11,000 on same term and note of interest, as heretofore.

Our Mr. C. L. Van Deventer holds the title to said property in trust for the Hammond Lumber Company as a matter of convenience and will sign all the necessary papers."

This memorandum, obviously, was to secure binding authority from the defendant for the transaction between the plaintiff and Van Deventer. Johnson testified that he with Maltman went to the office of the Title Guarantee & Trust Company of Los Angeles and Maltman asked a Mr. Samuel of that company if the memorandum would bind the defendant, at the same time showing him the writing; that Samuel replied that it would not, to which Maltman answered: "Well, this won't do, then." The witness interposed and said: "Well, all right, Maltman, we have told you all along the Hammond Lumber Company would not sign the paper and would not obligate themselves." Maltman and Johnson then left the trust company office and walked a considerable distance therefrom when the conversation concerning the proposed transfer of the property to Van Deventer was renewed and Johnson said to Maltman that he would be better off by accepting $2,000 "and taking this dummy (Van Deventer being so referred to) than he would be to go ahead and foreclose on the other one, where we were not responsible; that we would not change our condition any from that, and he would have $2,000 on that debt paid anyway. I said to him that Elliott was not the Hammond Lumber Company, and he was certainly man enough in the business world to know that he wasn't." Maltman thereupon stated: "I will take this proposition," and the two then returned to the trust company office, where Maltman stated to Samuel that he had accepted the proposition and asked Samuel to write a receipt for the $2,000, which Samuel did. It was stipulated that Van Deventer was "purely a dummy in relation to the conveyances, trust deed, and note, signed by him as disclosed by the evidence, and that he was paid therefor by the Hammond Lumber Company the sum of $25." The whole trend of Johnson's testimony was that the transfer to the "dummy" (Van Deventer) was for the purpose of releasing the defendant from any liability whatsoever upon the obligation.

The testimony of Johnson sufficiently supports the finding that the defendant was not liable for the indebtedness evidenced by the purported note of Van Deventer, or, in other words, was not liable upon the note in suit; that, even if the defendant ever considered itself as liable on the Elliott or McLeod note, the Van Deventer transaction was negotiated and consummated for the purpose of relieving the defendant from any further liability upon the obligation and that the payment of the $2,000 to plaintiff, for which he executed a written receipt at the time of the execution of the Van Deventer note and trust deed, was the consideration for the release of the defendant from any further liability in connection with the transaction. The fact is that the uncontroverted testimony of Johnson that Maltman insisted that the defendant should sign the memorandum referred to strongly tends to show that Maltman himself did not think or assume that the note from McLeod to him or even the note from Elliott to him constituted a binding obligation against the defendant.

The case of Karns v. Olney, 80 Cal. 90, 22 Pac. 57, 13 Am. St. Rep. 101, cited by appellant, is, in its facts, altogether different from the case at bar, and, therefore, bears no relevancy to the present consideration. There an agent, in the presence of his principals, orally agreed to sell certain lots to the appellant for a certain price. The latter, in obedience to the agreement, and in the presence of the principals, made at the time the required cash payment. Appellant took immediate possession of the lots and proceeded to and did make substantial improvements thereon with the knowledge of the vendors or the principals in the transaction. The action was for the specific performance of said contract. The trial court decided the case against the plaintiff (appellant), and the Supreme Court, on appeal, reversed the judgment and ordered the court below to enter judgment upon its findings in favor of the plaintiff. The decision in said case followed from a pertinent application of the doctrine of equitable estoppel. See Kinsell v. Thomas, 18 Cal. App. 683, 124 Pac. 220. In the present case, as we have shown, there was, so far as the record here discloses, no agreement by the defendant to purchase the land, nor was it shown that any of the transactions relating to the said land were carried on in the presence of the defendant or any one properly authorized to act for it in the premises, or that there was a memorandum in writing evidencing a sale or transfer of the property to the defendant through any one authorized to act for it, or any money paid by defendant or any person to plaintiff as an earnest of any bargain relating to said land or for any purpose, except the payment of the $2,000 on the execution of the Van Deventer transaction.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

62 Cal. App. 67

PEOPLE ex rel. THOMPSON v. SAN BERNARDINO HIGH SCHOOL DIST. et al.

(Civ. 4108.)

(District Court of Appeal, Second District, Division 1, California. May 2, 1923. Hearing Denied by Supreme Court June 29, 1923.)

1. Constitutional law 🔑62—Act held not to place power of annexation to high school district in officials having no legislative power; "recommendation"; "shall."

Pol. Code, § 1734b, as added by St. 1921, p. 722, § 1, providing that on recommendation of the county superintendent of schools and the supervisor of the district to be annexed the board of supervisors shall annex such school district to the high school district, is not invalid as placing in the superintendent and supervisor the power of annexation; the significance of "recommendation" being a mere suggestion as to desirability of a course of action to be pursued by the board, and "shall" of the act being a term of direction only, it being within the discretion of the board to act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Recommendation; Shall.]

2. Statutes 🔑259—Statute may be so drawn as to be operative on happening of contingency.

A statute may be so drawn that on the happening of some prescribed contingency it shall become operative.

3. Statutes 🔑227—Rule of construction to give mandatory term a directory meaning stated.

Whenever the text of a statute and the intent of the Legislature, as gathered either from the particular statute or from it in connection with other related statutes, show that the real meaning of the Legislature was that apparently mandatory words should be given a directory meaning, they will be given such construction.

4. Statutes 🔑227—Rule of construction of words of command as permissive only stated.

Whatever is within the ascertained intention of the Legislature is as much a part of a statute as are written words therein contained, and if the intent conflict with the literal meaning, especially where the rights of the public are involved, words of command may be construed as permissive or as carrying discretionary powers.

5. Statutes 🔑96(2)—Statute providing for annexation of common school district to high school district held not special legislation.

Pol. Code, § 1734b, as added by St. 1921, p. 722, § 1, which, after providing generally for annexation of common school districts to high school districts, provides, instead of annexation, for a tax levy on a common school district to be paid into the special fund of a high school most accessible thereto where it is governed by an appointive board, is not special legislation providing for annexation only to high school districts governed by such a board.

6. Schools and school districts 🔑22—Statute providing for annexation of common school districts to high school districts held not invalid as subjecting district to taxation and local government without representation.

Pol. Code, § 1734b, as added by St. 1921, p. 722, § 1, providing for annexing common school districts to high school districts, is not invalid as subjecting annexed districts to taxation and local government without representation.

7. Schools and school districts 🔑90—Statutes 🔑64(4)—Statute providing for annexing common school district to high school district held not, in connection with another statute, to violate prohibition against incurring indebtedness, since it is independent thereof and indebtedness is thrust on district and not incurred.

Pol. Code, § 1734b, as added by St. 1921, p. 722, § 1, providing for annexing a common school district to the nearest high school district, though containing no provision directly affecting the payment by the former of either principal or interest on outstanding bonds of the latter, is not invalid under Const. art. 11, § 18, against incurring without assent of electors indebtedness exceeding in any year the income for such year, because section 1747 requires the county board of supervisors to annually levy taxes for interest and redemption of a high school district bonds, since, assuming the latter section applies and it becomes the duty of the board to levy a tax including property in the annexed district to pay "interest and redemption" on such bonds, each section is independent and neither is essential to the other, though one in a measure may supplement the other, and furthermore, if section 1734b is construed as part of section 1747, the debt or liability created against the high school district is not incurred by it, but is thrust on it primarily by the board of supervisors and secondarily by operation of law.

8. Statutes 🔑64(1)—Statute invalid in part only, not invalid as a whole if intent shown to enact valid part irrespective of invalid provision.

Where an invalid provision of an act is severable from other provisions, so that, the objectionable part being eliminated, the remainder is capable of being carried into effect, and it is clear that the Legislature intended to enact such remainder irrespective of the part claimed to be void, that part of the act which is free from fault will stand and be considered as though the invalid part were omitted.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Quo warranto by the People, on the relation of R. S. Thompson, against the San Bernardino High School District and others. Judgment for defendants, and plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., and Henry Goodcell, of San Bernardino, for appellant.

W. J. Hartzell, of Redlands, and Leonard, Surr & Hellyer, of San Bernardino, for respondents.

HOUSER, J. This is an action in the nature of quo warranto brought for the purpose of annulling or declaring void an order made by the board of supervisors of San Bernardino county purporting to annex Highland school district to San Bernardino high school district upon proceedings had under section 1734b of the Political Code, as added by St. 1921, p. 722, § 1. A general demurrer to the complaint was sustained without leave to amend, and judgment was thereupon entered that "the plaintiffs take nothing by their said action." The appeal is from the judgment.

San Bernardino high school district, before the order made by the board of supervisors herein referred to, was identical with the territory included within San Bernardino school district, and said districts were governed in common by a board of education elected by the electors residing within the San Bernardino high school district. Highland school district is a school district situate within ten miles of San Bernardino high school district. Highland school district has never maintained a high school, nor formed part of or been annexed to any high school district, except in so far as it may have been annexed to said San Bernardino high school district by the order to which reference has heretofore been made. On August 31, 1921, the board of supervisors of San Bernardino county adopted an order for the annexation of said Highland school district, together with ten other such districts, to said San Bernardino high school district. Said order was made under and by virtue of section 1734b of the Political Code, and was so made pursuant to recommendation of the county superintendent of schools of said San Bernardino county and of the supervisor of said county in whose district said high school was situated, after publication of notice as prescribed by said section, and was so made without any authorization or procedure and without any consent by or on the part of said Highland school district or any of the officers, residents or taxpayers thereof. At the time said order was made said San Bernardino high school district was indebted in the sum of $200,000 on account of bonds theretofore issued and still outstanding, which bonds become due and payable in installments extending over several years hereafter.

It is contended that section 1734b of the Political Code is unconstitutional in the following respects: (1) That it places the power of annexation in the hands of officials having no legislative authority; (2) that it is special legislation in that it provides for annexation only to high school districts that are governed by an appointive school board; (3) that it subjects annexed districts to taxation and local government without representation; (4) that it subjects annexed districts to taxation for outstanding bonds of the high school district.

Section 1734b of the Political Code provides, in part:

> "Not later than August thirty-first, one thousand nine hundred and twenty-one, the board of supervisors of each county or city and county in which there are one or more high school districts, and in which there are one or more common school districts not members of any high school district at the time of the passage of this act shall upon recommendation of the county superintendent of schools, annex each of such common school districts to that high school district whose high school is most easily accessible to the children of the particular common school district; provided, that no common school district shall be annexed to such high school districts without the recommendation of the county superintendent of schools, and the supervisor or supervisors in whose district or districts said common school districts may be located; and provided, further, that no common school district shall be annexed unless the nearest point of such common school district lies within ten miles of a high school district."

[1] It is contended that because section 1734b of the Political Code provides that, upon the recommendation of the county superintendent of schools and the supervisor in whose supervisorial district the district to be annexed is located, the board of supervisors shall annex such school district to the high school district, the statute is unconstitutional in that it places the power of annexation in the hands of officials having no legislative authority. It may be conceded that neither a county superintendent of schools nor a single supervisor in his individual capacity, acting outside a board meeting, nor both of them combined, has any legislative authority. Among the definitions found in Funk and Wagnalls New Standard Dictionary for the word "recommend" are the following:

> "Offer with favorable representations; praise as desirable, advantageous, trustworthy, or advisable; speak in behalf of; counsel as to a course of action."

Taking the word "recommendation" in this instance to carry any one of the foregoing meanings, its significance is a mere suggestion as to the desirability of a certain course of action to be pursued by the board of supervisors. However, the statute contains the provision that upon such "suggestion" being made the board *shall* "annex each of such common school districts to that high school district whose high school is most easily accessible to the children of the particular common school district." The power of legislation is not placed in the hands of officials having no legislative authority—only the power of making a recommendation. The actual legislation upon that matter is still left with the board of supervisors—the legislative body of the county having power and authority to legislate therein. The effect of the statute as to the "recommendation" and as to the action to be taken thereon by the board of supervisors is no more than though the statute, instead of providing for a recommendation by the county superintendent of schools, had prescribed that whenever from any source it should appear "advisable," or "desirable," or "advantageous" to the board of supervisors that any common school district should be annexed to a high school district, the board of supervisors should make the necessary order or resolution to that effect.

[2] It is well settled that a statute may be so drawn that upon the happening of some prescribed contingency it shall become operative, or that it may remain in force until abrogated for like reason. In the case of People v. Dunn, 80 Cal. 211, 22 Pac. 140, 13 Am. St. Rep. 118, it is held that an act of the Legislature giving to certain persons the authority to select a site for a public building, and providing further that no purchase of such site should be made without the approval of the Governor of the state, thus leaving it partly, at least, to the Governor whether or not the act should take effect, was not a delegation of legislative functions.

Mr. Justice Harlan, in the case of Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294, after an exhaustive review of the authorities and early precedents in connection with that provision of the Tariff Act of 1890, which, among other things, gives the President of the United States the power to suspend operation of certain clauses in the Tariff Act "when he may deem proper," held that the legislation was purely contingent; that it provided for the ascertainment of an event in the future which was defined by the act and directed to be evidenced by presidential proclamation; and that it prescribed the consequences which were to follow upon that proclamation. He reaches the conclusion that "such proclamation was wholly in the nature of an executive act, a prescribed mode of ascertainment, which involved no exercise by the President of what belonged to the lawmaking power."

Hobart v. Board of Supervisors of Butte Co., 17 Cal. 23, is also a well-considered case having a general bearing upon the subject, and is authority for the broad statement of law that "an act granting power to be exercised upon such conditions as the Legislature may impose, is no delegation of legislative authority nor is it invalid."

Considering a "recommendation" as carrying the meaning only of a suggestion as to the desirability of a certain action, the apparently mandatory "shall" fades into nothing more than a term of direction. There is ample authority for holding "shall" to be directory rather than mandatory especially in a matter, as here, which relates to the performance of a public duty. It is no part of the duty of either or both of the officials mentioned in the statute to legislate upon any matter. On the other hand, it is most emphatically the duty of the board of supervisors, as a board, to perform legislative functions, and the presumption is that the legislative department of the county government would have an exclusive right to determine not only the preliminary question as to the desirability or the advisability of annexing a common school district to a high school district, but as well to ultimately enact the necessary legislative act to bring about that result.

[3, 4] "Shall" or "must" are frequently construed as directory terms. Whenever the text of a statute and the intent of the Legislature as a body, as gathered either from the particular statute under consideration or from it in connection with other related statutes, show that the real meaning of the Legislature was that apparently mandatory words shall be given a directory meaning, they will be given such a construction. Whatever is within the ascertained intention of the Legislature is just as much a part of the statute as are the written words therein contained, and if the intent conflict with the literal meaning, especially where the rights of the public are involved, words of command may be construed as permissive, or as carrying discretionary powers. People v. Sanitary District of Chicago, 184 Ill. 597, 56 N. E. 953; Clancy v. McElroy, 30 Wash. 567, 70 Pac. 1095; First National Bank of Seneca v. Lyman, 59 Kan. 410, 53 Pac. 125; Cooke v. Spears, 2 Cal. 409; Estate of Chadbourne, 15 Cal. App. 366, 114 Pac. 1012. The case of Board of Education of the City of Sacramento v. Board of Trustees of the City of Sacramento, 96 Cal. at page 42, 30 Pac. 838, is illustrative. The statute there in question, among other things, provided in substance that it was the duty of the board of education to submit to the board of trustees an estimate of the amount of money that would be required for school purposes during the current year, and that upon receipt of same the board of trustees "shall" levy a direct school tax, etc. In holding that the word "shall" was merely directory, the court said:

> "The general rule in the construction of statutes relating to the performance of a public duty which does not affect any private rights or interests, but concerns the public alone, is, that the language of the statute, although imperative in terms, must be regarded as directory rather than mandatory."

A similar question was raised on nearly identical facts in the case of Board of Education of the City of Woodland v. Board of

Trustees, etc., 129 Cal. 599, 62 Pac. 173, and the court affirmed the decision in the Sacramento Case, especially with reference to the effect of the provisions of the statute, closing with the remark that "the language used must therefore be held, as in the Sacramento Case, to be directory only." In a case involving a section of the Political Code which at the time provided in substance that, on the neglect of persons who excavate ditches across public highways to bridge such ditches, "the road overseer for that road district *shall* construct the same," the court, taking other statutes into consideration, ruled that the word "shall" should be construed as "may."

The statute, in addition to prescribing the manner in which the desirability of annexing a common school district to a high school district shall be brought to the attention of the board of supervisors, also vests a discretionary power in the board as to the high school district to which the common school district shall be annexed, dependent upon the accessibility of the latter to the former; and providing further that a notice shall be given by the board of a hearing on the matter, with the ultimate right of determination therein resting in the electors residing within the confines of the school district proposed to be annexed. No legislative power is attempted to be conferred upon the county superintendent of schools or upon the individual supervisor—only the right to make a recommendation, which recommendation suggests to the board of supervisors the propriety of, or the advantages which may accrue from, enacting legislation having the effect of annexing a given common school district to an undesignated high school district, as the board of supervisors in its discretion or the electorate of the common school district may determine. Such provisions in the statute are indicative of the intent of the Legislature with respect particularly to the effect of the word "shall"; that is to say, whether that word should be construed as mandatory or merely directory, in connection with the duties of the board of supervisors upon the receipt by the board of the "recommendation" by the county superintendent of schools. It therefore becomes apparent that the intent of the Legislature was, upon the recommendation of certain designated officials, to enact such legislation as would give the board of supervisors the authority to be exercised at its discretion to do the things enumerated in the enabling statute.

[5] Appellant contends that the statute in question "is special legislation in that it provides for annexation only to high school districts that are governed by an appointive school board." As a matter of fact, the statute contains no provision with reference to the annexation of a common school district to a high school district having an appointive school board. The statute, after providing generally for annexation of common school districts to high school districts, further provides:

> "That where the high school district which is most accessible to a majority of the pupils of the common school district attending high school is governed by an appointive school board, that the board of supervisors instead of annexing said common school district to the high school district having an appointive school board shall cause to be levied upon the property of such elementary school district a tax which shall produce an amount computed as follows: From the entire cost of maintenance of the high school for the year plus the interest and payments on bonds of said high school district for the year, there shall be subtracted the entire income of such high school from state and county sources; the remainder shall be divided by the units of average daily attendance in said high school, and the quotient so obtained shall be multiplied by the units of average daily attendance of pupils from the aforesaid elementary school district. Said amount shall be levied and collected from such elementary school district in the usual way and shall be paid into the special fund of the high school district."

It is urged that there is no reason why annexation should be required in one case and prohibited in the other, or why an annexed high school district should be required to contribute to the high school fund in proportion to its taxable property, while the common school district not annexed should pay taxes in proportion to actual attendance of its children in the high school. The fact that one class of school districts is dealt with by the law in a manner different from that in which another class is treated is in itself no sufficient reason for declaring the law to be special legislation and hence inimical to the constitutional provision. The discrimination in the creation of a class among school districts, or in the manner of providing for the maintenance of the high school in either class, in order to fall within the inhibition of the Constitution, must be arbitrary, not uniform in its operation, and not founded upon some natural or intrinsic or constitutional distinction. City of Pasadena v. Stimson, 91 Cal. 251, 27 Pac. 604; Darcy v. Mayor of San Jose, 104 Cal. 642, 38 Pac. 500; Rode v. Siebe, 119 Cal. 521, 51 Pac. 869, 39 L. R. A. 342; Deyoe v. Superior Court, 140 Cal. 481, 74 Pac. 28, 98 Am. St. Rep. 73; Ex parte King, 157 Cal. 164, 106 Pac. 578. In the Deyoe Case it is said that—

> "The classification must not be arbitrary for the mere purpose of classification, but must be founded upon some natural or intrinsic or constitutional distinction which will suggest a reason which might rationally be held to justify the diversity in the legislation."

The classification here as to annexation is not whimsical, but it is most natural, and the statute has a uniform application. By rules of law not here under consideration it is provided that some school districts be governed by an appointive board of trustees, while other such boards shall be elected to office. In the matter of taxation some common school districts may have few children who may attend high school; other common school districts may have many. It is proper that the several districts pay taxes according to the benefits received. The statute in question merely recognizes existing conditions and provides for the maintenance of each class of school districts by an appropriate method of taxation.

[6] Appellant's third point with reference to the unconstitutionality of section 1734b, in that "it subjects annexed districts to taxation and local government without representation," is completely answered by the case of Board of Education of the City of San Rafael v. Davidson (Cal. Sup.) 210 Pac. 961. The facts of that case are nearly identical with the facts herein. A matter involving the particular point was squarely before the court and the ruling was directly opposed to appellant's contention. Among other things, the court said:

> "We conclude, therefore, that under the state school law as followed by the charter of San Rafael it is contemplated that outlying and adjacent elementary school districts may be annexed to a city high school district for high school purposes, and that the district so consolidated is to be under the government and control of the city board of education and the annexed territory becomes part of the city for the purpose of electing such board."

[7] As a final contention on the part of appellant it is urged that section 1734b is void for the reason that it subjects annexed districts to taxation for outstanding bonds of the high school district.

Section 18 of article 11 of the California Constitution provides, among other things, in substance, that no board of education or school district shall incur any indebtedness or liability exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the qualified electors thereof voting at an election held for that purpose. Section 1734b contains no provision directly affecting the question of the payment by annexed common school districts of either the principal or the interest on any outstanding bonds on the high school district to which such common school district may be annexed. But as to the common school districts which are not annexed but which are most accessible to a given high school district which is governed by an appointive board of trustees, the section provides that the board of supervisors, instead of annexing the common school district to the high school district—

> "shall cause to be levied upon the property of such elementary school district a tax * * * computed as follows: From the entire cost of maintenance of the high school for the year plus the interest and payments on bonds of said high school district for the year, there shall be subtracted," etc. "Said amount shall be levied and collected from such elementary school district in the usual way and shall be paid into the special fund of the high school district."

Section 1747 of the Political Code provides that—

> "The board of supervisors of the county whose superintendent of schools has jurisdiction over any high school district must annually, * * * levy a tax for that year * * * for the interest and redemption of all outstanding bonds of such district."

In view of the fact that at the time of the annexation of the common school district to the high school district here in question the high school district had outstanding bonds in the sum of $200,000, it is claimed that, if the annexed common school district should incur any liability for payment of any part of the existing bonded indebtedness of the high school district to which the common school district was annexed, the common school district would thereby incur at the time of such annexation a future liability exceeding its income provided for the current year without an election for that purpose, which liability is forbidden to be incurred by the section of the California Constitution to which reference has been made. It is argued by appellant that because section 1734b contains no direct provision with reference to property lying within an annexed common school district being taxable on account of the bonded indebtedness of the high school district to which such common school district is annexed, and because said section does provide for such taxation on that account where no annexation takes place, and because section 1734a of the Political Code, as added by St. 1919, p. 396, § 1, which has to do with annexation of common school districts to high school districts under certain prescribed conditions, especially exempts from taxation on account of the payment of bonded indebtedness the property lying within a common school district annexed as in section 1734a provided, it necessarily follows that the provision of section 1747 of the Political Code applies, which requires a tax to be levied upon all the taxable property in the high school district for the payment of the interest and redemption of all outstanding bonds of the high school district to which the common school district has been annexed; and it is also contended that under section 1747 of the Political Code the property of the high school district includes, not only the property which lay within it at the time the bonds were issued, but as well all other territory which was added thereto by reason of the annexation of any and all common school districts.

[8] Assuming, without deciding, that section 1747 of the Political Code applies, and, consequently, that under that section it became the duty of the board of supervisors to levy a tax on all the property in the high school district, including the property in the annexed common school district, to pay "interest and redemption" on all outstanding bonds of the high school district, it does not follow that section 1734b is unconstitutional. That section embraces a plan for annexing a common school district to a high school district, but no provision with reference to the levying of a tax in circumstances such as are here presented. Even though the section under attack were to contain a provision similar to the clause of section 1747 with reference to taxation, the rule of law is that if such provision be severable from the other provisions of the statute, so that the objectionable part being eliminated, the remainder of the statute is capable of being carried into effect, and it is clear that the Legislature intended to enact such remainder irrespective of the part of the statute claimed to be void, that part of the statute which is free from fault will stand and be considered as though the unconstitutional part were omitted. Cooley on Constitutional Limitations (7th Ed.) p. 246; Hale v. McGettigan, 114 Cal. 112, 45 Pac. 1049; People v. McFadden, 81 Cal. 500, 22 Pac. 851, 15 Am. St. Rep. 66; Federal Construction Co. v. Wold, 30 Cal. App. 360, 158 Pac. 340. The provisions of section 1747, at least so far as the clause here considered is concerned, have been a part of our law since as far back as 1909, while section 1734b was enacted in 1921. While one of these statutes may in a measure supplement the other, they are nevertheless entirely independent statutes, and neither of them is essential to the existence of the other. They are perfectly distinct and separable, and each of them contains just and useful provisions standing alone which are perhaps in nowise obnoxious to any constitutional objection.

There is another reason why section 1734b, even when construed as a part of section 1747, is not in conflict with the provisions of the California Constitution, which forbids a board of education or a common school district from incurring an indebtedness or liability greater than its current income for any one year without the assent of two-thirds of its qualified electors as expressed at an election held for that purpose. In order that one may "incur" a debt or a liability one must necessarily perform some act or take some action—in other words, one must do something that will have the effect of bringing upon one's self the debt or liability. In the instant case it cannot be said that the Highland school district did anything by which any indebtedness or liability was incurred against it. If any debt or liability was created as against the Highland school district, it was one which was not of its own choosing or making, but was thrust upon it primarily by the board of supervisors of San Bernardino county, and secondarily by operation of law. The cases are numerous which announce the principle that in such circumstances there is no infraction of the constitutional provision to which reference has been made. In the case of Lewis v. Widber, 99 Cal. 412, 33 Pac. 1128, which involved a consideration of the constitutional provision here in question, the court said:

> "It is quite apparent, however, that this clause of the Constitution [section 18 of article 11] refers only to an indebtedness or liability which one of the municipal bodies mentioned has itself incurred—that is, an indebtedness which the municipality has contracted, or a liability resulting, in whole or in part, from some act or conduct of such municipality. Such is the plain meaning of the language used. The clear intent expressed in the said clause was to limit and restrict the power of the municipality as to any indebtedness or liability which it has discretion to incur or not to incur."

In Long Beach v. Lisenby, 180 Cal. 56, 179 Pac. 198, the foregoing language is quoted with approval, and in McCracken v. San Francisco, 16 Cal. 632, where a similar provision of a section of the city charter of the city of San Francisco was under consideration, the court said:

> "We are clear that the provision refers only to the acts or contracts of the city, and not to liabilities which the law may cast upon her."

In 28 Cyc. at page 1541, where many cases are cited as establishing the principle, it is said:

> "Limitations on municipal indebtedness do not apply to such liabilities as are cast by law upon the corporation, but only to those created by voluntary act or contracts."

The following California cases also support the principle: Welch v. Strother, 74 Cal. 416, 16 Pac. 22; Federal Construction Co. v. Wold, 30 Cal. App. 360, 158 Pac. 340; Harrison v. Horton, 5 Cal. App. 419, 90 Pac. 716; Metropolitan Life Ins. Co. v. Deasy, 41 Cal. App. 674, 183 Pac. 243.

The case of People v. Hanford Union High School District, 148 Cal. 705, 84 Pac. 193, was one in which the board of trustees of a common school district, in agreeing that the common school district be annexed to a high school district, as a part of the "terms" of annexation, attempted to bind the common school district by an agreement with the trustees of the high school district to pay "its pro rata of the taxes for the liquidation of interest and bonded indebtedness of said Hanford Union high school district."[3] No election was held for the purpose of procuring the assent of two-thirds of the electors of the common school district. It was held that the order of annexation made by the board of supervisors was ineffectual for any purpose; but that decision is not "out of line" with the other decisions of this state for the reason that it appears the incurred indebtedness or liability on the part of the common school district was the result of an agreement between the two boards of trustees, and was not such a debt or a liability as was cast by law upon the school district.

It is the conclusion of this court that section 1734b of the Political Code is not subject to appellant's specified objections thereto.

It follows that the judgment should be affirmed; and it is so ordered.

I concur: CONREY, P. J.

CURTIS, J., being disqualified, does not participate in the foregoing opinion.

---

62 Cal. App. 796

PEOPLE ex rel. CRAM v. REDLANDS HIGH SCHOOL DIST. et al. (Civ. 4109.)

(District Court of Appeal, Second District, Division 1, California. May 2, 1923. Hearing Denied by Supreme Court June 29, 1923.)

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Quo warranto by the People, on the relation of W. H. Cram, against the Redlands High School District and others. Judgment for defendants, and plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., and Henry Goodcell, of San Bernardino, for appellant.

Walter J. Hartzell, of Redlands, for respondents.

HOUSER, J. The facts in this case are identical with the facts as stated in the case of People ex rel. R. S. Thompson v. San Bernardino High School District et al. (Civ. 4108) 216 Pac. 959, the opinion in which is this day filed, and the same points are raised in each of the cases.

Upon the authority of People ex rel. Thompson v. San Bernardino High School District the judgment herein is affirmed.

I concur: CONREY, P. J.

CURTIS, J., being disqualified, does not participate in the foregoing opinion.

---

62 Cal. App. 402

BRIGGS v. KOSICH. (Civ. 4566.)

(District Court of Appeal, First District, Division 2, California. June 6, 1923.)

1. Appeal and error 🔑1011(1)—Findings on conflicting evidence conclusive.

A court of review cannot interfere with findings on conflicting evidence.

2. Appeal and error 🔑1071(5)—Finding as to immaterial fact harmless.

In a partner's action for dissolution and for an accounting defended on the ground that the plaintiff had previously sold his interest in the business to the defendant, in which there was no issue as to the amount of the consideration paid and the only issue was whether the firm had been previously dissolved by such sale, an inaccurate finding as to the extent of the consideration was harmless; the amount thereof being immaterial.

Appeal from Superior Court, Alameda County; George Samuels, Judge.

Action by Lewis Briggs against A. R. Kosich. Judgment for plaintiff, and defendant appeals. Affirmed.

Glickman & Glickman, of Oakland, for appellant.

William W. Laidley, of Bakersfield, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to dissolve a partnership alleged to be existing between the two parties, and to obtain an accounting. The trial court awarded him a judgment and the defendant has appealed. The plaintiff's complaint alleged the formation of a partnership, the commencement of business thereunder on the 18th day of August, 1921, and that the partnership conducted and managed a garage at 420 Twenty-Third street, in Oakland. The plaintiff further alleged that on the 5th day of January, 1922, the defendant sold the partnership business and refused to account to the plaintiff for any of the proceeds. Thereupon the plaintiff prayed that the partnership be dissolved, that an accounting be had, and for other relief. The defendant came forward with an answer in which he admitted the creation of the partnership, and the sale of the business; but he denied that the sale was wrongful, or without the assent of the plaintiff, or that he held any of the proceeds in trust for the plaintiff. In addition to his denials the defendant set forth that on the 16th day of December, 1921, the plaintiff sold his interest to the defendant for the sum of $20, and an agreement on the part of the defendant that the defendant would assume and pay the partnership debts. The sale to the defendant was alleged to have been evidenced by a bill of sale which the defendant pleaded in hæc verba. On the issues so made the parties went to trial. The trial court thereafter duly made its findings and ordered judgment in favor of the plaintiff in the sum of $550.

The appellant strenuously contends that the bill of sale to him should have been treated by the trial court as an absolute transfer in præsenti, whereas the trial court, on that subject, made findings as follows:

> "That on or about the 16th day of December, 1921, plaintiff at request of defendant executed and delivered to defendant a bill of sale of all of plaintiff's right, title, and interest in and to said garage business, said bill of sale being given by plaintiff to defendant for the purpose of allowing plaintiff to seek employment elsewhere and also for the purpose of enabling defendant, should the occasion arise, to consummate sale of said garage business for and on account of said copartnership. That the only consideration for said bill of sale was the sum of $20.
>
> "That on the 5th day of January, 1922, defendant was not the sole and absolute owner of said garage business located as aforesaid, but that said garage business was then and there the property of and belonged to plaintiff and defendant in equal shares as copartners therein; that said bill of sale was not an absolute conveyance to defendant of plaintiff's right, title, and interest in said garage business, but that defendant took said bill of sale solely and only as the agent of plaintiff in order that defendant could without undue delay, consummate a sale of said garage business for and on account of said copartnership."

[1] On the subjects contained in the foregoing findings there was conflicting evidence. The plaintiff testified in support of the theory on which the findings were framed. The defendant gave testimony to the effect that the bill of sale was, and was intended to be, an absolute transfer taking effect as of its date. Under these circumstances a court of review is not entitled to interfere.

[2] Appellant objects to the finding "that the only consideration for said bill of sale was the sum of $20," and contends that the bill of sale to the defendant was as stated in the bill of sale, "in consideration of the sum of $20 gold coin of the United States," and he also calls attention to the last sentence in the bill of sale, which is that "Mr. Kosich is to resume all obligations of the said garage," and he contends that that sentence is to be construed as though the word "resume" were the word "assume," and that the subject-matter constituted additional consideration. These contentions are but to present a false issue. The real issue involved was dissolution or no dissolution. The bill of sale, made for a consideration or no consideration, was but one item of evidence of proof on the subject before the court—dissolution or no dissolution. Rowe v. Simmons, 113 Cal. 688, 45 Pac. 983. It was not contended in the trial court, and it is not contended in this court, that the purported bill of sale was inoperative for any purpose because it was not supported by any consideration, or because the consideration was insufficient. But, admitting it was an operative transfer, the issue is, "For what purpose?" The amount of the consideration was immaterial.

We do not understand the appellant to contend that the trial court failed to give the appellant credit for all expenditures made by him on behalf of the partnership business. An examination of the record shows that the appellant's counsel was permitted to introduce evidence on every item which it was contended the appellant had expended, and later the trial court gave the appellant credit for all of those items.

We find no error in the record.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

(62 Cal. App. 405)

PRIVER v. YOUNG. (Civ. 3937.)

(District Court of Appeal, Second District, Division 1, California. June 6, 1923.)

1. Landlord and tenant ⟹164(2)—Tenant's right to damages for injuries caused by defective premises purely statutory.

At common law the landlord did not owe the tenant any duty to make repairs, and, in the absence of an express contract, was not liable for damages caused by defective condition of premises; the only right to such damages being statutory.

2. Landlord and tenant ⟹169(3) — Plaintiff lessee, who allege facts showing knowledge of defects, required to negative contributory negligence.

In lessee's action for injuries caused by defective wall bed, the complaint having alleged that lessee had informed lessor of the defects and had requested him to repair the bed, was required to allege attendant circumstances relieving her from the inference of contributory negligence, under Civ. Code, §§ 1941, 1942, entitling lessee, on lessor's refusal to repair defects, to either vacate premises or make necessary repairs.

3. Landlord and tenant ⟹168(1)—Lessee assumes risks obvious to ordinary observation.

A lessee assumes all risks obvious to ordinary observation.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Action by Fanny Priver against May A. Young. Judgment for defendant, and plaintiff appeals. Affirmed.

Wm. Crop and G. M. Caldwell, both of Los Angeles, for appellant.

R. F. Church and Timon E. Owens, both of Los Angeles, for respondent.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

HOUSER, J. This is an appeal from a judgment for defendant given after a general demurrer to plaintiff's second amended complaint was sustained by the court and upon plaintiff's failure to further amend her pleading.

The substance of the allegations of the complaint is that prior to August, 1921, plaintiff rented a certain "flat apartment property" from defendant, which was to be used by plaintiff as a dwelling, in which was located a disappearing wall bed, and which bed, on or about August 15, 1921, became broken and out of repair, of which fact plaintiff informed defendant and requested defendant to place the same in a safe condition for use by plaintiff, which defendant failed to do; that by reason of such failure on the part of defendant, and on or about November 11, 1921, the said bed collapsed and fell upon plaintiff, to her injury and damage, etc.

[1] At common law, in the absence of an express contract, there was no duty owing by the landlord to the tenant to make repairs, and consequently no liability was incurred by the landlord to the tenant arising from the defective condition of the leased premises. Brewster v. De Fremery, 33 Cal. 341; Van Every v. Ogg, 59 Cal. 565; Sieber v. Blanc, 76 Cal. 173, 18 Pac. 260; Willson v. Treadwell, 81 Cal. 58, 22 Pac. 304; Daley v. Quick, 99 Cal. 181, 33 Pac. 859. The right of the tenant to any relief in damages as against the landlord on account of injuries sustained by the tenant by reason of the defective condition of the leased premises is purely statutory, and such right must be measured solely by the provisions of the statute. Grazer v. Flanagan, 35 Cal. App. 724, 170 Pac. 1076; Callahan v. Loughran, 102 Cal. 476, 36 Pac. 835; Gately v. Campbell, 124 Cal. 523, 57 Pac. 567. With reference thereto, the statutes covering the apparent rights of the parties are to the effect that it is the duty of the lessor to repair dilapidations, and upon his neglect to do so, the lessee may either vacate the premises or make the necessary repairs himself where the cost thereof will not exceed in amount one month's rent of the premises. Civ. Code, §§ 1941, 1942.

[2, 3] In this case it is alleged in the complaint that—

> "On or about the 16th day of August, 1921, and at divers times thereafter, plaintiff informed defendant of the disabled and dilapidated condition of said bed, and requested defendant to repair and properly fix same and put it in a workable and safe condition for the use of plaintiff."

It must therefore be conclusively presumed that plaintiff was fully aware of the unsafe condition of the bed and, in the absence of any allegation in the complaint setting forth such attendant circumstances as would relieve plaintiff from the inference of contributory negligence, the rule of law that in such circumstances plaintiff assumed all risks which were obvious to ordinary observation would apply and preclude any recovery. Hatch v. McCloud R. Lumber Co., 150 Cal. 113, 88 Pac. 355; Grazer v. Flanagan, 35 Cal. App. 727, 170 Pac. 1076.

The judgment is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

62 Cal. App. 377

Ex parte BOGDEN. (Cr. 694.)

(District Court of Appeal, Third District, California. May 31, 1923.)

Prisons ⟹15—Prisoner not entitled to credit earned on shorter term on two sentences being commuted to single term.

Where, after a prisoner has served part of a 14-year sentence for burglary, he escaped, and on being recaptured the prison directors forfeited the credits earned and to be earned by him, a court sentenced him to a term of 4 years, to begin on the expiration of his 14-year term, and the Governor commuted the two sentences to a single term of 10 years, *held*, that the effect of the commutation was to reduce the longer term to 10 years and to make the two terms run concurrently; hence prisoner is not entitled to credit earned on the shorter term.

Application by John Bogden for a writ of habeas corpus, to be directed to the State Board of Prison Directors, to secure the release of petitioner from confinement, on the ground that his term has expired. Writ denied.

John Bogden in pro. per.

U. S. Webb, Atty. Gen., and J. Chas. Jones Deputy Atty. Gen., for respondent.

FINCH, P. J. Petitioner prosecutes this writ of habeas corpus to obtain his release from state prison on the ground that the term of his imprisonment has expired. He was sentenced to a term of 14 years' imprisonment for burglary of the first degree. He was received at the prison July 7, 1914. He escaped therefrom December 7, 1914, and was returned thereto February 27, 1915. As a penalty for such escape, the state board of prison directors, on March 3, 1915, duly forfeited all credits earned and to be earned by him. He was also tried in court on the charge of having so escaped and was convicted and sentenced to imprisonment for a term of 4 years, the imprisonment to commence at the expiration of his term of 14 years for burglary. December 20, 1922, the governor of the state commuted petitioner's term of service to a total of 10 years. The

---

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

parts of the commutation material here are as follows:

> "The prisoner was punished once for his escape from prison by forfeiture of his credits amounting to five years and two months and was given a sentence of four years additional upon his conviction in court. * * * Unless Bogden is given relief through executive clemency he will not be eligible for parole until 1930. It was for this reason that a majority of justices of the Supreme Court and the peace authorities who prosecuted Bogden joined in recommending commutation of his sentence as excessive. Now, therefore, I, Wm. D. Stephens, Governor of California, do hereby commute the two sentences of the said John Bogden to a single term of ten years, including time served."

Petitioner contends that—

> The Governor "aggregated his two sentences to one sentence of 18 years, and commuted this to a sentence of 10 years. The credits on aggregated 18 years amount to 6 years and 10 months, and the credits forfeited by the board of prison directors, on petitioner's previous sentence of 18 years, were 5 years and 2 months. Therefore petitioner is entitled to 20 months' credits on his previous sentence of 18 years, and those credits shall be deducted on his present sentence of 10 years, which was fixed by the Governor. Or, if petitioner's previous sentence is legally dead, then any action of the state board of prison directors taken on his previous sentence is null and void, and the petitioner not having lost any of his credits on his present sentence of 10 years, therefore he is entitled to all his credit deductions which are allowed by law on his present sentence of 10 years."

The commutation did not have the effect of nullifying the sentences imposed by the court or substituting therefor a new sentence by the Governor, but it merely reduced the length of time to be served under those sentences. While the Governor may reduce the length of service under a sentence, he is without power to impose one. In Duehay v. Thompson, 223 Fed. 305, 138 C. C. A. 547, two sentences of four years each, running consecutively, were commuted to run concurrently. The court said:

> "The executive has superimposed its mind upon the judgment of the court; but the sentence remains, nevertheless, the judgment of the court, and not of the executive, and is subject to the regulations of law respecting its enforcement."

Petitioner's rights after the commutation are the same as they would be if he had been sentenced originally to 10 years' imprisonment. Of course, the time heretofore served is to be deducted from the 10 years to which his imprisonment has been reduced by the commutation.

The only uncertainty as to the meaning of the commutation arises out of the fact that petitioner's credits on the term of 14 years were forfeited, while those on the term of 4 years were not. Had each term been commuted to a shorter period, to run consecutively, petitioner would have been entitled to credits on the term last imposed by the court. In consideration of the reasons, as stated in the order of commutation, for the exercise of executive clemency and the absence of specification of the sentence intended to be reduced, a reasonable construction of the commutation is that it was the intention to reduce the longer term to 10 years and, in effect, make the two terms run concurrently. So construing the commutation, petitioner's term of imprisonment has not expired.

The writ is denied.

We concur: BURNETT, J.; HART, J.

(62 Cal. App. 306)

PEOPLE v. ALEXANDER et al. (Cr. 1116.)

(District Court of Appeal, First District, Division 2, California. May 28, 1923. Hearing Denied by Supreme Court July 26, 1923.)

1. Infants ⚷68 — **Conflicting evidence as to age held to support trial court's action in refusing to certify defendant to juvenile court.**

Where the only evidence offered by defendant in a prosecution for murder to show that he was under the age of 18 was conflicting, uncertain, and unsatisfactory, the trial court did not abuse its discretion by refusing to certify him to the juvenile court.

2. Homicide ⚷254—**Evidence held to support conviction of murder in second degree.**

Evidence that, though there was no provocation defendant struck decedent, and after decedent walked away without retaliation pursued him, and while decedent had one hand in his pocket, defendant held the other and struck him a blow causing him to fall backwards, striking his head against the pavement, *held* to support a conviction of murder in the second degree in view of Code Civ. Proc. § 1963, subd. 3.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Tony Alexander was convicted of manslaughter, and Frank August Avilla was convicted of murder in the second degree, and they appeal. On defendant Tony Alexander's motion his appeal was dismissed. Judgment affirmed as to defendant Frank August Avilla.

Joseph P. Lacey, of Oakland, for appellants.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

NOURSE, J. Defendants were jointly tried on an information charging them with the murder of one William H. Reinking.

The defendant Alexander was convicted of manslaughter, and the defendant Avilla was convicted of murder in the second degree. Both defendants have appealed from the respective judgments following the verdicts and from the orders denying their motions for a new trial. Prior to the submission of the appeals the defendant Alexander filed a dismissal of his appeal, and consideration, therefore, is given only to the appeal of the defendant Avilla.

The facts of the case are that, while the two defendants were loitering upon the streets of Oakland with a number of other companions on the evening of July 5, 1922, deceased was peaceably walking along one of the main streets of that city. As he passed these defendants and their companions the defendant Avilla hit him in the leg with a rock or clod of dirt without any provocation. The deceased paid no attention to the incident, but continued on his way, and after he had gone some distance the defendant Avilla said to defendant Alexander: "Come on, Mowie, and let's get that guy," calling the defendant Alexander by his nickname. Thereupon the two defendants started after the deceased, who was then about two blocks down the street. When they arrived within a short distance of the deceased, the defendant Avilla took off his coat and threw it to another one of his companions, and the two defendants then crossed the street and, running part of the way, caught up with the deceased. The defendant Avilla grabbed the deceased and held him by his right hand and said to him: "You are one of these wise guys from Alameda that hit me before." The deceased replied: "No, you are badly mistaken," and smiled. He attempted to break away from the defendant Avilla, and thereupon that defendant struck the deceased in the face, knocking him down. As the deceased fell the back of his head struck upon the hard pavement of the street, causing a basal fracture of the skull. Deceased never regained consciousness, but died a short time thereafter. It appears that the deceased was a young man of frail build; that throughout the occurrence he kept his left hand in his pocket, and that he made no resistance and no threats of any kind against either of the defendants. In fact, it appears without conflict that the attack was wholly without provocation, and that it was deliberate and inexcusable.

[1] On behalf of the appellant Avilla, it is argued that he should have been certified to the juvenile court upon the claim that he was under the age of 18 years. However, the only evidence offered by this appellant to prove that he was under the age of 18 years was so uncertain and unsatisfactory that the trial court did not abuse its discretion in accepting the conflicting evidence upon the same subject-matter.

[2] It is also urged that the offense, if any, was manslaughter and not murder. In this behalf it is argued that the striking of the blow which caused deceased to fall over upon the pavement was the commission of an unlawful act not amounting to a felony, and that therefore the offense could be manslaughter only. But the intent to kill is plainly inferable from the evidence and the circumstances leading to the striking of the blow. It was shown without conflict that the deceased was a young man who had caused no offense or provocation for any attack upon him by these appellants; that the appellant Avilla, after having hit him with a rock or clod of dirt and having seen him go on his way without retaliation, persuaded his codefendant to join him in an attack upon the deceased, using the words: "Come on, Mowie, and let's get that guy." All the evidence goes to show that they deliberately pursued the deceased and that the blow was struck while the deceased had his left hand in his pocket and while the appellant Avilla held his right hand, thus causing him to fall backwards, with his head striking upon the hard pavement and without any opportunity of defending himself against the fall. It is presumed "that a person intends the ordinary consequence of his voluntary act" (subdivision 3, § 1963, Code Civ. Proc.), and this appellant must be presumed to have known that by holding the only free hand of the deceased fatal injuries would result from the striking of his head upon the hard pavement.

Judgment affirmed.

We concur: LANDGON, P. J.; STURTEVANT, J.

(62 Cal. App. 375)

BROWN v. KENNEDY et al. (Civ. 2579.)

(District Court of Appeal, Third District, California. May 31, 1923.)

Waters and water courses 🔑179(4)—Evidence held to support finding that water destroying plaintiff's crops came from defendant's irrigated field.

Evidence *held* to support a finding that the water which flowed on plaintiff's land, destroying his crop of alfalfa and most of the trees in a small orchard, came from defendant's irrigated rice field.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by W. H. Brown against J. R. Kennedy and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Brown & Albery, of Colusa, for appellants.
Millington & Millington, of Colusa, for respondent.

FINCH, P. J. This appeal is from a judgment awarding the plaintiff damages, found by the court to have resulted from irrigation water which defendants caused to flow from their land to and upon that of plaintiff. The only question presented by the appeal is whether the evidence supports the findings.

Plaintiff is the owner of the north half of the northeast quarter of the southeast quarter of a certain section of land. During the year 1920 the defendants raised a crop of rice on the northwest quarter of the same section. North of plaintiff's land there is a ridge extending from the northwest to the southeast through the northeast quarter of the section. Approximately parallel thereto, from about the center of the northwest quarter to the southeast corner of the section is another ridge. There is shown on the map a third ridge, connecting with the one last described at a point near the center of the northwest quarter and extending thence northerly. Midway between the parallel ridges the land is from four to five feet lower than at opposite points on the ridges; the slope being gradual from the higher to the lower points. The elevation of plaintiff's west boundary line is some five feet lower than that of the east line of defendants' land. It thus appears that plaintiff's land and a part of defendants' rice field are in a swale, and that surface water naturally flows from the latter to and across the former.

Plaintiff had 17 acres of alfalfa and a small orchard of bearing fruit trees on his land. The alfalfa and all but a few of the trees were destroyed by surface water and the rise of the water table during the year 1920. The only question to be determined is the source from which the water came. Between plaintiff's land and that of defendants, as will appear from the descriptions given, is a strip of land a quarter of a mile wide from east to west. Witnesses testified that water flowed out of defendants' rice field in the upper end of the swale across the intervening land and down to and upon the west and southwest parts of plaintiff's land; that the water table rose in other parts of his land, in some places coming to the surface, where prior and subsequent to the year 1920 it had stood eight feet below the surface. There was no rice raised in the swale above plaintiff's land other than that of defendants. The evidence stated is amply sufficient to support the finding that the water which did the damage came from the defendants' rice field. It is argued that the water probably came, through seepage or underground flow, from a main canal, a lateral, and other rice fields. Such argument goes to the weight of the evidence rather than to its sufficiency. It may be stated, however, that the evidence introduced by plaintiff shows that the marked rise of the water table occurred only in the year 1920, the one year in which defendants raised rice, while the other possible sources of the water existed prior and subsequent to that year. Since the weight of the evidence is exclusively for the determination of the trial court, there is no reason to state the evidence given in contradiction of the foregoing.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

---

62 Cal. App. 478

HORNE v. STANDARD AUTO SALES CO.

(Civ. 4555.)

(District Court of Appeal, First District, Division 2, California. June 9, 1923.)

1. Appeal and error 🔑956(2)—Order granting or denying application for relief from effect of failure to file bill of exceptions in due time affirmed unless record clearly shows abuse of discretion.

Unless the record clearly shows that the trial court abused its discretion in denying appellant's application to be relieved from the effect of its failure to file a bill of exceptions in due time, the order granting or denying the application will be affirmed.

2. Exceptions, bill of 🔑43(1)—Denial of motion for relief from effect of failure to file bill of exceptions in due time held not clear abuse of discretion.

The trial court *held* not to have clearly abused its discretion in denying a motion for relief from the effect of failure to file a bill of exceptions in due time, in view of an affidavit by appellee's attorney indicating appellant's attorney's negligence in informing attorneys substituted for him of an extension of time not in accord with his written office memorandum.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by F. L. Horne against the Standard Auto Sales Company. Judgment for plaintiff, and from an order denying defendant's motion for relief from the effect of its failure to file a bill of exceptions in due time, defendant appeals. Affirmed.

Sloss, Ackerman & Bradley, of San Francisco, for appellant.

Marion Vecki and A. Walter Allen, both of San Francisco, for respondent.

LANGDON, P. J. This is an appeal from an order of the trial court denying defendant's motion to be relieved from the effect of objections taken by plaintiff to proposed bill of exceptions because of defendant's failure to file said bill in due time. The motion of defendant was made under section 473 of the Code of Civil Procedure. It appears by the affidavits upon which the motion was considered by the trial court that, after the plaintiff had obtained a judgment in the action for damages for personal injuries, the respective attorneys for plaintiff and defendant negotiated with a view to compromising the claim and avoiding any further litigation. By stipulation between said attorneys the defendant's time for serving and filing proposed bill of exceptions was extended to November 25, 1921. On that date attorney for defendant requested of the attorney for plaintiff a further extension of 10 days, which was granted. At the expiration of said time (December 5, 1921) attorney for defendant telephoned to the attorney for the plaintiff and requested an additional 10 days, stating that the representative of the defendant company was in Los Angeles, and would come to San Francisco within a few days to confer with reference to payment of the judgment. The attorney for the plaintiff refused to grant an extension of ten days, but stipulated that the defendant might have 5 days' additional time, or until December 10, 1921, within which to serve and file said proposed bill of exceptions. On December 10, 1921, attorney for defendant again telephoned the attorney for the plaintiff, and asked for 10 days' additional time, stating that within such time he hoped to convince the representative of the defendant company of the wisdom of paying the judgment. Attorney for plaintiff refused to grant an extension of more than 5 days. Thereupon attorney for defendant pleaded that he be allowed the remainder of the week, and attorney for plaintiff finally extended defendant's time for six days, or until December 16, 1921.

No attempt was made to secure further time, and the bill of exceptions was not served and filed until December 20, 1921, at which time plaintiff objected to its settlement, and his objection was sustained. Then followed the motion of the defendant to be relieved of the effect of its default, and from the order denying such motion the defendant has appealed. Before the filing of said bill of exceptions, to wit, on December 8, 1921, the law firm of Sloss, Ackerman & Bradley was substituted in the place and stead of the former attorneys for the defendant. Said substitution was dated December 8, 1921, and copy of same was served upon the attorney for plaintiff and filed on December 12, 1921, and said substituted attorneys prepared and filed the proposed bill of exceptions, settlement of which was denied.

In support of its claim that the delay in filing the proposed bill of exceptions was due to mistake, inadvertence, surprise, and excusable neglect warranting relief, under section 473, Code of Civil Procedure, the defendant presented to the court the affidavit of one of the attorneys who represented the defendant at the trial of the action, which was to the effect that he thought he had arranged, in a telephonic conversation, with attorney for plaintiff for an extension of 10 days' time within which to file proposed bill of exceptions, and for 6 days' time within which to file undertaking to stay execution; that through some mistake "the time stated in said stipulation for preparing and serving said bill of exceptions was substituted for the time within which defendant was required to give an undertaking to stay execution"; that affiant was not aware of such mistake until advised by Mr. Ackerman "a few days since." Said affidavit was dated January 6, 1922. There was also presented to the trial court the affidavit of Mr. Ackerman, which recited that on the morning of December 10, 1921, the former attorney for defendant had telephoned to affiant stating that he had secured an extension of 10 days' time within which to prepare and serve a proposed bill of exceptions and file bond; that thereupon affiant entered in his office record the date of December 20, 1921, as the date when said bill of exceptions was due, and that affiant was not informed until December 30, 1921, that the said extension of time for filing said bill of exceptions actually expired on December 16, 1921.

In rebuttal there appears in the record the affidavit of attorney for plaintiff, which recites many of the facts herein set out, and states further that on or about December 30, 1921, affiant discussed with the attorney who had represented defendant at the trial of this action the matter of the stipulations for extension of time; that at that time said attorney for defendant showed to affiant his office diary, and affiant saw, under date of December 16, 1921, the memorandum "Horne v. Standard, bill of exceptions due," and on the same line another memorandum "substitution, drop"; that said attorney for defendant thereupon remarked to affiant, "my memorandum seems to bear you out."

[1, 2] This case falls within the well-settled rule announced in Ingrim v. Epperson, 137 Cal. 370, 70 Pac. 165, and followed by numerous decisions in this state to the effect that, unless the record clearly shows that the trial court has abused its discretion in a matter of this kind, its order, whether it be to grant or deny the application, will be affirmed. We think the record here does not clearly show an abuse of discretion. If the trial court gave weight to the affidavit of attorney for plaintiff, as it had the right to do, it must have believed that the attorney for the defendant was negligent in informing those substituted in his place and stead of an extension of time for filing said proposed bill of exceptions which was not in accord with his own written office memorandum of the same. Under such a view of the matter there was no excusable neglect.

It seems idle to review herein the numerous authorities in this state on so well-settled a proposition as that involved upon this appeal, and we shall only repeat, as an expression of our own view in the present case, the statement of our Supreme Court in the case of Alferitz v. Cahen, 145 Cal. 397, 399, 78 Pac. 878, 879:

> "While it may be conceded that, if the trial court in this case had reached the opposite determination, and had vacated its judgment, to the end that H. Cahen might be permitted to defend the litigation upon its merits, this court would not have disturbed the conclusion, upon the other hand that is very far from a declaration that the decision which the court actually reached was unwarranted, and therefore an abuse of its discretion."

The order appealed from is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

62 Cal. App. 460

CLIFFORD v. UTT et al. (Civ. 4493.)

(District Court of Appeal, First District, Division 2, California. June 8, 1923. Hearing Denied by Supreme Court Aug. 6, 1923.)

Vendor and purchaser ⚷21—Provisions of contract as to declaration of trust and possession held not sufficient to render contract enforceable.

A contract for the sale of land, providing for a declaration of trust to secure the deferred payments without any provision therein for the sale of the property on default and without any provision as to the possession of the property, was insufficient to be enforceable, where the evidence showed that it was not the intention of the parties to abide by the obligations which would be implied by law in the absence of such stipulations, but that it was intended those matters should be agreed upon by further negotiations.

Appeal from Superior Court, San Diego County; Edgar A. Luce, Judge.

Action by Chas. E. Clifford against the Union Title Company of San Diego for money had and received, in which the defendant paid the money into court and had substituted, as defendants, Lewis John Utt and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Lewis J. Utt, Stephen Connell, and Sweet, Stearns & Forward, all of San Diego, for appellants.

Sample & Harden, of San Diego, and C. E. Spencer, of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal by the defendants from a judgment awarding to the plaintiff $2,500. Plaintiff began this action against the Union Title Company of San Diego, alleging that it had received from him said sum for his use and benefit; that plaintiff had demanded the return of said sum, which demand had been refused. The Union Title Company of San Diego, upon order of court, duly made upon motion of the defendant, deposited in court the amount of money in dispute, and Lewis John Utt and Sarah M. Utt were substituted as defendants. These substituted defendants filed an answer and cross-complaint, denying that the money was paid to the Union Title Company for the use and benefit of plaintiff, and alleging that it was paid as a part of the consideration to be paid by plaintiff for the purchase from the defendants of a certain tract of land situated in the county of San Diego, state of California, and known as "Agua Tibia" ranch, and that the sum so deposited was deposited by plaintiff, not for his own use and benefit, but for the use and benefit of the defendants. Defendants also alleged that the plaintiff had breached his contract with them for the purchase and sale of said ranch, and that they had suffered damage by reason of said breach in the sum of $16,500.

At the trial there was but one issue; i. e., whether or not the plaintiff had entered into a valid and enforceable contract for the purchase of the ranch. The contract relied upon by defendants consisted of a letter to the Union Title Company, written by plaintiff, inclosing a check for the $2,500 in dispute and an authorization to use the same "in connection with your order No. 93380" when said title company could issue its unlimited guarantee of title to the said ranch vested in Union Trust Company of San Diego. The said letter of plaintiff to Union Title Company then continues as follows:

> "Cause Trust Co. to issue declaration of trust to secure two notes aggregating $80,000; $10,000 due on or before Feb. 15, 1924, and $70,000 due on or before Feb. 15, 1926, with interest at 6% per annum, from Feb. 15, 1921, payable quarterly said notes to be in favor of Lewis John Utt and Mrs. Sarah M. Utt said notes may be divided so as to make four in place of two, to wit: 2 for $5,000.00 and 2 for $35,000.00, otherwise being the same and are to be signed by Charles E. Clifford and Nettie I. Clifford."

The letter from which the above quotation is made must be considered in connection with two other documents which, it is admitted, were also a part of the contract between the parties. One of these is a so-called memorandum to be attached to escrow instructions relative to sale of Agua Tibia Rancho, from L. J. Utt and Sarah M. Utt to Charles E. Clifford. Said memorandum reads, in part, as follows:

> "For reference it is agreed that the entire sale price is $100,000.00, of which sum $20,000.00 shall be paid before conclusion of the escrow; that the remainder shall be secured by the notes covering the property; $10,000.00 being payable on or before February 15, 1924, and the remaining $70,000 on or before February 15, 1926, bearing interest and otherwise according to the terms of said escrow instructions."

Then follows a description of the portion of the property to be known as the "House and Springs Tract," and a description of the portion to be known as "the Olive Orchard Tract," and provisions for the release of these tracts from the lien of the trust upon the payment of specified amounts. There are also provisions about releases of water rights, etc., that are not material to our inquiry here. This document is signed by L. J. Utt and Chas. E. Clifford.

The other document to be considered here as a part of the contract is a letter written to the Union Title Company, signed: "Lewis John Utt" and "Sarah M. Utt, by Lewis J. Utt, Agent," which reads in part as follows:

> "I will hand you a deed executed by myself and wife, Florence G. Utt and Sarah M. Utt to Union Trust Co. of San Diego, of the property hereinafter described and also to include all water and water rights appurtenant thereto which you are authorized to use in connection with your order No. 93380 when you can issue your unlimited guarantee of title * * * in your usual form on lands known as Agua Tibia Ranch, which will show that the title to said property is vested in Union Trust Co. of San Diego. * * * Cause Trust Co. to issue trust to secure 4 notes by Chas. E. and Nettie I. Clifford, 2 of said notes to be for $5,000.00 each due on or before Feb. 15, 1924, and 2 of said notes to be for $35,000.00 each due on or before Feb. 15, 1926, and all drawing interest at 6% per annum payable quarterly, one $5,000.00 and 1 $35,000.00 note being payable to Sarah M. Utt and others to me. * * * Deliver guarantee to Trust Co.
>
> "Additional instructions: Collect $20,000.00 for account of Sarah M. Utt and myself and pay off present mortgage and interest and 2nd half of State and County Taxes 1920–21. Place $100.00 stamp on deed. * * *"

The trial court held that the foregoing instruments, considered together, were so ambiguous as not to constitute a valid and enforceable contract, and particularly so in regard to the terms of the declaration of trust to be made by the trust company. It was held by the trial court that many of the terms and conditions of said trust declaration had been left undetermined between the parties, to be settled between them by future negotiations, and, as such terms and conditions were never agreed upon, no contract between the parties was ever consummated. This ruling was made over the objection and contention of defendants that the contract was sufficiently certain and definite to be enforceable, and that any provisions necessary for the enforcement or carrying out of the purposes of the trust, which were not specifically agreed upon in the writings herein set out, would be implied by law.

The reasoning of the trial court was to the effect that if the Union Trust Company made a declaration of trust, holding the property to secure notes evidencing the unpaid balance of the purchase price, and then in trust for Clifford, such declaration of trust, in accordance with the terms of the documents constituting the contract between the parties, would not contain a provision giving to the trustee the power of sale upon default in the payment of the notes or interest, nor would it contain any provision for the possession of the property or the accumulation of the rents and profits, nor for the costs and expenses of the trust and the trustee, nor for the attorney's fees in case of a suit upon the notes or foreclosure of the declaration of trust, or for the payment of taxes. Conceding that strict compliance with the terms of the contract would result in a declaration of trust, which might be enforced in equity, regardless of the absence of provisions for its own enforcement by sale, etc., nevertheless, such a declaration of trust would not be the one intended by the parties. While certain provisions of a contract may be supplied by implication of law, there are no implications of law with reference to provisions that the parties intended themselves to agree upon later.

Particular stress is placed by the trial court upon the proposition that in the absence of such an agreement in a declaration of trust, the trustee in case of default would not have the power to sell the trust property and it would be necessary for the trustee to bring an action in equity to enforce the trust and to have the rights under the contract determined, instead of the proceeding usually provided for in a trust declaration upon default, giving to the trustee the power of sale upon proper notice without resorting to a suit in equity. Perry on Trusts, §§ 602b, 602c, 602d. The trial court concluded upon all the evidence that the parties intended to embody in the trust declaration a provision for sale by trustee in event of default, as well as other provisions to be agreed upon and settled between the parties. This conclusion is reinforced by what the parties actually did, the defendants presenting to the plaintiff for his acceptance an elaborate declaration of trust providing for sale in the event of default and for many other matters not provided for in the preliminary documents signed by the parties. This would seem to indicate that it was not their intention to rely upon the remedy furnished by law in the absence of special agreement.

The trial court was also influenced in its judgment by the fact that no provision for the possession of the property was made in the agreement between the parties. Appellant argues very convincingly that no provision was necessary upon this matter; that the possession would follow the legal title and is merely an incident of title and need not be specifically mentioned. This would be true, of course, if it had been intended by the parties that the right to possession should be determined by law and not by contract; but, as the trial court pointed out, other provisions of the contract—such as the provisions for the payment of taxes, insurance, upkeep, etc., as well as the provisions regarding possession by Clifford contained in the trust agreement later submitted to plaintiff for his approval—all indicate that the parties intended to agree definitely upon the possession and not to allow it to follow the title as a mere incident, and this we conceive to be the crux of the case. The trial court concluded, from all the evidence, including the evidence of the documents relied upon by defendants, that the parties did not intend to leave to implication of law provisions regarding numerous matters which they had not put in writing at the time their agreement was signed, but intended to arrive at an agreement regarding such matters at a later date. As to these matters, they never consummated an agreement, and their contract with reference to the entire subject-matter, therefore, was incomplete and unenforceable. As pointed out by the trial court, the parties continued to negotiate after the signing of the agreement relied upon here, as is evidenced by the fact that the Utts approved a certain declaration of trust containing provisions not mentioned in the earlier agreement and not implied by law, and submitted said declaration of trust to Clifford for his approval.

There are no other matters requiring discussion, and the judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

62 Cal. App. 399

FISHER v. GEORGE et ux. (Civ. 4552; S. T. 10285.)

(District Court of Appeal, First District, Division 2, California. June 6, 1923. Hearing Denied by Supreme Court Aug. 2, 1923.)

Judgment ⚷460(3)—Complaint held not to show "accident, surprise, or excusable neglect" as ground for setting aside default judgment.

A complaint to vacate a default judgment foreclosing a mortgage which did not charge defendant with any fraud whereby plaintiff was prevented from defending, but merely alleged that the mortgage had been transferred to defendant by plaintiff's partner to whom it was executed for a different purpose and that plaintiff failed to defend the foreclosure action because he relied upon his partner's assurance that he would pay the mortgage, does not show accident, surprise, or excusable neglect entitling plaintiff to have the foreclosure judgment vacated.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by Charles W. Fisher against Emery E. George and another to set aside a judgment. Judgment for defendants, and plaintiff appeals. Affirmed.

E. B. Mering and J. R. Gilbert, both of San Francisco, for appellant.

Black & Black, of San Francisco, for respondents.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against him entered upon an order sustaining a demurrer to the complaint without leave to amend.

The action was brought to set aside a judgment rendered against the appellant upon his default. According to the allegations of the complaint, the plaintiff, Charles W. Fisher, and one W. C. Walker, were partners in the real estate business. Fisher had confidence and faith in the integrity of Walker, and on November 10, 1915, plaintiff and Walker entered into a contract for the purchase of certain real estate, and, for the purpose of furnishing credit to Walker, plaintiff executed and delivered to him his promissory note for $3,000, secured by a mortgage upon real property owned by plaintiff. This transaction did not relate to the partnership business. On March 31, 1919, Walker assigned said note and mortgage to the defendants herein for a valuable consideration. The assignment was not made for the purpose for which the mortgage was executed, but was for Walker's own benefit, and was made without the consent and against the intention of plaintiff. Thereafter the defendants foreclosed the mortgage, making the present plaintiff a defendant in the foreclosure suit. The present plaintiff was served with summons in said foreclosure suit, and thereupon informed Walker of what had occurred and was assured by Walker that he (Walker) would discharge the mortgage and save the present plaintiff harmless. Said plaintiff, having full confidence in Walker, neglected to appear and defend in the foreclosure suit; Walker failed to discharge the mortgage, and on December 17, 1920, judgment was taken against the present plaintiff, by default, in said foreclosure suit. Plaintiff was first informed of this fact in December, 1921.

Demurrer was interposed upon the ground that the complaint failed to state facts sufficient to constitute a cause of action. The order of the trial court sustaining the demurrer recited that plaintiff had stated in his brief filed with the court that no attempt had been made to charge fraud in the complaint.

No fraud being alleged against the defendants, it is difficult to see how they can be held responsible for the negligence of plaintiff in trusting to Walker after he had betrayed his confidence, and in making no attempt whatever to protect his rights after he had been duly served with summons in the action. As stated in the case of Amestoy

Estate Co. v. City of Los Angeles, 5 Cal. App. 273, 276, 90 Pac. 42, 44:

> "There is no suggestion in the complaint that plaintiff was prevented by any act of the defendant from appearing and making a proper defense."

It was pointed out in said last-cited case that the selection of an attorney upon whose advice plaintiff acted was not induced by any act of the defendants. Also, in the present case, plaintiff's reliance upon his partner was not chargeable in any manner to the defendants.

We think the facts alleged do not show accident, surprise, or excusable neglect such as would justify a court of equity in interfering with a judgment obtained against the present plaintiff after personal service of summons.

> "There is a marked distinction between the powers of the court in the first instance, wherein discretion is given to the court to relieve a party from a mistake, fraud, or from excusable neglect, under section 473, Code of Civil Procedure, and those powers exercised by a court of equity after the lapse of such time when proceedings are instituted by an original bill to vacate the judgment of another court." Amestoy Estate Co. v. City of Los Angeles, supra.

Furthermore, it is fundamental that, in order to entitle the plaintiff to the relief he prays, plaintiff must allege facts which demonstrate that he has a good defense to the action on the merits. This has not been done in the present case; on the contrary, plaintiff has stated facts and circumstances which certainly raise a question of estoppel as against an innocent purchaser for value, without notice, who has been guilty of no fraud or misconduct. Assuredly, it cannot be said, as a matter of law, upon the facts stated, that the plaintiff was not guilty of such carelessness of the rights of a possible innocent purchaser as to preclude him from asserting any equities against such an one, and therefore the complaint does not allege a good defense on the merits.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

Opinion of the Supreme Court in Bank Denying Hearing.

PER CURIAM. In denying the petition for a hearing by this court after decision by the District Court of Appeal, we do not approve what is said in the last paragraph of the opinion of that court.

The judgment of the trial court herein was properly affirmed on the ground that the complaint fails to state facts showing such fraud, mistake, inadvertence, or excusable neglect as to justify the interposition of a court of equity for the purpose of setting aside a judgment.

The petition is denied.

---

62 Cal. App. 435

CLAUSSEN v. NEWTON.

THOMAS v. SAME.

(Civ. 4544.)

(District Court of Appeal, First District, Division 2, California. June 7, 1923. Hearing Denied by Supreme Court Aug. 6, 1923.)

1. Appeal and error ⟹1010(2)—Judgment unsupported by evidence cannot be sustained.

In an action on promissory note, where all the evidence and the only evidence sustains the allegations of the complaint that the note was unpaid, a finding that it has been fully paid and judgment for defendant cannot be sustained.

2. Master and servant ⟹80(9)—Recovery for services warranted by evidence.

In an action for services as salesman, evidence *held* sufficient to entitle him to a judgment.

Appeals from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Two actions, one by Helen Claussen, a minor, by Sophie Thomas, guardian ad litem, against John Newton, doing business under the fictitious name of Pacific Body Works, and one by Adolph Thomas against the same defendant, tried together. From judgments for defendant, plaintiffs appeal. Judgments reversed.

Chalmer Munday, of San Francisco, for appellants.

Harry I. Stafford, of San Francisco, for respondent.

NOURSE, J. These two cases were tried together upon the same evidence, and though separate appeals were filed, are submitted upon the same record. The first case of Helen Claussen v. John Newton was on a promissory note for $500. The trial court found that the note was executed and delivered in accordance with the allegations of the complaint. It also found that said note, together with all interest thereon, had been fully paid, and entered judgment for the defendant.

[1] The whole attack upon this judgment is that the finding of payment is not supported by the evidence. A review of the evidence discloses that all that was offered in the case showed conclusively that the note was not paid. There was some evidence of doubtful merit that, at some time during the

business relations of the respondent and Adolph Thomas, the plaintiff in the second case, a payment was made by this respondent to Thomas in the sum of $1,060 on "trade acceptance and a note." There was no attempt to connect this testimony with the payment of the note in suit, and the respondent cites no evidence to sustain the finding and presents no argument in support of the judgment. The case presented, therefore, is one in which all the evidence, and the only evidence sustains the allegations of the complaint that the note was unpaid. The judgment, therefore, must be reversed.

[2] In the second case, Adolph Thomas sued John Newton on a common count for money for services rendered in the sum of $3,939.49. An amendment to the complaint was filed setting up a second cause of action in which it was alleged that on the 19th day of June, 1919, this plaintiff and the defendant entered into an agreement of copartnership for the conduct of a business in the city and county of San Francisco wherein they agreed to participate in the profits of said business, share and share alike. The prayer followed for an accounting of said partnership, and the recovery of the amount found to be due from the defendant. The trial court found that these allegations of the complaint and the amendment thereto were not true, and rendered judgment in favor of the defendant. As in the other case, the appeal is based upon the ground that the evidence is insufficient to support these findings.

The appellant testified, and on this appeal respondent concedes, that on April 15, 1918, the appellant entered into the employment of the respondent as a salesman or solicitor for him on the agreement that he was to receive as compensation therefor the sum of $15 per week, which was to cover the first $200 worth of business procured by him each week, together with a commission of 5 per cent. on all further business procured by him, and expenses. The appellant testified that this agreement terminated about June 19, 1919, and the partnership agreement was thereupon made. Respondent contends that no partnership was formed, but that the appellant continued in the employ of the respondent under the agreement of April 15, 1918, until July 20, 1920. The only evidence on the question of the formation of the partnership is the direct and positive testimony of the appellant that such a partnership was formed, and that the parties continued to act under it until the breach on July 20, 1920. The only evidence of any kind covering the terms under which the parties were working was the testimony of the appellant to the effect that from June 19, 1919, to July 20, 1920, he worked under an express agreement to divide the profits 50-50. In support of the finding of the trial court that no partnership had been formed the respondent relied upon the inferences which he contends the trial court was justified in drawing from other circumstances.

Passing the question of the formation of the partnership and directing our attention to the suit for the recovery of money due under the common count, respondent concedes that during the period of their business relations the gross revenue from the business was the sum of $119,346.13. He then deducts from this total the sum of $23,600, which represents the revenue estimated on the basis of $200 per week for the period of 218 weeks, upon which no commission was payable. He then gives the sum of $95,746.13 as the gross revenue upon which appellant was entitled to a commission of 5 per cent. amounting to $4,787.30. The payment of $15 per week for the period of 118 weeks is conceded to be $1,770. The total of these two sums is $6,557.30, to which appellant would be entitled for the entire period under respondent's theory of the case. (Through a mathematical error, the respondent gives this figure as $6,478.81.) The respondent then contends that the appellant actually received the sum of $6,346.62 for his services during this period. In arriving at the amount of the gross revenue of the business, respondent takes the amount shown by deposit of money in the bank only and omits therefrom all mention of cash actually received and divided between the parties at various times during the period of employment. He also omits the amount of business on hand on July 20, 1920, which was shown to be $4,000. Thus, upon the case made out by respondent, the appellant was entitled to a judgment in some amount.

These calculations are all made on the basis of respondent's theory that the appellant was to receive 5 per cent. commission on the gross business of the concern throughout the entire period of employment. But the only evidence offered was that this arrangement was for 5 per cent. commission and expenses, and that this was changed by mutual consent on June 19, 1919, so that appellant was to receive 50 per cent. of the net profits instead of 5 per cent. of the gross. Having proved the agreement by uncontradicted evidence, appellant was entitled to an accounting to determine the net profits. If it should then appear that he had received less than his proportionate share of these profits, he would be entitled to a judgment for the difference.

Judgment reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

62 Cal. App. 485

BEST et al. v. TOPRAHANIAN. (Civ. 3818.)

(District Court of Appeal, Second District, Division 2, California. June 12, 1923.)

1. Appeal and error ⚷931(1)—Findings of lower court presumed sustained by sufficient evidence.

On appeal, the findings of the lower court are presumed to be sustained by sufficient evidence.

2. Appeal and error ⚷907(3)—In absence of typewritten abstract or bill of exceptions in printed abstract, findings cannot be held unsupported by evidence.

Where appellant has not brought up a typewritten transcript of the evidence as authorized by Code Civ. Proc. §§ 953a–953c, and where the printed transcript contains no bill of exceptions showing what evidence was presented to the lower court, the appellate court is unwarranted in holding that the findings are not justified by the evidence, notwithstanding a stipulation that the printed record contains true copies of plaintiffs' and defendant's exhibits, there being no showing that other evidence was not deduced.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action by W. H. Best and others, doing business under the firm name and style of Best, DeBlois & Covington, against A. Toprahanian. Judgment for plaintiffs, and defendant appeals. Affirmed.

H. N. Dyke, of Imperial, for appellant.

Sebille & Sebille, of Brawley, for respondents.

FINLAYSON, P. J. Plaintiffs, licensed real estate brokers, averring that they had been employed by defendant to find for him a purchaser of his real property, brought this action to recover their commission, alleging that they had found a buyer who was ready, willing, and able to purchase the property. Plaintiffs recovered judgment, and defendant has appealed.

The case comes here upon a printed transcript which contains no copy of any bill of exceptions. No attempt has been made by appellant to avail himself of the alternative method of presenting a record on appeal by causing a typewritten transcript of the evidence to be brought up in lieu of a bill of exceptions, as he might have done under sections 953a–953c of the Code of Civil Procedure. The printed transcript, besides containing a copy of the judgment roll, contains copies of certain documents which, on their face, would seem to be exhibits introduced in the court below during the trial of the action. At the end of the transcript is a stipulation, signed by counsel for the respective parties, stipulating that the transcript contains true copies of the judgment roll and "plaintiffs' and defendant's exhibits."

[1, 2] Appellant's sole point is that the evidence is not sufficient to sustain certain of the findings made by the trial court. Appellant, on the record before us, is not in a position to attack the findings. The presumption in this court is that the findings are sustained by sufficient evidence, and the burden is upon appellant to show that the decision of the court below is erroneous. This can be done only by a duly authenticated record of the evidence. Since appellant has not brought up a typewritten transcript of the evidence, and, since the printed transcript contains no bill of exceptions showing what evidence was presented to the lower court, we are unable to say that the findings are not fully justified by evidence sufficient and competent for the purpose. The printed record does, it is true, set forth the stipulation that the transcript contains true copies of "plaintiffs' and defendant's exhibits," but there is nothing to show that other evidence was not adduced at the trial. Since every intendment must be indulged in support of the action of the trial court, it must be presumed, in the absence of an affirmative showing to the contrary, that there was other evidence besides the exhibits to support the decision. We are not at liberty to disturb the judgment in the absence of a record sufficient to enable appellant properly to present the only point made by him.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

---

62 Cal. App. 439

DENNIS v. BROWN. (Civ. 4547.)

(District Court of Appeal, First District, Division 2, California. June 7, 1923. Hearing Denied by Supreme Court August 2, 1923.)

1. Witnesses ⚷140(10)—Surviving husband held not competent witness under statute in action by deceased wife's administrator against administrator of deceased wife's father.

Under Code Civ. Proc. § 1880, which provides that the following persons cannot be witnesses, "persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person," *held*, that a surviving husband was not a competent witness in an action by the administrator of his deceased wife's estate brought against the administrator of the deceased wife's father to recover on a note, since under Civ. Code, § 1384, he was entitled to share in all decedent's property, both real and personal, and must be deemed to be an interested person on whose behalf the action was brought.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

2. Appeal and error 🔑1010(1)—Finding of trial court supported by evidence will not be reversed, though the evidence would have supported different finding.

Where there is some evidence to support the finding of a trial court to the effect that a note was not delivered and that there was no consideration for it, such finding will not be reversed, though there was sufficient evidence to have warranted a different finding.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by William S. Dennis, as administrator of the estate of Easter Belle Stewart, deceased, against Eldora Brown, executrix of the last will and testament of James Brown, deceased, wherein Robert W. Dennis was substituted as plaintiff and administrator of the estate of Easter Belle Stewart, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

J. J. Lermen and G. K. Burgren, both of San Francisco, for appellant.

B. M. Aikins, of San Francisco, for respondent.

NOURSE, J. This is an action on a promissory note for $10,000 and interest brought by the administrator of the estate of Easter Belle Stewart, deceased, against the estate of her father, James Brown, deceased. Judgment was rendered in favor of defendant, and plaintiff appeals.

The defendant Eldora Brown is the widow of James Brown, who was the father of Easter Belle Stewart by a former marriage. Easter Belle Stewart died intestate November 25, 1918, in Spokane, Wash., where she resided with her husband, Neil Stewart. About four months later, on March 21, 1919, her father, James Brown, died in San Francisco, where he resided with his wife, Eldora Brown. He left a will in which he named his wife executrix, and divided his property, share and share alike, between her and a son by his former marriage. Ten days after the death of James Brown, Neil Stewart, as surviving husband of Easter Belle Stewart, in writing, nominated the original plaintiff, William S. Dennis, as administrator of her estate, and requested the superior court at San Francisco to appoint him as such administrator. The application for letters named Neil Stewart and James Brown as the next of kin and heirs at law of Easter Belle Stewart. William S. Dennis died pending the appeal, and Robert Dennis was appointed administrator of Mrs. Stewart's estate and substituted as plaintiff in this action. Among the papers left by the deceased James Brown at his home, or in a wallet delivered by him to his wife about two weeks before his death, was the note in suit, dated February 1, 1918, signed by him and naming his daughter payee. With it was an explanatory letter to the daughter. This action was commenced after a claim therefor presented against the father's estate was rejected by the executrix. The issues presented by the pleadings are due execution and delivery of the note and want of consideration.

The note and explanatory letter were produced by defendant on the trial and introduced in evidence by plaintiff. This letter reads:

> "My Dear Easterbelle: The inclosed note is to represent value of twenty five hundred ($500) dollar bonds of the California Paper & Board Mills which I set aside for you when they were issued but which I was never able to give you as I used them as security for money I borrowed but they were redeemed February 1st, 1918, and instead of cash I am giving you a note as I still need the money.
>
> "Your loving father, James Brown."

Plaintiff also put in evidence a letter which James Brown wrote to his daughter addressed to her at Spokane, April 14, 1918, containing the following:

> "I put a note for 10,000.00 (ten thousand) dollars in your name Easter Belle Stewart in the Safe Deposit Box and a note explaining it was for 20 bonds of the Cal. Paper & Board Mills which I sold on Feby. 1st and that these were yours but on a/c of using them as collateral for borrowed money I had not been able till then to turn over to you and I am still needing the money so this note which calls for 6 per cent. int. is in place of it for the present and is dated Feby. 1, 1918 so you understand it."

The trial court found that James Brown, deceased, never made, executed, and delivered to Easter Belle Stewart either on the 1st day of February, 1918, or at any other time, the promissory note in suit, or any promissory note, and never promised or agreed to pay her the sum of $10,000, or any other sum; also, that said James Brown never received any consideration of any character whatsoever from Easter Belle Stewart for said promissory note.

It was the theory of plaintiff on the trial of the action, as indicated by his opening statement, that James Brown deposited this note in a safe deposit box in the vaults of the Wells Fargo Nevada National Bank (which was rented in his daughter's name with himself as deputy) in lieu of $10,000 worth of bonds which he had previously given as a gift to his daughter; that the bonds constituted the consideration for the note; and that the deposit of the note in the safe deposit box constituted a delivery to Easter Belle Stewart. In support of his case plaintiff's counsel questioned Neil Stewart concerning matters occurring prior to James Brown's death. Defendant objected on the ground that the witness could not testify by reason of the provisions of subdivision 3 of section 1880 of the Code of Civil Procedure. The trial court sustained the objection and refused to permit Stewart to testify regarding such matters.

Appellant contends that this ruling constituted prejudicial error. Also, that the evidence produced shows a delivery of the promissory note and that there was a valid consideration therefor.

[1] As to the first point, section 1880 of the Code of Civil Procedure provides:

> "The following persons cannot be witnesses: * * * (3) Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person."

We think Stewart quite clearly came within the excluded class as a person "in whose behalf" the action was being prosecuted. Upon the death of Easter Belle Stewart, intestate, title to all her property, both real and personal, immediately vested in Neil Stewart and James Brown, as her heirs, subject only to the control of the probate court and to the possession of the administrator for purposes of administration. Civ. Code, § 1384. Letters of administration of the estate of Easter Belle Stewart were issued to William S. Dennis, the original plaintiff herein, as the nominee and at the request of Neil Stewart, the surviving husband of deceased. The test seems to be whether or not the witness's interest in the claim amounts to an existing property right. "An action against an executor or administrator on a claim against a deceased person is one brought 'on behalf of' any person not a party to the action who, nevertheless, has an existing property right in the claim." Badover v. Guaranty Trust & Savings Bank, 186 Cal. 775, 781, 200 Pac. 638, 640; Uhlhorn v. Goodman, 84 Cal. 185, 192, 23 Pac. 1114. As before observed, Neil Stewart had a vested interest—an existing property right (Brenham v. Story, 39 Cal. 179, 188; Smith v. Olmstead, 88 Cal. 582, 586, 26 Pac. 521, 12 L. R. A. 46, 22 Am. St. Rep. 336; Phelan v. Dunne, 72 Cal. 229, 13 Pac. 662), and the trial court properly excluded the testimony objected to.

[2] As to delivery of the note in suit and consideration therefor, appellant argues that the statements contained in the father's letter to his daughter that he had deposited the note in the safe deposit box conclusively proved that fact; that such a deposit constituted a delivery to Mrs. Stewart, and the note being in writing, a consideration would be presumed; and, further, that the evidence showed certain bonds constituted the consideration.

There is sufficient evidence in the record to support a finding that the note had been delivered and that a valuable consideration had passed if the trial court had desired to make such a finding. There is also some evidence to support the finding to the contrary which the trial court did make, and under repeated rulings of the Supreme Court this is sufficient to support the finding.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

(62 Cal. App. 508)

SCOTT, MAGNER & MILLER v. MOZZETTI.
(Civ. 4432.)

(District Court of Appeal, First District, Division 2, California. June 15, 1923.)

1. Appeal and error 🔑931(1) — Appellate court must assume that trial court accepted plaintiff's testimony on appeal by defendant.

Where the evidence as to the value of certain goods was conflicting, the appellate court, on an appeal by the defendant, must assume, in support of the judgment, that the trial court accepted the testimony of plaintiff's witnesses.

2. Sales 🔑187—Allowance of interest prior to date of judgment in action for goods sold and delivered held error.

In seller's action for goods sold and delivered, in which the buyer claimed that the seller was entitled merely to the reasonable value of the goods, as against seller's contention that he was entitled to the price as provided in a contract, which contract did not provide for the payment of interest on deferred payments, allowance of interest prior to rendition of judgment was error, since under either theory interest should not have been included before the date of the judgment.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Scott, Magner & Miller, a corporation, against Ben Mozzetti. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Wm. P. Caubu, of San Francisco, for appellant.

A. A. Sanderson, of San Francisco, for respondent.

STURTEVANT, J. [1] The plaintiff commenced an action to recover a judgment for merchandise sold and delivered. Judgment went for the plaintiff, and the defendant has appealed. The plaintiff was, prior to July 1, 1920, engaged in the business of dealing in stock feed at wholesale. The defendant was a dairyman and purchased large quantities of hay of the plaintiff. In some years the purchases ran as high as $40,000. During the season of 1920 the plaintiff commenced to close up its affairs and go out of business. A difference having arisen between the plaintiff and the defendant, the plaintiff commenced its action by filing a complaint, the charging part of which is:

> "That the said defendant, Ben Mozzetti, is indebted to the plaintiff above named in the sum of $1,925.50 for goods, wares, and merchandise sold and delivered by plaintiff to defendant at the special instance and request of said defendant, at the said city and county of San Francisco, state of California, together with the interest accrued on said sale, and for which the said defendant promised and agreed to pay to said plaintiff at said city and county of San Francisco, state aforesaid, said sum of $1,925.50."

Later the plaintiff filed an amended complaint which is identical with the original complaint, except that it claims $2,940.16 instead of $1,925.50. Thereafter the defendant filed an answer which denied the material allegations of the plaintiff's complaint and contained an allegation as follows:

> "That on or about the 19th day of May, 1920, said defendant agreed with said plaintiff to purchase a certain boat load of first-class, first-cut alfalfa hay and to pay therefor the sum of $32 per ton; that delivery was made by said plaintiff of alfalfa hay from what was known as the Enos Ranch; that delivery was made to the said defendant of a certain lot of hay which was not first-class and first-cut alfalfa hay from said Enos Ranch; that said defendant objected to the said delivery and refused to accept the said boat load of hay, and that following such refusal said plaintiff agreed with said defendant that, upon the acceptance of said hay by said defendant, said defendant should pay what was the reasonable value of the said hay; that said defendant agreed so to do; that the reasonable value of the said hay was $15 per ton and said defendant has offered and is now and has always been willing to pay for such hay at the rate of $15 per ton; that said plaintiff has refused to accept such payment."

On the issues so made the parties went to trial. The plaintiff took up the burden of proof and called five witnesses to the stand. It called Mr. Hyde, the plaintiff's bookkeeper, and by him elicited the proof that the books showed a balance of account in the sum of $2,940.16. By Mr. Miller, the plaintiff's manager, the plaintiff proved that on the 19th day of May, 1920, Mr. T. J. Code, acting for the plaintiff, entered into a contract with the defendant as follows:

> "May 19, 1920. This is to certify that Scott, Magner & Miller have sold the named lots of alfalfa: Tony Valine, 160 tons at 32½, Guadalupe Wharf, or So. San Francisco. A. T. Nunes, 70 tons at 32.50, same delivery. Alamo Bros., 100 tons at 32.50, same delivery. Three boat loads of the Enos hay, first lot at 32.00, Cabu's barn. [Signed] T. J. Code, Ben Mozzetti."

The plaintiff, continuing the burden of proof, introduced evidence to the effect that hay from the Enos Ranch arrived on the schooner Thomas; that there was in the load 105.4 tons; that of that quantity 50 per cent. of the bales contained foxtail or other foul material; that the amount of the foul material was 10 to 15 per cent. and that hay of that quality was, according to the varying testimony of the plaintiff's witnesses, worth $26 to $27.50 per ton. The defendant introduced testimony that the value was much less, but in support of the judgment we must assume that the trial court believed the plaintiff's witnesses were more nearly correct, and that the trial court accepted the highest price stated by those witnesses. So assuming, the case stands thus: The total amount of the hay in question was 105.4 tons; 50 per cent. thereof would be 52.7 tons; that quantity should have been charged at $27.50 per ton, whereas it was charged at $32 per ton, or, in other words, at a price $4.50 per ton too high. The overcharge on 52.7 tons was $237.15.

[2] The book account included a charge for interest, which item, according to the testimony of the bookkeeper, was computed down to December 31, 1920, and amounted to $956.88. That item was improperly inserted for two different reasons. The written contract made by the plaintiff's agent and the defendant did not call for the payment of interest on deferred payments. In the next place, the theory of the plaintiff in presenting its case was that the plaintiff was not entitled to the contract price, but was entitled to the reasonable value of the cargo of hay that was shipped on the schooner Thomas. That reasonable value was not ascertained until the judgment was rendered. Interest should not have been included before the date of the judgment. It therefore appears that the defendant was overcharged $237.15 on the defective hay and $956.88 as interest, making $1,194.03 in all. As the judgment of the trial court was for the total sum claimed, the judgment should be reduced $1,194.03. But the trial court, in ruling on the motion for a new trial, reduced its own judgment $500; therefore the present judgment stands of record for $2,440.16, whereas there should be deducted the further sum of $694.03, leaving it stand for the sum of $1,746.13.

The judgment is modified accordingly, and as so modified the same is affirmed. And it is further ordered that the appellant recover his costs.

We concur: LANGDON, P. J.; NOURSE, J.

62 Cal. App. 265

In re MOORE'S ESTATE.

MOORE v. MOORE.

(Civ. 4214.)

(District Court of Appeal, Second District, Division 2, California. May 22, 1923. Rehearing Denied June 21, 1923. Hearing Denied by Supreme Court July 19, 1923.)

1. Wills 🔑778—"Election" is the acceptance of right and renunciation of inconsistent rights.

The doctrine of election rests upon the equitable ground that no man can be permitted to claim inconsistent rights with regard to the same subject, and that any one who asserts an interest under an instrument is bound to give full effect, so far as he can, to that instrument, or, as it is sometimes expressed, he who accepts a benefit under a deed or will must adopt the contents of the whole instrument, conforming to all of its provisions and renouncing every right inconsistent with it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Election.]

2. Wills 🔑782(3)—Widow required to elect where will gives her property to which she is not otherwise entitled.

A widow is put to her election where she would receive, if she took under the will, something to which she would not otherwise be entitled as community owner.

3. Wills 🔑439—Testator's intent controlling.

The intention of the testator controls the construction of a will.

4. Wills 🔑487(1)—Testator presumed not to have included wife's share of community property.

In the absence of a manifest intent on the part of testator, it will not be presumed that he designed to devise or bequeath his wife's share of community property or other property of which he had no power of testamentary disposition.

5. Wills 🔑800—Wife's acceptance of devise confirmation of testamentary disposition of her share of community property.

Where testator's manifest intent was to dispose of his wife's share of community property as well as his own share, if the widow accepts a legacy or devise under the will, such acceptance must be held to be a confirmation of the disposition of the will.

6. Wills 🔑781—Testator's bequest by specific description of property in which he had only undivided interest requires election.

Where a testator uses words of specific description in disposing of property in which he has only an undivided limited or conditional interest, the necessity for election arises, it not being presumed as in the case where he uses general words, such as "all my lands" or "all my estate," that he intended to dispose of his individual interest only.

7. Wills 🔑782(2)—Testator's knowledge or mistake as to his ownership immaterial in determining necessity of election.

That testator mistakenly believed he had unrestricted testamentary power of disposition over community property is not material in determining whether his widow is put to an election, nor is it material that he knew that he had no title or right to dispose of her share, if his intention to devise it as an entirety is manifest.

8. Wills 🔑782(2)—Devise of community property held to necessitate widow's election.

A devise of a lot, specifically described with the improvements thereon, to testator's sister, made necessary an election by testator's widow, where the property so devised was community property, and the widow could not take both the devises under the will and her community interest in the property devised to the sister.

9. Wills 🔑793—Stipulation of election to take under will binding on widow.

A written stipulation entered into prior to the entry of a decree of distribution, but after the court had indicated his decision, that, if it should be determined that testator's widow was put to an election, she should be deemed to have elected to take under the will, constituted an election to take under the will binding on her on a reversal of the trial court's finding that she was not required to elect.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Proceedings in the matter of the estate of James C. Moore, deceased. From the decree of final distribution, Mary J. S. Moore, individually and as executrix, appeals. Modified and affirmed.

William Hazlett and Merton A. Albee, both of Los Angeles, for appellant.

Simpson & Simpson, of Pasadena, for respondent.

FINLAYSON, P. J. Mary J. S. Moore, the sister of James C. Moore, deceased, appeals from that part of the decree of final distribution which distributes to her an undivided one-half of, instead of the whole estate in, that certain parcel of land which is situated in the city of Los Angeles and which for convenience will be referred to herein as the "Ceres avenue property."

The lower court found that all of the decedent's estate was community property. One of the questions presented for decision, and the one upon which this appeal will be decided, is whether under the terms of the will the widow, Mollie C. H. Moore, was entitled to take the one-half of the community property which devolved upon her by law and in addition thereto her interest in the other moiety thereof as given to her by the will, or whether she was put to an election between the provisions of the will and of the law in respect to such property. The lower court held that the widow was not required to elect, and distributed to her not only the undivided one-half which devolved upon her under the statute but also the interest in the other moiety which the will gave to her.

James C. Moore died July 8, 1919, leaving an estate consisting of eight parcels of land in the city of Pasadena and the Ceres avenue property in the city of Los Angeles. He was a resident of the county of Los Angeles continuously from 1903 to the time of his death. By his last will, executed May 18, 1919, he devised the Ceres avenue property to his sister, the appellant here, and all the rest and remainder of his property to his wife and his six children. The only provisions of the will which we need notice in our present inquiry are the following:

> "II. I give, devise and bequeath to my beloved sister Mary J. S. Moore, of Los Angeles, California, all of lot No. five (No. 5) of E. M. Funk Subdivision of Valenzuela Tract in Los Angeles, California, with the improvements thereon, and known as the 714 Ceres Ave. property, and originally purchased by me out of a considerable sum of money coming out of my now deceased mother's property, and purchased as a home for her and to which she never received a properly recorded deed.
>
> "III. All the rest and residue, and any remainder of my estate, both real and personal, wherever situated and of which I die seized or possessed, or to which I may be entitled at the time of my decease, I give, devise and bequeath as follows: One-half (½) thereof to my beloved wife Mollie C. H. Moore, and the remaining one-half (½) thereof I give, devise and bequeath to my beloved sons and daughters, Hester Elizabeth Armstrong, Zephyr A. Moore, Pleasant Ruth Moore, Jas. C. Moore, Jr., Paul J. Moore, and Miriam H. Moore, to be divided and shared among them according to their merits, needs and several abilities to rightly use the same."

Decedent and the respondent, Mollie C. H. Moore were married at Knoxville, Tenn., in 1890, where decedent's mother, Elizabeth Moore, owned a home. The newly married couple lived for a while with decedent's mother, until James bought a home of his own in Knoxville. On August 4, 1903, and before moving to Los Angeles, decedent purchased the Ceres avenue property for the sum of $3,000. The purchase price was paid in installments. The final payment, amounting to $957.89, was not made until some time in 1913. Before the property was fully paid for, namely, on March 4, 1907, James C. Moore received from his vendors a deed to the Ceres avenue property. His mother and sister came to Los Angeles in 1902, and shortly after the purchase of the Ceres avenue property in 1903 they made that their home until the mother's death in 1909. Thereafter it was occupied by the sister. James and his wife, after coming to California, resided in Pasadena. The Ceres avenue property seems to have been purchased in part from the proceeds of the sale or mortgage of the mother's property in Knoxville, in part from the proceeds of the sale or mortgage of the son's Knoxville property, and in part from the latter's earnings acquired subsequent to the time when he and his wife moved to Los Angeles county and took up their domicile in this state.

It would seem that James C. Moore intended that the Ceres avenue property should be purchased for and regarded as the property of his mother, to be occupied by her and his sister as their home. Indeed, by a written assignment dated March 22, 1904, he transferred to his mother his contract to purchase this property. His wife joined him in making this assignment to the mother. It recites a consideration of "one dollar, with divers other considerations." Later the son deeded the property to his mother by a deed dated April 5, 1907. His wife did not join with him in the execution of this deed, nor was that instrument ever recorded. Notwithstanding the assignment to the mother of the contract of purchase and the son's execution of the unrecorded deed to his mother, the Ceres avenue property has been treated by the parties to this litigation as a part of the son's estate. It was inventoried as a part of his estate; it is described as a part of his estate in respondent's petition for distribution; and appellant, in her written objection to the petition for distribution and also in a certain written stipulation entered into by her in the course of the trial, treats the property as a part of her brother's estate. Therefore the assignment of the contract and the deed to the mother, if they may be considered in the present proceeding for any purpose whatever, are relevant only in so far as they may have a tendency to show that James C. Moore considered that such interest as he had in the Ceres avenue lot was his own separate property and not the property of the community. Indeed, by a previous will, executed May 26, 1911, which was after his mother's death, Mr. Moore devised the Ceres avenue property to his sister by a clause which reads as follows:

> "I will *my non-community* property—one house and lot at what is now 714 Ceres avenue—to my sister Mary J. S. Moore." (Italics ours.)

The only reason for adverting to these facts is that they are circumstances tending to explain why it was that the testator used the language which he employed when devising the Ceres avenue property to his sister by his last will. They shed some light upon the question whether it was his intention to devise to his sister all the estate in the lot or only a moiety thereof; and under the doctrine of election the testator's intention is the crux of the problem, in so far at least as the case must turn upon the interpretation to be placed upon the testator's will.

Having found that all of the estate of James C. Moore, including the Ceres avenue property, was community property, and having concluded that the widow was not put to her election, the trial court distributed the estate as follows: To the sister, the appellant here, an undivided one-half of the Ceres avenue property; to the widow, as her part of the community property passing to her by operation of law, an undivided one-half of all of the property belonging to decedent's estate, including an undivided one-half of the Ceres avenue property; to the widow, under the will and in addition to the undivided one-half coming to her by operation of law, an undivided one-fourth of all of the property other than the Ceres avenue property; and to the six children, in equal shares, the remaining undivided one-fourth of all the property other than the Ceres avenue property, the same to be held in trust for them by their mother under a trust clause of the will which we have not deemed it necessary to set forth.

It will be noticed that the widow received under the will, in addition to her statutory community interest in the Pasadena lots, one-half of the remaining undivided half of those lots. That is, by taking under the will she was entitled to receive, and there was in fact distributed to her, an undivided three-fourths of those properties. These parcels of land in Pasadena formed a very considerable bulk of the deceased husband's estate; and from the fact that the widow entered into a certain stipulation referred to in the latter part of this opinion it would seem that she deemed an undivided three-fourths interest in the Pasadena lots to have a greater value than would be possessed by her mere statutory community undivided half interest in all the property of the estate.

As we have stated, appellant appeals from that part of the decree of distribution which distributes to her but an undivided one-half of, instead of all of the estate in, the Ceres avenue property. Her principal points on this appeal are: (1) That the evidence does not support the finding that the Ceres avenue property was community property; and (2) that if that property did belong to the community the widow was put to her election; that the latter elected to take under the will, and that therefore she may not now assert her statutory right to an undivided one-half of the Ceres avenue property, but that all of the estate therein should have been distributed to appellant under the will. We do not find it necessary to consider the first point; i. e., whether the evidence supports the finding that the Ceres avenue lot was community property, for we think that if that parcel of land was, as found by the lower court, the common property of the spouses, the will of James C. Moore, in so far as it makes a devise of the Ceres avenue property to his sister, was one whose terms forced an election upon the widow, and that the latter has made her election to take under the will.

[1, 2] The doctrine of election rests upon the equitable ground that no man can be permitted to claim inconsistent rights with regard to the same subject, and that any one who asserts an interest under an instrument is bound to give full effect, so far as he can, to that instrument. Or, as it is sometimes expressed, he who accepts a benefit under a deed or will must adopt the contents of the whole instrument, conforming to all of its provisions and renouncing every right inconsistent with it. In testamentary law, election, says the court in Morrison v. Bowman, 29 Cal. 347, 348, citing Story's Equity Jurisprudence—

> "is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases when there is a clear intention of the person from whom he derives one, that he should not enjoy both; * * * a person cannot accept the benefit intended for him and at the same time reject the will by asserting, in opposition to it, his own inconsistent proprietary rights."

A widow is put to her election where she would receive, if she took under the will, something which she would not otherwise be entitled to as community owner. Smith v. Butler, 85 Tex. 126, 19 S. W. 1083; Zinn v. Farmer (Tex. Civ. App.) 243 S. W. 523–526. That was the case here; for, by electing to take under the will, the widow received an undivided three-fourths of the Pasadena properties instead of only an undivided one-half thereof.

[3-5] Before looking to the particular language of the will let us notice some of the rules of law applicable to the construction of such instruments when the question of election is involved, always remembering that the intention of the testator is to be kept in view as the pole star in the construction or interpretation of his will. In the absence of a manifest intention on the testator's part, it will not be presumed that he designed to devise or bequeath any property over which he did not possess the power of testamentary disposition. Morrison v. Bowman, supra. Of two possible constructions, that which favors the conclusion that the testator was disposing only of his own moiety of the common property will be adopted. This, says the court in Re Smith, 108 Cal. 119, 40 Pac. 1037, is the scope of the doctrine in Silvey's Estate, 42 Cal. 210; In re Gwin, 77 Cal. 313, 19 Pac. 527; and In re Gilmore, 81 Cal. 240, 22 Pac. 655. But though an intention on the part of the husband to dispose by his will of his wife's share of the community property will not be readily inferred, and will never be inferred where the words of the gift may have their fair and natural import by applying them only to the one-half of the community which he has the power to dispose of by will, yet when from the terms of the will it appears that the testator did intend to dispose of his wife's share of the community property, as well as the undivided half which is subject to his testamentary power, then, if the widow accepts a legacy or devise under the will—which acceptance necessarily operates to give effect to the will as an entire disposition by the testator—such acceptance must, by the conditions on which it is founded, be held to be a confirmation of the dispositions of the will. Morrison v. Bowman, supra. The controlling question is the intention of the testator, as manifested by the language of his will; and if it clearly appears that he intended to dispose of his wife's as well as his own interest in the community property, his widow will be put to her election.

[6] The difficulty of ascertaining the testator's intent is generally, if not always, greater where he has a partial or limited interest in the property devised than where he undertakes to dispose of property in which he has no interest whatever. In the former case the presumption is that he intended to dispose of that which he might properly devise, and nothing more, and this presumption will always prevail unless the intention is clearly manifested by demonstration plain, or necessary implication, on the part of the testator to dispose of the whole estate. Where he has only a limited or conditional interest in the property which he affects to dispose of by will, as, for instance, where it is community property, and he uses general words in disposing of it, such as "all my estate," "all my lands," and the like, no question of election arises. In such cases the testator's language can have full effect when applied only to that share or interest of which he has the absolute power of disposal, and he will be presumed to have intended to give only that estate or interest which is thus subject to his testamentary power. Examples of such wills are to be found in the cases relied upon by respondent. In re Gilmore, supra; Estate of Silvey, supra; In re Wickersham, 138 Cal. 355, 70 Pac. 1076, 71 Pac 437; and In re Prager, 166 Cal. 450, 137 Pac. 37. But a wholly different question is presented where the testator, having a limited or partial interest in a particular piece of property, does not employ general words of description and donation, such as "all my estate," and the like, but describes the property specifically. In such case the language of the devise is such as is suitable to a disposition of the particular piece of property as an entirety. Thus in Penn v. Guggenheimer, 76 Va. 847, the court says:

> "Generally when the testator has an undivided interest in certain property, and he employs general words in disposing of it, as 'all my lands,' or 'all my estate,' no case of election arises from it; for it does not plainly appear that he meant to dispose of anything but what was strictly his own. 2 Story, E. J., § 1087; Pomeroy, § 489. A case of election does arise, however, when the testator, having an undivided or partial interest in an estate, devises it specifically, thus indicating a purpose to bestow it as an entirety. The rule on this subject is thus laid down in Pomeroy's Equity Jurisprudence, § 489. Where the testator proposes to give the whole thing itself, using language which by reasonable intention, must necessarily describe and define, the whole corpus of the thing in which his particular interest exists as a distinct and identified piece of property, then an intention to bestow the whole, and not merely the testator's individual share, must be inferred, and a case for an election arises."

To the same effect are Smith v. Butler, supra; Skaggs v. Deskin (Tex. Civ. App.) 66 S. W. 793; Zinn v. Farmer, supra, and Pratt v. Douglas, 38 N. J. Eq. 516, 537, a case involving the doctrine of election under the community system obtaining in this state. See, also, Waggoner v. Waggoner, 111 Va. 325, 68 S. E. 990, 30 L. R. A. (N. S.) 644, and Ditch v. Sennott, 117 Ill. 362, 7 N. E. 636.

[7, 8] Let us now apply these principles to the case under consideration. The particular parcel of land devised to appellant is described specifically and as an entirety. The language of the will is: "I give and bequeath to my beloved sister * * * all of lot No. five," etc. This language is such as would be suitable in disposing of the whole property. The testator purports to give the whole thing itself, using language which, by reasonable interpretation, necessarily describes and defines, as a distinct and identified piece of property, the whole corpus of the thing in which his partial and testamentary interest exists. The language of this devise is ample, complete and correct for the purpose of disposing of the corpus of the lot and every estate therein, but is wholly inapplicable to a gift of a mere moiety. Not only this, but, by declaring in his will that the lot which he was devising to his sister "was originally purchased by me out of a considerable sum of money coming out of my now deceased mother's property, and purchased as a home for her," but to which "she never received a properly recorded deed," the testator clearly evidences his belief that the lot was not property of the marital community, but was property all of which, after his mother's death, he could devise to his sister unembarrassed by any

claim which his widow might rightfully assert. This belief is further evidenced by the fact that in the will previously made by him he refers to the Ceres avenue property as "my non-community property." It is of no moment that he was mistaken in his belief that the lot was not the common property of himself and wife. His intention to devise the lot as an entirety, regardless of any right which might be asserted on behalf of the marital community, is the controlling factor. It is the testator's intention, and not the ground upon which that intention rests, that must control in the interpretation of his will. A mistaken belief on the part of a testator that he has the unrestricted power to dispose of the property absolutely is immaterial. Underhill (Law of Wills, vol. II, § 736) states the rule as follows:

> "It is not material, in determining whether a party is put to an election, that the testator, in disposing of that person's property, was in error as to its ownership, or that the testator in fact knew that he had no title to it."

See, also, Alexander's Commentaries on Wills, § 814, p. 1180. The testator's intention that the corpus of the lot, and not merely his community interest therein, should go to his sister, read into the terms of his will, was sufficient to put his widow to her election. In re Smith, 108 Cal. 119, 120, 40 Pac. 1037. See, also, In re Stewart, 74 Cal. 98, 15 Pac. 445. Having reached the conclusion that the widow, by the provisions of her husband's will, was put to her election, and that she could not and cannot choose both her own community interest in the Ceres avenue property and the devises made in her favor, the next question is: Has she made such election?

[9] That part of the decree which distributes to the widow an undivided three-fourths of the Pasadena properties has become final, no appeal having been taken therefrom. Of this undivided three-fourths, one-third thereof—i. e., an undivided one-fourth of the Pasadena lots—was received by the widow under her husband's will and solely by reason thereof. Moreover, a written stipulation was entered into prior to the entry of the decree of distribution, but after the evidence was all in and after the learned trial judge had orally announced from the bench what his decision would be, whereby it was stipulated that if it should finally be determined that the widow was put to her election, then and in that event she should be deemed to have elected to take under the will. In view of this stipulation, thus solemnly entered into, and our conclusion that by the terms of her husband's will she was put to her election, it must be held that the widow has elected to take under the will, and that therefore the Ceres avenue property and every estate therein should be distributed to the appellant, Mary J. S. Moore.

> "The widow, having accepted the devises and bequests provided for her by the will, thereby made her election and confirmed the disposition made by her husband of the common property." In re Stewart, supra.

A new trial will not be necessary, since the facts as found by the trial court in its final decree of distribution, taken in connection with the stipulation to which we have just adverted, fully support the conclusion that appellant is entitled to have distributed to her the corpus of the Ceres avenue property, including all estate therein, to the exclusion of any claim on the part of the widow.

The cause is remanded, with directions to the trial court to modify its decree of distribution to conform with the views expressed herein, and as so modified it will stand affirmed.

We concur: WORKS, J.; CRAIG, J.

62 Cal. App. 233

In re STODDART'S ESTATE.

NEWTON et al. v. STODDART et al.

(Civ. 4186.)

(District Court of Appeal, Second District, Division 1, California. May 18, 1923. Rehearing Denied June 14, 1923. Hearing Denied by Supreme Court July 16, 1923.)

1. Wills 🔑104—Statute inapplicable to render sufficiently clear and distinct clause inoperative.

Where the clause qualifying testatrix's bequest to daughters was sufficiently clear and distinct that her intention could be ascertained therefrom with reasonable certainty, then Civ. Code, § 1322, providing that a clear and distinct clause cannot be affected by any other words not equally clear and distinct, will not apply so as to render the qualifying clause void for uncertainty.

2. Wills 🔑104—Clause qualifying bequest held not so uncertain as to render it void under rule of statute.

Where testatrix gave to her surviving daughters each one-sixth of the residue of her estate in equal parts, provided that if G. and E., or either of them, survived testatrix and not then be widowed, testatrix gave to M. and T. the portions that otherwise would go to G. and E. to hold in trust, testatrix's intent was that if both daughters survived and were unwidowed "the portions" would go to trustees, but if only one survived and was unwidowed then "the portion" which otherwise would go to her passed into the trust, and the qualifying clause was so uncertain as to render it void under the rule of Civ. Code, § 1322, providing that a clear and distinct devise cannot be affected by any other words not equally clear and distinct.

3. Wills 🔑104—Will not conflicting as to portion each married daughter took in event of widowhood.

Where testatrix gave to her surviving daughters each one-sixth of the residue of her estate in equal parts, but provided if either of her married daughters should be left a widow "the portion of my estate so held in trust by said trustees for either of said daughters shall at once go to and vest in and be paid to such widowed daughter," and the remaining portion be held under the terms of the trust, in view of testatrix's use of portion as intending the share each daughter was to take, the four unmarried taking absolutely and the two married ones conditionally, her intention was that when one daughter became a widow her one-sixth was to be paid to her, and not that the two-sixths should go to the daughter first widowed, and hence the language used to designate the portions was not in conflict.

4. Wills 🔑687(1)—As affecting disposition on death of one beneficiary each beneficiary held to have right to one-half trust fund.

Testatrix left two-sixths of the residue of her property in trust for two married daughters and provided that on the death of either prior to the deaths of their husbands, or the husband of either, the portion of the principal of the trust as should be held for the benefit of the deceased daughter should go at once to other unmarried daughters. *Held*, that each of the two married daughters had a distinct right to one-half the trust unconnected with the other's right to a like interest, and on the death of one the trust was not merged for the benefit of the surviving married daughter, but the principal of the deceased's share would go to unmarried daughters.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Eliza J. Stoddart, deceased. On proceeding for distribution by Emily Newton and another against Mary Stoddart and another, executrices. From decree granting distribution, petitioners appeal. Affirmed.

Lester Wm. Roth and Frank M. Gunter, both of Los Angeles, for appellants.

Flint, MacKay & Bowen, of Los Angeles, for respondents.

CURTIS, J. Eliza J. Stoddart died March 1, 1914, leaving a last will and testament which was duly admitted to probate in the superior court of the county of Los Angeles. She left surviving her six daughters and one son. Four of the daughters were unmarried and were living with their mother at the time of her death. Two of her daughters, Emily Newton and Grace C. Shattuck, were married at the time of their mother's death, and Emily Newton had then a husband and one child living, and Grace C. Shattuck had a husband and five children living. The son of the deceased has no interest in this proceeding. Since the death of the testatrix, Grace C. Shattuck, one of the married daughters, died, leaving her husband and five children surviving. Lillian E. Shattuck, one of said children, is the executrix of the last will of her mother, and together with Emily Newton, the surviving married daughter of the said Eliza J. Stoddart, are the appellants in this proceeding. Mary E. Stoddart and Evelyn L. Stoddart, two of the unmarried daughters, were named as executrices of their mother's will, and as such are the respondents herein.

The testatrix, after making certain special bequests, disposed of the residue of her estate, which residue was by far the greater portion of the estate left by her, by the following provisions of her will:

"All the rest, residue and remainder of my estate I give, devise and bequeath to such of my daughters as survive me, in equal shares or parts; provided that if my said daughters, Grace Shattuck and Emily Newton, or either of them, shall survive me and not then be widowed, I give, devise and bequeath unto Mary E. Stoddart and Evelyn L. Stoddart and to their successors, the portions or portion which would otherwise go to said Grace Shattuck and Emily Newton, or either of them, under this paragraph, to have and to hold the same in trust for the following uses and purposes:

"To receive and collect the income, interest and other revenue derived therefrom and to pay the net amount thereof in equal shares to said Grace Shattuck and Emily Newton, so long as each of them shall live, unless either of them shall be left a widow, in which latter event the portion of my estate so held by said trustees for either of said daughters, shall at once go to, vest in and be paid to such widowed daughter, and the remaining portion or interest, only, shall thereafter be held under the terms of this trust by said trustees; or if only one of said daughters, to wit, Grace Shattuck and Emily Newton, survive me and is not then a widow, the whole of the net income of the portion of my estate which would have gone to her as above provided, shall be paid to such daughter, and the principal thereof shall be held by such trustees subject to the trusts in this paragraph; and on the death of said Grace Shattuck or Emily Newton or either of them prior to the death of their husbands or the husband of either of them, the portion of the principal of such trust fund as shall be held for the benefit of such deceased daughter shall at once go to and vest in my daughters, Mary E. Stoddart, Florence E. Stoddart, Evelyn L. Stoddart and Bessie D. Stoddart, or the survivors, in equal shares.

"If however my said daughters, Mary E. Stoddart, Evelyn L. Stoddart, Florence E. Stoddart and Bessie D. Stoddart, shall all predecease their sisters Grace Shattuck and Emily Newton, or either of them, then on the death of all those first above named this trust, or so much thereof as shall then be in force, shall terminate, and the fund or funds then held in

> trust shall at once go to and vest in said Grace Shattuck and Emily Newton, or either of them, in such proportion or interests as they or either of them were last entitled to receive the income from such trust fund."

The court, upon final hearing, granted distribution of said residue of said estate as follows:

> "XI. That all the rest, residue and remainder of the estate of Eliza J. Stoddart, deceased, now in the hands of said executrices, as hereinbefore described, and all other property belonging to said estate and to said testatrix at the time of her death, whether described herein or not, be, and the same is hereby distributed as follows:
>
> "(a) An undivided one-sixth (1/6) thereof to Mary E. Stoddart, Florence E. Stoddart, Evelyn L. Stoddart and Bessie D. Stoddart, as tenants in common share and share alike.
>
> "(b) An undivided one-sixth (1/6) thereof to Mary E. Stoddart.
>
> "(c) An undivided one-sixth (1/6) thereof to Florence E. Stoddart.
>
> "(d) An undivided one-sixth (1/6) thereof to Evelyn L. Stoddart.
>
> "(e) An undivided one-sixth (1/6) thereof to Bessie D. Stoddart.
>
> "(f) An undivided one-sixth (1/6) thereof to Mary E. Stoddart and Evelyn L. Stoddart in trust upon the following uses and trusts:
>
> "To receive and collect the income, interest and other revenue derived therefrom and to pay the net amount thereof to Emily S. Newton so long as she shall live, unless she shall be left a widow; in which latter event, that is to say, upon her being left a widow, said one-sixth (1/6) interest shall at once go to, vest in, and be paid to the said Emily S. Newton, as her absolute property; and on the death of the said Emily S. Newton, prior to the death of her husband, Edward Payson Newton, the principal of said one-sixth (1/6) interest shall at once go to and vest absolutely in Mary E. Stoddart, Florence E. Stoddart, Evelyn L. Stoddart, and Bessie D. Stoddart, or such of them as may be living at the death of the said Emily S. Newton (occurring during her said husband's lifetime), as tenants in common share and share alike; and in case of the death of all four of said last named sisters, to-wit: Mary E. Stoddart, Florence E. Stoddart, Evelyn L. Stoddart and Bessie D. Stoddart, during the lifetime of the said Emily S. Newton, said trust shall cease, if the same shall then be in force, and the principal of said one-sixth (1/6) interest shall at once go to and vest in the said Emily S. Newton absolutely."

Appellants make no objection to that portion of the decree of distribution wherein an undivided one-sixth of said residue is distributed to each of the unmarried daughters, Mary E. Stoddart, Florence E. Stoddart, Evelyn L. Stoddart, and Bessie D. Stoddart, being subdivisions (b), (c), (d), and (e) of paragraph XI of the decree of distribution hereinbefore set out; but they do object to subdivisions (a) and (f) of said paragraph XI.

Subdivision (a) relates to the one-sixth interest, which, under the terms of said will, would have gone to Grace C. Shattuck, had she been widowed and living at the time of the death of her mother; and subdivision (f) relates to the one-sixth interest which would have gone to Emily S. Newton, had she been widowed and living at the time of the death of her mother.

Appellants contend that the one-sixth interest referred to in subdivision (a) should have been distributed direct to the heirs of the said Grace C. Shattuck, and that the one-sixth interest referred to in paragraph (f) should have been distributed direct to Emily S. Newton. Appellants base their claim upon the contention that all that portion of the residuary clause of the will above quoted, following the word "provided," is so vague, general, and equivocal that it cannot affect the clear and distinct desire of the testatrix expressed in that portion of the residuary clause preceding the word "provided." That portion of said residuary clause, preceding the word "provided," is as follows:

> "All the rest, residue and remainder of my estate I give, devise and bequeath to such of my daughters as survive me in equal shares or parts."

By this portion of the residuary clause, standing alone, the testatrix explicitly bequeathed the residuary portion of her estate to such of her daughters as might survive her, in equal shares or parts.

Appellants, in support of their appeal, assert that the clear and distinct devise first expressed herein by the testatrix, under the rule of construction expressed in section 1322 of the Civil Code and kindred rules, is entirely "unaffected" by the subsequent language of said residuary clause which is "not equally clear and distinct," but which is, on the contrary, ambiguous and equivocal throughout, and that the trust, attempted to be set up in the proviso following the outright gift, and which is repugnant to it, must fail in that its language is so vague, general, and equivocal that the trust is left wholly uncertain in all of its material terms. In other words, appellants' contention is that the outright bequests to the six daughters are valid, but that the attempt to limit the bequests made to the two married daughters is so uncertain as to render this limitation absolutely void, leaving the straight bequests of the whole of the residuary property to the six daughters of the deceased unaffected by any other portion of the will.

Section 1322 of the Civil Code is as follows:

> "*In What Case Devise Not Affected.*—A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or ref-

erence to its contents in another part of the will."

This rule of construction put in succinct form by our Code is one that has long prevailed, not only in this state, but generally in other jurisdictions in this country. Church on Probate Law and Practice (2d Ed.) vol. 3, p. 2179.

In Thompson on Wills the rule is thus stated:

> "If the subsequent clause is vague and unintelligible and the prior clause is clear and intelligible, the prior clause will not be destroyed, cut down, or limited by the subsequent clause." Section 154, p. 134.

Taking the Code section and stripping it of all useless verbiage, the rule for our purpose may be stated as follows: A clear and distinct devise cannot be affected by any other words not equally clear and distinct. This section of the Civil Code was before the Supreme Court in the two cases of the Estate of Tooley, 170 Cal. 164, 149 Pac. 574, Ann. Cas. 1917B, 516, and the Estate of Briggs, 186 Cal. 351, 199 Pac. 322. In the latter case the court said:

> "Nor is the expression of the testatrix's intention contained in the second clause open to the objection that it is not 'clear and distinct.' In Estate of Tooley [supra], a similar question was presented. The will in that case read:
>
> "'I give all my property at my death to my daughter, Logan Mattie Tooley.
>
> "'If at her death she has neither husband or children I desire any property that may be left divided equally among my sisters and brother.'
>
> "Of the contention that the words of the second paragraph were not as clear and distinct as those of the first, and consequently could not cut down the distinct devise contained in the first, the court said: 'In view of these authorities it cannot be said that the words of the second paragraph of the will are not equally clear and distinct as those of the first paragraph. We think no case can be found in which a will indicating a disposition of property by the word "desire" or "wish" has been held not to be sufficient to constitute a will. The meaning of the word, when used in such connection in a will, is as clear as that of any other word in the language.'
>
> "In the case here, although the testatrix used the technical word 'bequeath' in the first clause, the word 'desire' used in the second, in connection with the words she has used in the first, equally well expresses her testamentary intention and is equally as clear as the word 'bequeath.'"

Commenting upon certain words of a will and their sufficiency under this section of the Civil Code, the Supreme Court uses the following language:

> "The words of the qualifying clause first above quoted are not grammatical in form, but they are entirely clear and distinct as an expression of the will of the testatrix that if any legatee or devisee shall undertake to contest the will the legacy given to such person shall be thereby forfeited. The rule referred to does not apply to the case." Estate of Shirley, 180 Cal. 400, 181 Pac. 777.

[1] From the foregoing authorities it would appear that if the qualifying clause is sufficiently clear and distinct that the intention of the testatrix can be ascertained therefrom with reasonable certainty, then the rule laid down in section 1322 of the Civil Code will not apply so as to render the qualifying clause void for uncertainty.

[2] With this understanding as to the meaning of section 1322 we will now proceed to examine a few of the provisions of the qualifying clause of the will objected to by appellants, and which they contend are so uncertain as to render them void under the rule prescribed by said section.

The first objection is made to the following portion of the will:

> "Provided that if my said daughters, Grace Shattuck and Emily Newton, or either of them, shall survive me and not then be widowed, I give, and bequeath unto Mary E. Stoddart and Evelyn L. Stoddart and to their successors, the portions or portion which would otherwise go to said Grace Shattuck and Emily Newton, or either of them, under this paragraph, to have and to hold the same in trust for the following uses and purposes."

It is the contention of appellants that, since, by the above provision of the will, "it is stated that it is 'the portions or portion' which would otherwise go to Grace Shattuck and Emily Newton 'or either of them' that is to pass into the trust, and it is not stated under what contingency the single portion only passes, and, if a single portion, which portion; it will be demonstrated that the testatrix has failed to indicate with the clarity required by section 1322 of the Civil Code and the authorities previously cited, or at all, the part of the clearly expressed gift referred to."

"The clearly expressed gift," we understand counsel to mean, is the two-sixths of the estate given unconditionally to the two married daughters in that portion of the will immediately preceding the word "provided." It is admitted that the terms of the will preceding the word "provided," or as we will hereafter refer to this part of the will as the "proviso," make clear the contingency upon which the whole of the gift passes into the trust fund. This contingency is the survival under coverture of both married daughters. If both of the married daughters of the testatrix survive her under coverture, then the two-sixths interest or "the two portions" which would otherwise go to them goes into and forms the trust fund. This is conceded by appellants, but it is contended by them that the proviso fails to state clearly the contingency upon which only a single portion may pass into the trust fund, and, if a single portion, which portion.

The proviso plainly states that "if my said daughters * * * or either of them, shall survive me and not be widowed, I give to" the trustees "the portions or portion which would otherwise go to" said married daughters "or either of them." The only reasonable construction that can be given to these words is that if both of the married daughters survive the testatrix and are then unwidowed, "the portions" will go to the trustees, but if only one of said married daughters survive the testatrix and she is unwidowed, then "the portion" which would otherwise go to her (if she was then not under coverture) passes into the trust fund. We can see no escape from such a construction. The intent of the testatrix is in our opinion clear and explicit, and is as above set out. We are, therefore, unable to agree with appellants that this portion of the will of the testatrix should be declared void for uncertainty.

[3] Appellants next contend that there is a hopeless conflict in the language used to designate the portions that each married daughter is to take in the event of her widowhood. It is set forth in the will that in the event either of the married daughters shall be left a widow "[the portion of my estate so held by said trustees for either of said daughters shall at once go to and vest in and be paid to such widowed daughter] and the remaining portion or interest only shall thereafter be held under the terms of this trust by said trustees." Appellants insist that the portion of the above provision of the will, set off in brackets, compels the vesting in favor of the first widowed daughter of both portions of the trust estate; that the words "held * * * for either" constitute a designation of the entire property held in trust and that such a construction is in conflict with the clause of the will following that in brackets, which latter clause shows that the passing of the entire trust property could not have been intended. From this provision of the will, it is clear that the testatrix did not intend that by the death of the husband of one of her married daughters his widow should receive all of the trust property. The will provides that if the portion is paid to her, the "remaining portion shall be held on the terms of this trust." Throughout the whole will, the testatrix refers repeatedly to "the portion" of the estate. By such reference she clearly means the one-sixth interest which each of her daughters was to receive in the property of her estate —the four unmarried daughters to receive their portions absolutely, and the two married daughters conditionally. In the same sense she uses the terms "the portion" in the clause of the will last above quoted, and when she provided that "the portion of my estate so held by said trustees for either of said daughters shall at once go to such widowed daughter," she could have intended but one thing, and that was that the one-sixth interest held by said trustees for said widowed daughter should at once go to her upon the death of her husband. That she could not have intended that both portions, or the two-sixths interest, should go to the daughter first widowed, is made still more apparent when we read the balance of this clause which provides that "the remaining portion or interest only shall thereafter be held under the terms of this trust by said trustees." We think, therefore, that it clearly appears from this clause of the will that the testatrix intended that in the event of the death of the husband of either of her married daughters, then the portion, or one-sixth interest, held by her trustees for said married daughter, should immediately be paid to said widowed daughter, and the remaining portion or one-sixth interest, only, should be held by said trustees for the other married daughter. There is, in our opinion, no conflict in the language of this clause used to designate the portion that each married daughter is to take in the event of her widowhood.

[4] The third objection made by appellants is that the daughter Grace Shattuck having died approximately four years after the decease of the testatrix, it cannot now be ascertained what part of the trust property is to go to the single daughters. This involves the construction of the following clause of the will:

> "On the death of the said Grace Shattuck or Emily Newton, or either of them, prior to the death of the husbands, or the husband of either of them, the portion of the principal of said trust fund as shall be held for the benefit of said deceased daughter shall at once go to and vest in the four unmarried daughters."

It is the appellants' contention that the language used is entirely uncertain, in that it refers to the portion of the principal of such trust fund as shall be held for the benefit of said deceased daughter, when there is no portion of the principal of the trust fund held for one daughter separately from the other, but that there is a single trust fund held for both jointly. Appellants base their argument upon a prior clause in the trust provision reading as follows: "To pay the net amount thereof in equal shares to said Grace Shattuck and Emily Newton so long as each of them shall live," and appellants claim that by providing that the net income from the two-sixths interest is to be paid in equal shares to the two married daughters, that the will thereby merged these two interests in the one single trust fund, and that the trustees hold both interests as one trust for the joint benefit of the two beneficiaries and hold no portion thereof for either beneficiary separately. Appellants rely upon the Estate of Fair, 136 Cal. 79, 68 Pac. 306, to support them in this contention. In that case the court decided that where trustees were directed to collect the income from certain real and personal property and to pay the net proceeds thereof to certain beneficiaries, that the real and personal property constituted a single trust, and where the trust is declared invalid as to the real property, the trust as to the personal property, being inseparably united and interwoven with the invalid trust in regard to the real property, is itself invalid and must fail with the defeat of the trust scheme of the testator. The court said:

> "Under these conditions, to hold that the testator, if he had known that his attempted disposition of the realty was invalid, and that upon his death his vast amount of real property, worth many millions of dollars, would go immediately in fee-simple to his children, would have given them also the income of the personal property, would be to indulge in a most impossible supposition and to violate the settled law on the subject."

We fail to see any similarity in the principles of law involved in the proceeding before us with those in the Estate of Fair, supra. Neither do we agree with appellants' contention that there is no portion of the trust fund held for one daughter separately from the other. On the other hand, we think that it is clear from the will that each of these two married daughters has a distinct and separate right to one-half of the trust fund unconnected in any manner with the right of her married sister to a like interest in said fund, except that their two interests were to be held by the same trustees. The interests were exactly alike, and, therefore, the direction to the trustees to pay the net income therefrom to the two sisters in equal shares was simply a convenient mode of expressing the wish of the testatrix as to the disposition of this income and could not, and in our opinion did not, change the nature of the interest held by them respectively.

Appellants in their brief have directed the court's attention to other portions of the will which they consider lacking in that clarity demanded by section 1322 of the Civil Code, and which, therefore, are void for uncertainty. We consider, however, that the most serious objections made by appellants are those which we have hereinbefore discussed and which we believe we have sufficiently shown are not subject to the criticism made against them by appellants. Those objections which we have not discussed are in our opinion not well taken.

Our conclusion, therefore, is that the limitations imposed by the testatrix upon the bequests made to her two married daughters are not so uncertain as to render them absolutely void, but on the other hand, we are of the opinion that the qualifying clause prescribing these limitations is sufficiently clear and distinct, that the intention of the testatrix can be ascertained therefrom with reasonable certainty, and is, therefore, legal and valid. Furthermore, we are of the opinion that the lower court correctly interpreted the terms of the will as indicated by the decree of distribution, the material portions of which are hereinbefore set out.

The decree of distribution is therefore affirmed.

We concur: CONREY, P. J.; HOUSER, J.

---

62 Cal. App. 198

SOFUYE v. PIETERS-WHEELER SEED CO. (Civ. 2605.)

(District Court of Appeal, Third District, California. May 14, 1923.)

1. Judgment 🔑143(3)—Facts held sufficient to warrant vacation of default judgment.

Lessee under contract to raise crops for defendant gave lessor a crop mortgage. Under an agreement of all parties that any sums becoming due to lessee should be paid as additional security to lessor, defendant paid over all that was due lessee under his contract; lessor agreeing to defend against lessee. Defendant forwarded suit papers, but judgment went by default. On motion to set aside the default, alleging mistake, inadvertence, and excusable neglect, under Code Civ. Proc. § 473, *held*, that an order opening the default was properly granted.

2. Appeal and error 🔑957(1)—Action of trial judge in opening default not disturbed, in absence of discretion.

A nisi prius order opening up a default judgment will not be disturbed, in the absence of an abuse of discretion, in view of Code Civ. Proc. § 473.

3. Judgment 🔑136—Statutory rule for vacating liberally construed.

In the absence of any showing of prejudice to plaintiff, the remedial power to open up default judgments, under Code Civ. Proc. § 473, should be liberally exercised to dispose of all cases on their substantial merits without unreasonable delay.

4. Judgment 🔑153(1)—Motion to vacate filed 19 days after entry of default held not unreasonable delay.

Where defendant reasonably and in good faith relied upon an agreement to protect and defend any suit plaintiff might bring, a motion to vacate a default judgment, filed 19 days after entry, was made within a reasonable time, in view of Code Civ. Proc. § 473; plaintiff not having shown prejudice.

5. Judgment 🔑143(10)—One agreeing to defend an action against another held not the latter's attorney as affecting the question of opening default judgment.

A seed company employed plaintiff's assignor to plant and harvest a crop of seed on leased land; it being agreed that the assignor might execute a chattel mortgage to the lessor to secure the rent, but that the crop might be delivered to the seed company on its paying to the lessor any sums due the lessee. The seed company made such payment to the lessor, and the latter agreed that he would defend any suit brought by plaintiff. On suit being commenced against the seed company it sent the suit papers to the lessor, but the latter suffered default judgment to be entered. *Held*, that the lessor, while in a sense an agent of the seed company, could not be regarded as its attorney, within the rule that a client is bound by the negligence of his attorney in permitting entry of default.

6. Judgment 🔑148—Defendant against whom default was entered held clothed with sufficient interest to urge motion to vacate.

That defendant, a seed company, paid to a lessor of land all that was due to the lessee for the services of the latter in raising a crop of seed on the land, such payment being made under agreement of all parties concerned to secure the payment of the rent due, did not deprive defendant of interest, so as to preclude it from moving to open a default judgment against it in favor of an assignee of the lessee, though the payment was made under an agreement of the lessor to defend any suit for the services rendered.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by I. Sofuye against the Pieters-Wheeler Seed Company. From an order setting aside a default judgment, plaintiff appeals. Affirmed.

Smallpage & Rex, of Stockton, for appellant.

Mastick & Partridge and Brooks Cox, all of San Francisco, for respondent.

HART, J. The plaintiff prosecutes this appeal from an order setting aside a default judgment entered against the defendant on the 17th day of March, 1922. The plaintiff is the assignee of one S. Kagi of the latter's interest in a certain contract entered into between said Kagi and the defendant on January 3, 1921. By the terms of said contract Kagi was to plant certain land then occupied by him in what is known as "the New Hope Pocket," San Joaquin county, in carrots, beets, parsnips, and parsley, with seed to be furnished by the defendant. Kagi was to "tend, cultivate, and harvest the seed of such crops and to deliver such seed to defendant f. o. b. Hood, Cal." The defendant, in addition to furnishing such seed, was also to furnish the necessary sheets and bags for harvesting the crops and to pay said Kagi for the use of said land and for his services for the work required for the purpose, as follows, 12 cents per pound for carrot seed, 8 cents per pound for beet seed, 8 cents per pound for parsnip seed, and 10 cents per pound for parsley seed, all to be marketable and produced and delivered, deducting, however, from the total amount of seed raised and delivered an amount of seed of the various kinds equal to the amount of seed of such kinds furnished by defendant to said Kagi to plant. It was further provided in said contract that, in case said Kagi failed or neglected properly to care for, cultivate, and harvest said crops of seed, defendant might do so, and might, in such event, charge the reasonable and necessary cost of doing said work to said Kagi. Under this contract defendant furnished said Kagi the necessary seed of the various kinds mentioned and Kagi planted the same in said land.

It is alleged in the complaint that Kagi failed to fully harvest and deliver the same to the defendant and that pursuant to the provisions of said contract that the defendant, upon such failure, might itself complete the harvesting of said crops, the said defendant did harvest the same, took possession thereof, and, so states the complaint, "necessarily expended in so doing certain moneys, but that plaintiff has no knowledge or information sufficient to enable him to state what moneys were so expended by defendant." It is alleged upon information and belief, that 31,580 pounds of carrot seed, 9,094 pounds of beet seed, 4,500 pounds of parsley seed and 24,450 pounds of parsnip seed were harvested from said land and received by the defendant, and that the aggregate value thereof, figuring according to the agreed prices therefor, was the sum of $6,923.12, minus the necessary cost and expenses in completing the harvesting and delivery of said crops and also the amount due the defendant for the quantities of the several kinds of seed which defendant furnished said Kagi for planting, as to which amounts, the complaint states, the plaintiff has no such information or knowledge as to enable him to state the precise or approximate total thereof. The complaint further states that there is to be deducted the sum of $500 which was advanced under said contract by defendant to said Kagi. The prayer of the complaint is for an accounting by the defendant to him for the said crops of seed and that, upon the ascertainment by such accounting of the amount due the plaintiff, he be awarded judgment against the defendant for said amount.

The complaint was filed January 20, 1922. Summons was issued on the same day and the same was forwarded to the sheriff of the county of Santa Clara, who, on the 23d day of January, 1922, served the same, together with a copy of the complaint, upon L. W. Wheeler, the president of the defendant, at the city of Gilroy, in the county of Santa Clara. The defendant having failed to appear and demur to or answer the complaint within the time prescribed by law, a demand was made by the plaintiff on the 3d day of

March, 1922, for the entry of a default against said defendant, and the clerk of the court, in accordance with said demand, entered said default. Thereafter, and on the 13th day of March, 1922, the court received evidence in support of the complaint, and on the 17th of March filed its findings of fact, conclusions of law, and default judgment in favor of the plaintiff for the sum of $2,215.94.

On the 6th day of April, 1922, the defendant filed a notice of motion to set aside the default judgment on the grounds that the defendant failed to answer the complaint within the time prescribed by law by reason of its "mistake, inadvertence, surprise, and excusable neglect." Section 473, Code Civ. Proc. Said notice fixed Monday, the 10th day of April, 1922, at 10 o'clock a. m., for the hearing of the motion. With this notice of motion the defendant filed an affidavit of merits made by L. W. Wheeler, the president of the defendant corporation, and also relied, in furtherance of the motion, on an affidavit filed on March 25, 1922, and made by W. H. George, the general manager and the attorney in fact for S. H. Cowell, Isabella M. Cowell, and Helen E. Cowell, the owners of the land upon which the seeds referred to were grown and who had leased said land to said Kagi; said affidavit having been so filed in support of a motion previously noticed to stay execution of the default judgmen. Accompanying these papers was also a proposed answer to the complaint. It is admitted by the appellant in his brief that respondent's proposed answer states a good defense to the complaint, and therefore it will not be necessary to reproduce herein the contents of the proposed answer.

The affidavit of L. W. Wheeler, after stating that deponent is president of the defendant corporation and briefly reciting the terms of the contract between said defendant and the said Kagi, is, in substance, as follows: That at the time that said contract was entered into an agreement was had between the defendant, Kagi, and the Cowells, above named, that Kagi was to execute and give to the said Cowells a chattel mortgage on the crops to be grown on said land as security for the payment of any rent which might fall due and become payable to the latter, who, as seen, were the owners of the land; that it was further agreed that there should be excepted from said chattel mortgage any seeds which might be furnished and delivered to the defendant under its contract with Kagi upon the distinct understanding and agreement that any sums to become due to said Kagi under said agreement should be paid to the Cowells as further security for the payment of any rent due for the use of the land; that under the contract between Kagi and the defendant the sum of $1,157.79, and no more, became due to the former; that demand was made upon defendant by the plaintiff herein for any moneys due under said contract and that when said demand was made the defendant agreed with the said Cowells and the latter agreed with the defendant that they would defend and protect the said defendant against any claim the plaintiff might make herein against the defendant for any sums due to said Kagi under the said contract, and that under said understanding and agreement the said defendant paid to the Cowells the said sum of $1,157.79, due and payable to said Kagi under his contract with the defendant; that the summons and copy of the complaint in this action were served upon the affiant as the president of the defendant, as above stated, on the 31st day of January, 1922, and that, acting upon the understanding and agreement with the Cowells that the latter would protect and defend the defendant in any suit or action brought by the plaintiff against the defendant to recover the said sum of $1,157.79, he forwarded said summons and complaint to W. H. George, the general manager and attorney in fact of the Cowells; that affiant believed that said Cowells would proceed to answer the said complaint and defend the said action; that the defendant, under the terms of the contract with Kagi, was justly indebted to the latter in the sum of $1,157.79 and no more, "excepting that it was clearly understood and agreed that the same should be paid to the said S. H. Cowell, Isabella M. Cowell, and Helen E. Cowell as security for any moneys due from S. Kagi to the said" Cowells; "that affiant is informed and believes and therefore alleges that judgment has been entered against said defendant for more than double the amount which would be justly due to the said S. Kagi under any circumstances."

The affidavit of W. H. George, above referred to, declares that the land upon which the seeds were grown was leased to S. Kagi by the Cowells above named; that Kagi made, executed, and delivered to the Cowells a chattel mortgage on all growing crops to be raised on said land for the season, December 1, 1920, to December 1, 1921, except those raised under contract with the said defendant; that the Cowells had an understanding and agreement with Kagi and the defendant that the chattel mortgage should not cover the seeds raised under the contract between Kagi and the defendant, "for the reason that the said Pieters-Wheeler Seed Company was unwilling to make the necessary advances for planting, cultivating, and harvesting the said seed crop if the same were covered by a chattel mortgage," and that there was a further understanding and agreement between Kagi, the defendant, and the Cowells that there should be and there was assigned to the Cowells all the proceeds and profits of the said seed crops over and above the advances made by the defendant, to be applied by the

Cowells "upon the payment of the said sums due from the said Kagi to the said S. H. Cowell, Isabella M. Cowell, and Helen E. Cowell"; that at or about the time of harvest in the year 1921 Kagi absconded and disappeared and abandoned the said land and the seed crops thereon and did not pay the rent of said land or the other sums due the Cowells, and that said Cowells commenced a suit in the superior court of the city and county of San Francisco to foreclose the said chattel mortgage; that the value of the property covered by said mortgage is wholly insufficient to pay the sums due the said Cowells, and that said Kagi is utterly insolvent and has no property of any kind or character whatsoever; that, in accordance with the understanding and agreement with the said Cowells, the said Kagi, and the said defendant, the last-named accounted to the said Cowells and paid to them the sum of $1,157.79, which was all that was due the said Kagi under the agreement with the defendant for the raising of said seed; that on or about the 20th day of January, 1922, the present action was commenced and copy of the complaint served upon the defendant in the city of Gilroy, county of Santa Clara, on the 31st day of January, 1922; that affiant, as manager of the Cowells, agreed with the defendant to defend and protect it against the claim of the plaintiff, I. Sofuye, and in accordance with said agreement the defendant forwarded the summons and copy of the complaint to the affiant in the city of San Francisco, "but the affiant believed that the whole matter was covered in the suit to foreclose the said chattel mortgage and neglected to take the matter up with his attorney, whereupon the said plaintiff has entered the default of said defendant and obtained judgment thereon, as affiant is informed and believes, for a sum more than double the amount which could have been, by any possibility, due to the said S. Kagi"; that affiant has fully and fairly stated the facts of the case to his attorney and is informed by the said attorney and therefore states that the Cowells have a claim to the moneys due from the said defendant prior to and superior to the claim of the said I. Sofuye.

No counter affidavit was filed or any showing otherwise made in rebuttal of the salient facts set forth in the foregoing affidavits. One of the attorneys for the appellant did make and file an affidavit, which, however, contains nothing which affects or bears upon the question to be determined upon this appeal.

[1, 2] It cannot justly be declared, upon the record as it is presented here, that the action of the court below in granting the relief asked for by the defendant involved error. An application for relief, under section 473 of the Code of Civil Procedure, from the consequences of a default judgment, is addressed to the sound judicial discretion of the court to which such application is made; and, unless it can be said from the face of the record on appeal that, in granting or disallowing such a motion, the nisi prius court has abused the discretion committed to it in disposing of such a proceeding, the order will not be disturbed on appeal.

[3] It has for many years uniformly been held in this state that the power vested in trial courts by section 473 should be freely and liberally exercised by said courts to the end that they might "mould and direct its proceedings, so as to dispose of cases upon their substantial merits, and without unreasonable delay, regarding mere technicalities as obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial right." Roland v. Kreyenhagen, 18 Cal. 455; Brasher v. White, 53 Cal. App. 545, 200 Pac. 657, 661.

In Nicoll v. Weldon, 130 Cal. 667, 63 Pac. 64, it is said:

> "Section 473 * * * is a remedial provision and is to be liberally construed so as to dispose of cases upon their substantial merits, and to give to the party claiming in good faith to have a substantial defense to the action an opportunity to present it. Buell v. Emerich, 85 Cal. 116; Harbaugh v. Honey Lake, etc., Water Co., 109 Cal. 70; Melde v. Reynolds, 129 Cal. 308. It is for this reason that we more readily listen to an appeal from an order refusing to set aside a default, than where the motion has been granted, since in such case the defendant may be deprived of a substantial right, whereas it may be assumed, if nothing to the contrary is shown, that the plaintiff will be able at any time to establish his cause of action. If, for any reason, he will be unable to do so, that fact should be made to appear; but if he is merely subjected to delay or inconvenience by having the default set aside, he can be compensated therefor by the terms which the court will impose as the condition of granting the motion."

In Berri v. Rogero, 168 Cal. 736, 145 Pac 95, the rule enunciated by section 473 where that section has been successfully invoked in a proceeding involving the application to be relieved from a default judgment is admirably expounded by Chief Justice Sullivan, as follows:

> "The law does not favor snap judgments The policy of the law is to have every litigated case tried upon its merits, and it looks with disfavor upon a party who, regardless of the merits of his case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary. Where a party in default makes seasonable application to be relieved therefrom, and files an affidavit of merits alleging a good defense, and the plaintiff files no counter affidavit and makes no showing that he has suffered any prejudice or that injustice will result from the trial of the case upon its merits, very slight evidence will be required to justify a court in setting aside the

default. A broad discretion is allowed to courts in granting relief against default, and it is in cases only where the lower court has abused its discretion that the appellate court will reverse its action. Counsel for appellant and respondents in their briefs agree, and this court agrees with them, that the following is a correct statement of the rule applicable to courts in dealing with defaults: 'It is largely a matter of discretion, to be liberally exercised by the court in the furtherance of justice, and where the action of the trial court will result in a trial upon the merits, the appellate courts are very reluctant to interfere with the exercise of such discretion, and will do so only where it clearly appears that there has been a plain abuse of discretion.' "

It is said in Vinson v. Los Angeles Pac. R. Co., 147 Cal. 479, 483, that, where the trial court has granted or refused to grant an application for the setting aside of a default judgment, an appellate court will not interfere with the exercise of the discretion of the court below—

> "except in a case where a clear abuse of discretion is apparent. Particularly is this so where the discretion is exercised in favor of the granting of the relief sought, as such action tends to bring about a conclusion on the merits, which is always to be desired. O'Brien v. Leach, 139 Cal. 220 [96 Am. St. Rep. 105, and note, 72 Pac. 1004]. It has been said by this court that where the circumstances are such as to lead the court to hesitate in such a matter, it is better, as a general rule, that the doubt should be resolved in favor of the application. Watson v. San Francisco & Humboldt Bay R. R. Co., 41 Cal. 17."

[4] 1. It cannot be doubted that, under the circumstances, the defendant in this case proceeded within a reasonable time after the default was entered to take the necessary legal steps for securing an order setting aside the default judgment. The affidavit of W. H. George was filed eight days after the entry of judgment, and while this affidavit was not, when filed, intended as in furtherance of a motion to set aside the default, no such motion then having been filed, its purpose was, nevertheless, to secure a nullification of the default judgment and, as seen, was used in support of the motion subsequently made. The motion was filed 19 days after the default judgment was entered. One of the attorneys for the plaintiff addressed a letter at Stockton under date of March 18, 1922, to the defendant's manager at Gilroy in Santa Clara county, in which he notified the defendant of the entry of the judgment "on the 16th day of March, 1922, in the sum of $2,215.94," and it may safely be assumed that this letter was not received by the defendant's manager at Gilroy until the 20th or 21st of March.

2. The neglect of the defendant to answer the complaint within the time required by law was, as we have seen, due to the fact that the defendant had paid to the Cowells the sum of $1,157.79 which was coming to Kagi from the defendant upon an agreement between the defendant and the Cowells that the latter would protect and defend the defendant against any action which the plaintiff, as assignee of Kagi, might bring against the defendant to recover the amount so paid to the Cowells. While it was, as a matter of law, the duty of the defendant to have answered the complaint, still its reliance entirely upon the Cowells to keep their agreement to defend the action and thus protect the defendant appears to have been characterized by good faith and an honest belief that the Cowells would, upon receiving the summons and copy of the complaint, seasonably interpose an answer or demur to the plaintiff's pleading. In relying upon the promise of the Cowells or their manager to take the necessary steps to defend against the claim of plaintiff, the defendant acted as any reasonably careful person would ordinarily act, and therefore its neglect to answer within due legal time is, in our judgment, clearly excusable, within the meaning and intent of section 473. Viewing these considerations, together with the fact that defendant acted within a reasonable time after having been notified of the entry of the default judgment and the showing of a meritorious defense to the action, we have here a case to which the following observations in the case of Vinson v. Los Angeles Pac. R. Co., 147 Cal. 479, 82 Pac. 53, have peculiar and singularly pertinent application:

> "The inadvertence or neglect here was one that well might occur to a reasonably careful man, there is no pretense of bad faith, and the application for relief was made so promptly after the expiration of the ten days that no appreciable injury could have been caused to plaintiffs by the delay."

[5] It is contended, however, that in order to make a case for the relief sought herein it was necessary to show a legal excuse for the neglect of George, as the agent of the Cowells, in not answering the complaint within the time required, and that no such showing was made. The argument in support of this contention is that under the agreement between the Cowells and the defendant the relation of principal and agent was created and that the neglect of the latter is imputable to the defendant itself. Cases in which it is held that the negligence of the defaulting party's attorney to answer within the time prescribed constituted the negligence of the client are cited to sustain the argument thus advanced. We think, however, there is a difference between the two situations. While it is true that there was an element of principal and agent created by the agreement between the defendant and the Cowells, yet it cannot be said that

it was such a relation as exists between attorney and client. An attorney holds himself out as one who will faithfully perform any service within the scope of his profession committed to him by a litigant or a client, and when employed in his professional capacity is always specifically charged with the duty of taking such steps as the case requires shall be taken to protect or conserve the rights of the client. Here the defendant acted upon an agreement with parties who, so far as we know from the record, are not attorneys at law or professionally engaged in attending to the legal business of others. In other words, under the agreement between the defendant and the Cowells the latter were not employed to act as the former's attorneys or in a professional capacity. Hence the question for the court to determine was whether the defendant, in placing dependence upon the good faith of the Cowells as to the agreement between them and the former, acted in good faith and as a reasonably prudent business man would ordinarily act under such circumstances.

[6] It is further contended that, since the defendant paid to the Cowells the sum due from it to Kagi, and the Cowells thereupon agreed to defend any action which the plaintiff might institute to recover said money from the defendant, the latter has no financial interest in the action or its outcome; that therefore it has no such interest in the action as to justify it in interfering in any manner with the default judgment which was entered against it. There is no support either in law or in fact for this contention. The affidavits show that the judgment was against the defendant for a sum far in excess of any amount which Kagi or his assignee would, in any event, be entitled to recover. Moreover, if it should transpire that the defendant had illegally paid to the Cowells the sum which it admitted was due Kagi, it would be liable to the assignee of Kagi for the amount so paid, albeit in such case it would have a right of action against the Cowells for the return of said money. In this connection it may be suggested that the court, as it should have done, in passing upon the moton, in all probability took into consideration the fact, as alleged in the affidavits filed by the defendant, that the amount of the default judgment was so far beyond that which the plaintiff would in any case be entitled to recover that it would be unjust and perhaps result in injustice if the defendant were not permitted to litigate the claim involved in the judgment.

We have carefully examined the cases cited by the appellant and find that there is nothing in any of them which militates against the conclusion at which we have arrived. Each case must be determined upon its own peculiar circumstances and by the light of the rules as to such proceedings as this which are expounded and applied in the cases to which we have above referred.

The order appealed from is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

(62 Cal. App. 472)

BARRAGER v. WALLS. (Civ. 4177.)

(District Court of Appeal, Second District, Division 1, California. June 8, 1923.)

1. Good will 🔑7—Evidence held to establish breach of contract in depriving purchaser of former patronage.

In an action to recover a balance due plaintiff on the sale of certain business formerly owned by her, evidence *held* sufficient to establish that through her husband she had drawn off and deprived defendant of certain patronage to which he was entitled under the contract of sale.

2. Good will 🔑7—Evidence held to sustain finding seller of business had thereafter engaged in similar business in violation of his contract.

Testimony of four witnesses tending to prove that immediately after the sale of his business a vendor entered into a similar business in violation of a provision in the contract of sale, though disputed, *held* sufficient to sustain a finding to that effect.

3. Good will 🔑7—Failure of proof in one particular held not to preclude recovery of damages for breach of sales agreement.

In an action to recover a balance due plaintiff on the sale of a certain business, wherein defendant counterclaimed for damages, alleging that plaintiff and her husband had conspired to deprive him of the patronage to which he was entitled, and in violation of their contract had engaged in a similar business using formulas which they had agreed not to use, where the proof tended to establish the allegations of such counterclaim except the use of the formulas, *held*, that defendant's failure to prove the use of such formulas would not defeat his right to recover damages.

4. Sales 🔑359(1)—Evidence held insufficient to establish the amount of damages for the breach of a contract of sale by the seller.

In an action to recover a balance due on the sale of a certain business, wherein defendant counterclaimed for damages for the breach by plaintiffs of their contract of sale, evidence *held* insufficient to establish the amount of such damages as equivalent to the unpaid balance of the purchase price sued for.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Lena Barrager against James L. Walls. Judgment for defendant, and plaintiff appeals. Reversed, and remanded for new trial on a particular issue.

Burrel D. Neighbors and F. A. Jeffers, both of Los Angeles, for appellant.

Wm. T. Kendrick, Jr., of Los Angeles, for respondent.

CURTIS, J. This action was instituted for the purpose of recovering the sum of $2,750 alleged to be due plaintiff on the sale of a certain business carried on in the city of Los Angeles, formerly owned by plaintiff, and by her sold to defendant on April 4, 1921. Defendant, after denying certain allegations of the complaint, set up as an affirmative defense that he purchased the business and the property pertaining thereto from the plaintiff and her husband, paying therefor the sum of $4,115 in cash, and giving his check for $2,750 additional. He admitted said check had not been paid. He further alleged that plaintiff and her husband executed to him a bill of sale of said business and property, wherein they transferred said business and property, together with the good will of said business, to defendant, and further promised not to carry on or engage in a similar business within the city of Los Angeles for a period of one year, and that they would not use in the state of California the formulas used by defendant, or which had been theretofore used by plaintiff in said business; that immediately after said sale the plaintiff and her husband conspired to destroy defendant's business and to draw off customers from defendant by importuning them not to patronize defendant, but to do business with others, and represented to numerous regular customers of the defendant that defendant was soon to cease doing business, and would soon be out of said business, and recommended said customers to purchase goods from persons other than said defendant; that, pursuant to said conspiracy, and as a result of the acts of said plaintiff and her husband, a large number of regular and other customers of the defendant in said business had been induced to withdraw their business from defendant, and defendant had thereby been deprived to a large extent of the good will so purchased by him to his damage in the sum of $2,750, and that plaintiff and her husband are using, through others, the formulas mentioned in said bill of sale, and contrary to the provisions thereof, and that plaintiff and her husband have co-operated with others to take away the business from the defendant.

[1] The court found in favor of defendant upon all the issues raised by his separate defense, and gave judgment in his favor, it having been stipulated that all the acts of F. J. Barrager, the husband of plaintiff, might be considered to be the acts of the plaintiff. Plaintiff appeals from said judgment, and the sole ground of her appeal is that there is no evidence to support the findings of the court.

Appellant first claims that there is no evidence to show that either she or her husband ever drew off or deprived respondent of the trade of a single customer of the business sold. The witness Houk testified that he was present when appellant's husband, with a Mr. Lieb, were endeavoring to persuade a Mr. Fontes, a customer of respondent, to transfer his business from the defendant to a new firm composed of Barrager and Lieb. The witness Conboy testified that all of the customers of the defendant were taken away. He further testified that Barrager and Lieb simply froze the respondent out; that they took his money and then froze him out, and that they started in business again. This testimony would tend to establish the fact that the husband of appellant, F. J. Barrager, drew off and deprived respondent of the trade of the customers of the business sold, and, when taken in connection with the stipulation above mentioned, was sufficient to support the finding of the court upon this issue.

[2] Appellant next specifies that the record does not show that appellant or her husband entered into any business of a similar nature within the county of Los Angeles within one year from the date of the sale to respondent. The business sold to respondent was known as the Cabin Beverage Company, and consisted of the manufacture and sale of cider. The witnesses Swisher, Houk, Vail, and Conboy, all gave testimony tending to prove that immediately after the sale by appellant to respondent L. J. Barrager and Lieb entered into the business of manufacturing and selling cider within the city of Los Angeles. This testimony, it is true, is disputed by L. J. Barrager and other witnesses of appellant; but the trial court evidently was impressed with the testimony of respondent's witnesses, and found, upon their testimony, in favor of respondent. The testimony above referred to amply supports this finding.

[3] The third exception taken by appellant to the findings of the court is that the record nowhere shows that appellant or her husband ever used or attempted to use the formulas used by the Cabin Beverage Company and sold by appellant to respondent. There is very little testimony upon this issue, and it may be doubted whether there is sufficient testimony to support this finding; but, conceding this to be true, it does not necessarily follow that for this reason the judgment should be reversed. The court having found on sufficient evidence that F. J. Barrager, appellant's husband, had established and carried on a similar business to that sold by appellant to respondent, contrary to the express provisions of

the bill of sale transferring the said business, it would not be a matter of any great consequence, legally speaking, whether or not he used in this business the formulas which he had formerly used in the business of the Cabin Beverage Company. If it had been satisfactorily proven that he had used these formulas, this fact would have been an additional reason why respondent should have prevailed in this action; but the failure of respondent to establish this fact after having established other facts which in themselves were sufficient to entitle him to recover would not in any way impair or invalidate the judgment in his favor.

[4] The further objection is made that there is no evidence to support the finding that respondent was damaged in the sum of $2,750. It is not claimed that there is any direct testimony as to the amount of damages sustained by respondent.

But it is contended on behalf of the respondent that he paid for said business and good will a consideration of $2,750, and that there is evidence to the effect that all of the customers of the respondent were taken away from him, and that "they simply got him out of business—took his money and then froze him out." In other words, respondent claims that the testimony shows that the entire business purchased by him from appellant was ruined by the acts of herself and husband, and that, as he paid the sum of $2,750 for said business and good will, he was damaged in at least the amount of said sum. We agree with respondent to the extent that the testimony justifies the finding of the court that his business was practically destroyed by the acts of the Barragers, but we are not entirely convinced that there is any testimony which warranted the court in fixing the amount of damages sustained by respondent at the sum of $2,750. The price fixed by the bill of sale which defendant was to pay was $4,115 in cash, and the check of $2,750. There is no dispute upon this point. The property transferred by the bill of sale was "the goods, chattels, and personal property of every kind and nature now on hand and used or heretofore used in the business commonly known as the Cabin Beverage Company, located at 1200 West Fifty-Eighth street, in the city of Los Angeles, county of Los Angeles, state of California, together with all machinery, equipment, and formulas used in making products handled or used by the said business as well as all fixtures, paraphernalia used therein, including all barrels, kegs, one Ford roadster, and one Moreland truck, as well as all outstanding accounts, notes, bills, payable due to them and all debts and obligations due and owing to them or either of them, including all things used and connected in any way with the said business, including all cash in bank belonging to the said firm, including also the lease on the real property and all leases on all property now or heretofore used or owned in connection with the said business, including also all personal property specially set forth in the schedule hereto attached marked 'Exhibit A', and made a part hereof. It being understood and agreed that the lease of the real estate heretofore described will be assigned to the said Walls simultaneously with this transfer, and the said vendors agree to assign and deliver all accounts, notes, bills, and other papers concerning the said business, together with the business and good will of the said business heretofore conducted by the said vendors at the place aforesaid."

This property was sold as a whole for the stipulated sum of $6,865; the business and good will was only a part of the property to be transferred. Conceding that the business was absolutely and totally destroyed, yet the respondent still had in his possession, as a result of the purchase from appellant, a large amount of personal property, consisting, among other things, of a Moreland truck, a Ford roadster, machinery, equipment, and fixtures, outstanding accounts, cash in bank, and leases of real property.

It may be conceded that proof of the agreed price of the property sold is a prima facie showing of its value, yet we have in this action proof of the agreed price of the whole of the property sold when damages are sought for the loss of only a part of it. It may be true, as contended by respondent, that plaintiff alleged in paragraph III of her complaint that the $2,750 was agreed to be paid for "all the interest of plaintiff, of, in and to said business." The court found paragraph III to be true. The court further found that defendant purchased the whole of the property described in the bill of sale for the sum of $4,115 in cash and the check for $2,750, amounting in the aggregate to the sum of $6,865. There was no evidence, nor was it claimed during the trial, that the sum of $2,750 or any specific amount was paid for the business and good will, separate and apart from the consideration paid for all the property described in the bill of sale. On the other hand, the testimony shows that the property was sold and agreed to be paid for as a whole, and in our opinion the findings are to be so construed.

It follows, therefore, that the record fails to show that there was any evidence to justify the finding that defendant was damaged in the sum of $2,750. All the other findings of the court are sustained by the evidence, and it is not necessary to disturb any of them. It will be necessary, however, that there be a new trial upon the issue as to the amount of damages sustained by defendant, and there should be a reversal for that purpose alone.

It is ordered that the judgment be reversed, and that the cause be remanded for a new trial on the issue as to the amount of damages sustained by the defendant, and for further proceedings in accordance with this opinion.

We concur: CONREY, P. J.; HOUSER, J.

WILLIAMS et al. v. ANDREWS, Superior Court Judge, et al. (Civ. 4165.)

(District Court of Appeal, Second District, Division 1, California. March 26, 1923.)

1. **Courts ⚷472(2)—Appellate court can issue to compel certification of transcript for appeal to Supreme Court.**

Under Const. art. 6, § 4, the jurisdiction of the appellate courts to issue mandates to inferior courts is concurrent with that of the Supreme Court, and the appellate court can issue the writ to require a judge of the superior court to certify a transcript, even though the case is one in which the Supreme Court only has jurisdiction of the appeal.

2. **Mandamus ⚷14(2)—Delay in procuring transcript held to defeat right to mandamus to compel certification.**

Where appellants' attorneys had presented a transcript to the clerk for presentation to the court for certification, as required by Code Civ. Proc. § 953a, but on the date fixed the judge was absent, and thereafter more than a year elapsed without appellant's counsel bringing the matter to the court's attention except by occasional inquiries of the clerk or judge, the delays in procuring action by the judge were unreasonable and gross laches, which defeats the right to compel the judge to certify the transcript.

Application for mandamus by Mina W. Williams and another against C. N. Andrews, as Judge of the Superior Court of the State of California, and J. B. McLees, County Clerk of San Diego County, to require certification of reporter's transcript and transmission of clerk's transcript and transmission of records. Mandamus for certification of transcript denied, and that for transmission of record to Supreme Court granted.

L. E. Dadmun, of San Diego, for petitioners.

Eugene Daney and Frederic W. Stearns, both of San Diego, for respondents.

HOUSER, J. This is a petition for a writ of mandate directing Hon. C. N. Andrews, judge of the superior court of the state of California in and for the county of San Diego, to certify to the truth and correctness of a reporter's transcript, and also directing that J. B. McLees, as clerk of the superior court of said San Diego county, transmit to the clerk of the Supreme Court of the state of California the clerk's transcript and records prepared in accordance with the provisions of section 953a of the Code of Civil Procedure. A demurrer was interposed, which, while general in that it specifies that the petition does not state facts sufficient to authorize the issuance of the writ of mandate as prayed for, is also special in that it sets up alleged inexcusable delay on the part of petitioners in the matter of procuring the necessary certification of the transcript by the said judge of the trial court, as well as in procuring the transmittal to the said clerk of the Supreme Court of the said clerk's transcript and other documents therein referred to.

No question is raised as to the regularity of any of the proceedings in the cause leading up to the preparation of the reporter's transcript, and, in the absence of an answering affidavit as such covering the facts in the matter, it must be presumed that all statements contained in the affidavit accompanying the petition are true, and from which it appears, among other things, that within five days after the receipt by the clerk of the reporter's transcript the said clerk served by mail upon the plaintiffs and the defendants in said action a notice fixing the time for the presentation of the transcript to the court for its certification in accordance with the provisions of section 953a of the Code of Civil Procedure, fixing a date for presenting said transcript for approval on the 3d day of September, 1921, at 10 o'clock a. m.; that on that date the judge of the trial court was absent on his vacation, and did not return until about the 1st day of October, 1921; that no objections were offered or made to the transcript by either the plaintiffs or the defendants, nor was there any suggestion or request made by either plaintiffs or defendants to insert in said transcript any matter not therein included; that upon the return of the trial judge he failed and neglected to certify to said transcript, and in the month of May, 1922, pursuant to a conversation with said judge, said petitioners requested the clerk of the department in which said judge presided to ascertain and to fix a date when it would be convenient to court and counsel for defendants to take up the matter of approving and certifying said transcript, but that neither the court nor the clerk at any time fixed any date pursuant to said request; that on the 15th day of January, 1923, in open court, and in the presence of the attorneys for defendants, plaintiffs insisted upon the court's fixing a time for the approval and certification of said transcript, and the court did then and there set and fix the time as the 22d day of January, 1923, at

2 o'clock p. m., on which date, all parties being present, on the objection of counsel for defendants, the court refused and declined to approve and certify said transcript.

[1] On the hearing of the alternative order made herein counsel for respondents made a motion, which was argued and submitted, to dismiss the writ on the ground, that if any appeal should be taken in the action, it was one which should be made to the Supreme Court, and for that reason the mandate, if any, should issue from the Supreme Court rather than from the District Court of Appeal. Section 4 of article 6 of the California Constitution directly confers such powers on District Courts of Appeal; and, while Chief Justice Beatty, in writing the opinion of the court in the case of Collins v. Superior Court, 147 Cal. 264, 81 Pac. 509, made it plain that "when a case is such that an appeal from the judgment of the lower court would properly be taken to the District Court of Appeal, a petition to prohibit the proceeding should be addressed to that court," and that it was desired "in the outset to make a precedent to be followed in like cases" thereafter, in a later case entitled Matter of Application of Davidson, 167 Cal. 727, 141 Pac. 216, in which a petition for a writ of mandate was commenced in the District Court of Appeal, but, because that court was of the opinion that it had no jurisdiction of the matter by reason of the fact that it had no direct appellate jurisdiction of the cause pending in the superior court, the District Court of Appeal declined to act, and transferred the application to the Supreme Court, it was said that—

> "The Constitution gives the District Court of Appeal original jurisdiction of proceedings in mandamus, in language identical with that giving such jurisdiction to the Supreme Court. Its jurisdiction in such matters is, therefore, coequal with our own and does not depend upon the existence of appellate jurisdiction over the case to which the mandamus relates."

And in that case it was further ordered that the papers be forthwith returned to the District Court of Appeal, and that that court proceed "to a decision of the cause, as in other cases." In Favorite v. Superior Court, 181 Cal. 265, 184 Pac. 16, 8 A. L. R. 290, Judge Shaw, in speaking of the question of jurisdiction, used the following language:

> "There is no merit in the motion of respondent to quash the writ of prohibition issued by the district court. The motion was based on the claim that the case before the superior court was an action in equity—a case in which appellate jurisdiction is, by the Constitution, lodged in the first instance, in the Supreme Court alone (Const. art. 6, § 4), from which fact, it is argued, an original proceeding in prohibition to prevent action by the superior court in such a case is cognizable only in the Supreme Court. This assumption is not correct. The same section of the Constitution gives equal and concurrent jurisdiction to the district courts and to the Supreme Court to issue writs of prohibition in all proper cases. So far as jurisdiction to do so is concerned, the questions of appellate jurisdiction and of the nature of the action in which the act sought to be prohibited is threatened are entirely immaterial. As a matter of policy and practice, both this court and the district courts, respectively, have at times refused to take jurisdiction of an original proceeding where the case involved was in the superior court and was originally appealable to the other court. [Citing cases.] But this practice was not adopted because of any want of original jurisdiction in such cases in either court."

There are some decisions by Courts of Appeal of this state from which it would appear that in circumstances such as are here presented no jurisdiction exists in this court; but, while such decisions are persuasive, they are not controlling. As the matter is one of "policy and practice," the proper course, so it appears to this court, is indicated in the case of Reclamation District v. Ash (Cal. App.) 208 Pac. 394, where it is said that—

> "Having once issued the alternative writ and thus signified its willingness to entertain the proceeding, a District Court of Appeal will not dismiss such proceeding merely because the subject-matter to which the writ pertains is solely of equitable cognizance and of which the Supreme Court has exclusive appellate jurisdiction."

It therefore follows that the motion to dismiss must be denied.

The petitioners contend that upon the presentation to the judge of the reporter's transcript it was the duty of the judge to examine same, and, if found to be correct, to certify to the truth and correctness of the transcript. On the other hand, it is respondents' contention that, because the judge failed and neglected to certify to said transcript within a reasonable time, the duty devolved upon petitioners to take immediate action in the matter; to which petitioners reply that, petitioners having done everything required of them by law, they could not be held responsible for the failure or neglect or laches of the officers of the court in performing their duty. The delay in finally bringing the matter to the attention of the court covered a period of over 16 months, and, while petitioners contend that it was not their duty to see to it that the transcript was certified within a reasonable time, as an answer to the charge of negligence preferred against them by respondents, petitioners show by their affidavits that after the 3d day of September, 1921 (which was the date originally fixed by the clerk for having the transcript certified and approved by the judge, and which matter could not receive the attention of the judge by reason of the fact that he was away on his vacation, from which he returned on about October 1, 1921), and on the 13th day of October, 1921, counsel for petitioners left the city of San Diego for the city of Washington, D. C., on legal business which occupied his time until November 23, 1921, when he returned to the city of San Diego, at which time he made inquiry of the judge's clerk, and was informed by him that the transcript had not been approved; that thereafter he spoke to the judge about approving said transcript, but was again called to Washington, D. C., on the 3d day of January, 1922, and did not return to San Diego until the 25th day of February, 1922; that between the 13th and the 16th days of March, 1922, he was engaged in the trial of a case in the county of Imperial; that thereafter he again made inquiry of the judge's clerk as to whether the transcript had been approved, but was again informed that it had not been approved; that thereupon, which was during either the month of May or the month of June, 1922, he spoke to the judge about approving the transcript, to which the judge replied that he did not wish to do so unless the attorneys for the respondents were present; whereupon counsel for petitioners requested the judge to fix some time for considering the matter, to which the judge replied that any time when he was not engaged, and which would be convenient to both sides, would be satisfactory to him; that thereupon counsel for petitioners requested the judge's clerk to fix a date that would be convenient to the court and to notify counsel for petitioners and counsel for respondents as to the time so fixed; that thereafter, on or about the 15th day of January, 1923, counsel for petitioners, in the presence of counsel for respondents, requested the judge to take up the matter of approving said transcript, at which time the judge set the date for certifying and approving the same as of January 22, 1923.

The provisions of section 953a, Code of Civil Procedure, relating to this matter, are to the effect that, after the transcript has been filed with the clerk of the court, it shall be his duty to forthwith give the attorneys appearing in said cause notice that said transcript has been filed, and stating the time at which the transcript will be presented to the judge for his approval and certification. A consideration of some of the authorities shows as follows: The case of Town of Mill Valley v. Massachusetts Bonding & Insurance Co. (Cal. Sup.) 207 Pac. 253, involved, among other things, the delay of the stenographic reporter in preparing a transcript of the testimony within the statutory period, which delay was shown to have been unavoidable because of the extreme length of the transcript. It was held that, even if the stenographic reporter had been negligent in the preparation of the transcript, such default should not be properly charged to appellant, and the court said:

> "When proceeding under section 953a the appellant must rely on the official conduct of the officers of the court. Their delay or default is not his delay or default."

In Jansson v. National Steamship Co. (Cal. Sup.) 208 Pac. 90, plaintiff presented the objection that no statement on motion for new trial had been prepared, settled, and filed at the time the motion for new trial was heard by the trial court. The record discloses that the defendant's time to serve its proposed bill of exceptions was extended to March 29, 1915, and that a copy thereof was served upon plaintiff prior to the expiration of such extension; that thereafter, on April 30, 1915, plaintiff served on defendant a copy of his proposed amendments to defendant's proposed bill; that on May 8, 1915, and within time, defendant notified plaintiff that defendant rejected the latter's amendments, and that on said date the proposed bill and amendments were presented to the court for settlement. In considering that point the court said, among other things:

> "When once in the hands of the clerk for the judge or court, the law does not specifically declare the time within which the judge must act upon it. The delay of the judge, if any, in settling the bill of exceptions, cannot, under circumstances such as are present here, be attributed to the moving party or his attorney, and he should not be made to suffer by reason thereof. It is the duty of the moving party to present the proposed bill and amendments, * * * and that is exactly what was done here."

An Idaho case, entitled Johnson v. Ensign, reported in 34 Idaho, 374, 201 Pac. 723, is also in point. It is there held that, when a reporter's transcript is seasonably delivered to the trial judge for settlement, it is the duty of the judge promptly to settle it, and that, under the statute covering the matter, after a transcript is duly delivered to the trial judge for settlement, he becomes the actor; that the law imposes upon him the duty of giving such notice as may be required, and of settling the transcript when it is in such condition that he can properly settle it. The Idaho statute governing the matter provided that—

> "The transcript, with any notice designating errors, shall be transmitted to the judge who tried the cause, * * * and such judge shall forthwith settle the same, notifying the parties by such notice as he deems adequate of the time and place of settlement." C. S. § 6886.

It will be noted in the case of Town of Mill Valley v. Massachusetts Bonding and Insurance Co., supra, that, while the matter under consideration was only the failure of the stenographic reporter to prepare the transcript of the testimony within the statutory period, the court dealt generally with the question when it said that appellant must rely upon the official conduct of the officers of the court, and that their delay or default was not his delay or default. In such a case, after an appellant has procured the necessary order for the transcription of the testimony, there is nothing further possible that appellants may do in the premises. The work to be done is of such a personal character that the reporter who takes the testimony is the only person who can with any degree of accuracy transcribe his notes. If it be impracticable for him to perform his duties in that respect within the time prescribed by the statute, certainly the appellant ought not to be prejudiced thereby. The delay in such a case is excusable; but the facts in the case referred to do not fit the facts in the instant case. In Jansson v. National Steamship Co., supra, while the date when the bill of exceptions was presented to the court for settlement is shown, there is nothing in the opinion which indicates that there was any delay on the part of the judge in settling the bill of exceptions other than that the bill had not been settled at the time the motion for new trial was heard, and the court ruled that, inasmuch as the bill had been approved and was on file at the date of the making of the order, such hearing, at most, was a mere irregularity, and in no way injurious to plaintiff. The language of the court that, under the circumstances as were then presented, the delay of the judge could not be attributed to the appellant, while helpful in the instant case, is not conclusive. In the Idaho case the ruling depended primarily upon the mandatory provisions of the statute requiring the judge on receipt of the reporter's transcript, with the "notice designating errors," to forthwith settle the same and to notify the parties by such notice as he deemed adequate of the time and place of settlement. The great difference between such a statute and section 953a, Code of Civil Procedure, is that section 953a contains no provision with reference either to the time when the judge shall certify to the reporter's transcript nor regarding the giving of any notice by the judge to any of the parties to the action; hence the decision in the Idaho case is not particularly apt.

The California cases dealing with the other side of the question are to the effect that it is the duty of the appellant at all times to take whatever steps may be necessary to bring the matter to the attention of the court, and to show some excuse or explanation for any delay in taking such steps.

In Miller v. Queen Insurance Co., 2 Cal. App. 267, 83 Pac. 287, it appeared, as in the case at bar, that the first delay in settling the bill of exceptions was caused by the absence of the trial judge. After his return no action was taken in the matter for perhaps four months, at the expiration of which time, and for a period of another month, the attorneys met with the judge at intervals, and attempted to agree upon a settlement of the proposed bill, however without success. A delay of five months thereafter then occurred, when a motion was made by plaintiff to dismiss defendant's motion for a new trial. The court said:

> "Upon the foregoing facts the burden was thrown upon the defendant to show some excuse or explanation for its delay in taking the steps requisite for enabling the court to hear and determine its motion for a new trial, including the settlement and filing of the bill of exceptions setting forth the matters upon which the motion was to be heard; otherwise, the court would be authorized to hold that it had not acted with due diligence and to grant the motion of the plaintiff. The defendant was the moving party in the proceeding for a new trial, and the burden was at all times upon it to take whatever steps were necessary to enable the court to hear its motion. Kubli v. Hawkett, 89 Cal. 638, 27 Pac. 57; San Jose Land Co. v. Allen, 129 Cal. 247, 61 Pac. 1083; Mowry v. Weisenborn, 137 Cal. 110, 69 Pac. 971; Galbraith v. Lowe, 142 Cal. 295, 75 Pac. 831."

In the companion case of Miller v. American Central Insurance Co., 2 Cal. App. 273, 83 Pac. 290, the court said:

> "The fact that the judge was absent from the city at the time the engrossment was completed, and for several days thereafter, did not relieve the defendant from the necessity of diligence in ascertaining the date of his return and in seeking to procure his authentication to the bill."

In this connection it should be remembered that the duties of the judge are much more emphatically expressed in the statute relating to the settlement of bills of exception (Code Civ. Proc. § 650) than they are provided for in the statute covering the approval and the certification of the reporter's transcript (Code Civ. Proc. § 953a). In the former the statute is that, "when received from the clerk, the judge must designate the time at which he will settle the bill. * * * At the time designated, the judge must settle the bill"—while in the latter statute no direct duty devolves upon the judge, excepting that "at the time specified in the notice of the clerk to the attorneys said transcript shall be presented to the judge for his approval," etc.

Having to do with the duty of an appellant in a matter of this kind, it is said, in Estate of Depeaux, 118 Cal. 523, 50 Pac. 683, that—

> "It is the duty of the party seeking to avail himself of a bill of exceptions, for the purpose of obtaining a review of the action of the superior court, to take whatever steps may be necessary to procure its settlement."

And in Smith v. Jaccard, 20 Cal. App. 280,[1] it is held that it is the duty of an appellant as the moving party to take the necessary steps to procure the filing of the reporter's transcript, and for want of diligence on the part of appellant in that regard the court has power to terminate proceedings for procuring such transcript. Galbraith v. Lowe, 142 Cal. 297, 75 Pac. 831, and Dorcy v. Brodis, 153 Cal. 675, 96 Pac. 278, are authorities to the effect that—

---

[1] 128 Pac. 1023, 1026.

> "The motion for a new trial is an independent proceeding in an action, in which the burden of acting is at all times upon the moving party."

And as having a bearing upon this phase of the question, see Moore v. Kendall, 121 Cal. 145, 53 Pac. 647.

The petitioners' delays in the instant case cover a period of over 16 months. After the judge's return on October 1, 1921, from his vacation, a period of 12 days elapsed before counsel for petitioners left San Diego for Washington, D. C. Upon his return to San Diego, on November 23, 1921, nothing was done by him in connection with getting the transcript approved by the judge other than the making of a single inquiry of the judge's clerk whether or not it had been done. Matters remained in statu quo until January 3, 1922, a period of about 6 weeks, when counsel for petitioners again went to Washington, D. C., from which place he again returned to San Diego on February 25, 1922, where he remained quiescent, so far as this matter was concerned, until the 13th of March, 1922, when he was absent from San Diego for a period of three days. On his return he again contented himself with making an inquiry of the judge's clerk, who informed him that the transcript had not been approved. Nothing further appears to have been done by counsel for a period of 2 or 3 months, when he took occasion to speak to the judge about approving the transcript, to which the judge replied that he did not wish to do so unless the attorneys for respondents were present. Counsel then requested the judge's clerk to fix a date for hearing the matter, and to notify attorneys on either side thereof; but nothing was actually done thereafter by anybody connected with the case until the 15th day of January, 1923, a period covering at least 7 months.

[2] As has been indicated, the weight of authority is to the effect that the burden is cast upon the appellant in a matter of procuring the approval and certification by the judge of the reporter's transcript. That he must act diligently in that regard is beyond question. Petitioners' delays in procuring action by the judge were unreasonable and are not satisfactorily explained. Petitioners have been guilty of gross laches in the premises, and are not entitled to the relief which they seek at the hands of this court. In the circumstances the judge of the lower court was right in refusing his approval and certification of the transcript.

Neither argument nor authority has been presented by either side with reference to the propriety of the issuance of the writ prayed for as to respondent J. B. McLees, acting in the capacity of clerk of the superior court, requiring him to transmit to the clerk of the Supreme Court the clerk's transcript and records prepared in accordance with the provisions of the statute. As to that feature of the matter, no reason being assigned for its refusal, it is ordered that the writ issue as prayed; otherwise the issuance of the writ prayed for is denied.

We concur: CONREY, P. J.; CURTIS, J.

WILLIAMS et al. v. ANDREWS, Superior Court Judge, et al. (L. A. 7708.)

(Supreme Court of California. June 16, 1923.)

Mandamus ⚷10—Facts held not to show unreasonable delay defeating right to have transcript settled.

Where the circumstances under which the settling of a transcript by the trial judge was delayed do not show such unreasonable delay as to relieve the court of its duty to settle the transcript, a peremptory writ of mandamus will be ordered to require such settlement.

In Bank.

Application by Mina W. Williams and another against C. N. Andrews, as Judge of the Superior Court of San Diego County, and others to require settlement of the transcript. Writ granted.

L. E. Dadmun, of San Diego, for petitioners.

Eugene Daney and Fred W. Stearns, both of San Diego, for respondents.

PER CURIAM. It appears to the court from the petition herein that there has been no unreasonable delay under the circumstances stated in the petition, and that it was the duty of the court to settle the transcript. A peremptory writ of mandamus will be ordered.

191 Cal. 426

SEARLES v. GONZALEZ et al.
(L. A. 7436.)

(Supreme Court of California. July 5, 1923.)

1. Limitation of actions ⚷148(3)—Written acknowledgment tolling statute may be check connected by parol with notice of interest.

Under Code Civ. Proc. § 360, a written acknowledgment signed by the party to be charged, may be the check of the debtor sent to the creditor in an envelope containing notice of interest, of the amount of the check, due on a note, which notice had been sent by the creditor, such connecting facts being shown by parol.

2. Limitation of actions ⚷143(2)—Generally joint obligor's promise does not toll statute against the others.

Generally a promise by one joint obligor does not toll the statute as against the others.

In Bank.

Appeal from Superior Court, San Diego County; Edgar A. Luce, Judge.

Action by James H. Searles against Ella Ibs Gonzalez, with cross-complaint against plaintiff and others. From judgment for plaintiff, defendant appeals. Reversed.

Ralph E. Jenney and Wirt Francis, both of San Diego, for appellant.

W. J. Mossholder, of San Diego, for respondent.

H. W. Scheld, of San Diego, for cross-defendants.

WASTE, J. The plaintiff brought this action to quiet title to certain real property. The defendant answered and filed a cross-complaint setting up an unpaid note and mortgage executed by the plaintiff's grantors, who were made cross-defendants. On its face the note was barred by the statute of limitations, but the defendant alleged that the makers thereof had, at various times, "acknowledged to this defendant their certain indebtedness to her and promised to pay the same, which said acknowledgments and promises were contained in several writings signed by said cross-defendants." She prayed for foreclosure of the mortgage and for deficiency judgment against the makers of the note. Judgment was entered for the plaintiff, and the defendant has appealed.

[1] The only issue raised by the pleadings and tried in the court below relates to the application of section 360 of the Code of Civil Procedure, which provides that no acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of the statute of limitations, unless the acknowledgment or promise is contained in some writing, signed by the party to be charged thereby.

The evidence is uncontradicted. On the 9th day of April, 1914, the cross-defendants, Leroy H. and Nani A. Arnold, executed and delivered to the appellant, Mrs. Gonzalez, a certain promissory note for the sum of $5,000, bearing date on that day, and due three years after date, with interest thereon at the rate of 8 per cent. per annum, payable quarterly. As security for the payment of such note, they executed a mortgage on the real property described in the complaint, the lien of which plaintiff seeks to remove in this action. Mrs. Gonzalez placed the note and mortgage for collection with the Southern Trust & Commerce Bank of San Diego, which institution, it is admitted, acted as her agent in dealing with Arnold during the entire transaction. Arnold testified that he kept track of the quarterly interest payments through regular interest notices sent to him by the bank just shortly prior to the payments becoming due. He thereupon wrote his check to the bank for the exact amount of quarterly interest due, $100, and "inclosed the notice in an envelope with the check and mailed it to the bank; that was the general procedure;" or he took the notice and check in person to the bank. He continued this practice until some time in the year 1921. On one occasion, on October 13, 1917, not having received the interest notice, he wrote the Southern Trust & Commerce Bank of San Diego as follows:

> "I have received no notice from you regarding interest on my note to Mrs. Maguil Gonzalez for $5000.00 which I believe was due Oct. 9, 1917.
>
> "I have always received a notice from you and paid the interest at your bank.
>
> "I inclose check for the amount, $100.00. If you still have the note please apply it on same if not please return it to me and inform me if possible to whom it is to be paid."

No other writings relating to the matter were ever signed by either Arnold or his wife, and no other acknowledgments or references to the indebtedness appear to have been contained in any writings that passed between the parties connected with the transaction. In January, 1922, the Arnolds transferred the mortgaged property to the plaintiff, who immediately brought the action against Mrs. Gonzalez to quiet title to the property. The foregoing facts were established at the trial, but when the note and mortgage were offered in evidence by the cross-complainant, the trial court sustained an objection that the cause of action was barred by the statute of limitations on April 9, 1921. The judgment is an affirmance of that contention.

When the plaintiff bought the property and instituted this suit, the records showed that the lien of the mortgage had become extinguished. Civ. Code, § 2911. The judg-

---

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ment must therefore be affirmed, unless the right of action on the note had been kept alive and enforceable by some means legally effective to toll the running of the statute of limitations. Appellant seeks to obtain a reversal by contending that when Arnold, one of the makers of the note, signed his personal checks for the exact amounts of the installments of quarterly interest and delivered those checks to the bank as agent for the appellant, accompanied by the notices which the bank had sent to him and which referred to the note, giving the amount and description thereof, and the amount of interest due, the transaction amounted to an acknowledgment in writing sufficient to comply with the requirements of the statute, and constituted sufficient evidence of a new and continuing contract on his part, which removed the case out of the operation of the statute of limitations. Some of the checks, accompanied by the notices, were made and sent or delivered to the bank prior to the expiration of the limitation of the note, and some were made and sent after the lapse of that time. The last one was dated January 12, 1921. The checks themselves, of which there were some 25, contain no express reference to any note or obligation, or any notation indicating for what purpose they were given. The record discloses that the notices sent quarterly to Arnold, and returned by him, were the bank's "regular interest notice, a form * * * filled out saying interest will be due on the 9th of such a month * * * upon a note for $5,000." On the objection of the plaintiff, further evidence of the contents of the notices was shut out by the ruling of the trial court.

The checks, by themselves, do not meet the requirements of section 360. Clunin v. First Fed. Trust Co. (Cal. Sup.) 207 Pac. 1009, 1011. In that case it was claimed that the case was taken out of the operation of the statute of limitations by checks signed by the debtor payable to the order of the holder of the note, together with the memoranda made by the debtor on the stubs to which the checks were attached at the time they were made, showing the amount of the check and the purpose for which it was given. This court held that the stubs of the checks did not constitute an acknowledgment or promise sufficient to take the case out of the statute of limitations, since they were never communicated to the creditor. The checks were held an insufficient acknowledgment, because they made no reference to the existence of any debt, and contained no language which could be said to be uncertain in its meaning and subject to explanation by the aid of extrinsic circumstances so as to be made to refer to a debt. In reaching its conclusion in that case the court examined and analyzed the leading cases theretofore decided in this state, and held, as a general rule of construction, that no writing is sufficient as an acknowledgment under section 360 unless it contains some reference to a debt, which, either of itself or with the aid of permissible evidence of extrinsic facts in explanation, amounts to an admission that there is a debt existing to the creditor to whom the writing is sent, for which the debtor is liable and willing to pay.

Two pertinent facts in the Clunin Case differentiate it from the case at bar. There the checks were separated from the stubs to which they were originally attached, and on which appear the memoranda of the purpose for which they were executed; and they were not accompanied by any letter or other writing. The notations on the stubs were not in any manner communicated to the holder of the note. None of the checks was for the exact amount of interest due, but all included sums for other purposes.

It is well established that the Code section does not prescribe any form in which an acknowledgment or promise sufficient to lift the ban of the statute of limitations shall be made. It is sufficient if it shows the writer treats the indebtedness as subsisting and one which the debtor is liable and willing to pay. From this acknowledgment the law implies the promise to pay. Concannon v. Smith, 134 Cal. 14, 20, 66 Pac. 40; Foster v. Bowles, 138 Cal. 346, 351, 71 Pac. 494, 649; Clunin v. First Fed. Trust Co., supra. Such acknowledgment or promise may be made to an agent of the creditor or to some person authorized to receive it. Wood on Limitations (4th Ed.) § 81c; Taylor v. Hendrie, 8 Nev. 243. A memorandum or promise, binding under the statute of frauds, may be gathered from several writings between the parties with reference to the subject-matter and so connected with each other that they may fairly be said to constitute one paper relating to the contract. Concannon v. Smith, supra; Ryan v. United States, 136 U. S. 68, 10 Sup. Ct. 913, 34 L. Ed. 447; Elbert v. L. A. Gas Co., 97 Cal. 244, 32 Pac. 9; Brewer v. Horst & Lachmund Co., 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240. While the memorandum must express the essential elements of the contract with reasonable certainty, these may be gathered either from the terms of the memorandum itself or from some other paper or papers therein referred to. If one of a series of papers which appear to have some relation to the same matter is signed by the party to be charged, this is enough, as all the papers are to be considered together as forming one contract or memorandum. There is no doubt, also, that parol evidence is admissible to identify any paper referred to. Freeland v. Ritz, 154 Mass. 257, 259, 28 N. E. 226, 12 L. R. A. 561, 26 Am. St. Rep. 244. Any rule to the contrary is not now conceded to be absolute. There may be instances in which it would be a violation of reason and common sense to ignore a reference which derives its significance from parol proof. Beckwith v. Talbot, 95 U. S. 289, 292 (24 L. Ed. 496). In such cases parol evidence of contemporaneous facts and of the circumstances in which the parties were when the writings were signed will be received to show their connection. What constitutes a "reference" in such cases?

> "The old rule, by which no other paper could be used to help out the memorandum unless incorporated into it by reference in the memorandum itself, * * * is no longer followed. The connection between different papers, so that they may be considered together and their sufficiency be determined by the contents of all of them may be proved by oral evidence, at least so far as it is the result of that evidence to establish the fact that all of the different papers which are so to be considered together were brought to the attention of both parties, and were linked together in their minds, so that the parties themselves may be found to have adopted all the papers as the expression of their purpose. This is the effect of the recent cases." Nickerson v. Weld, 204 Mass. 346, 90 N. E. 589.

The relation of one paper to another must appear upon the face of the writings relied upon, but it may appear in either of two ways. It may appear by express reference or from the nature of the contents. Swallow v. Strong, 83 Minn. 87, 92, 85 N. W. 942. One writing may be connected with another either expressly or by internal evidence of subject-matter and occasion. Marks v. Cowdin, 226 N. Y. 138, 145, 123 N. E. 139. It matters not what may have been the immediate purpose for which some of the writings may have been prepared, or that one of them may be unsigned. All that the statute requires is written evidence from which the whole contract may be made out. St. L., I. M. & S. Ry. Co. v. Beidler, 45 Ark. 17, 28.

> "It has been held that if all the writings adduced to establish the contract, when viewed together in the light of the conditions and circumstances of the parties at the time they were written, show unmistakably that they relate to the same matter and constitute the several parts of one connected transaction, so that there can be no other reasonable conclusion, from the evidence thus afforded, than that they were written with reference to those concurrent or preceding, there is such a reference of one to the other as satisfies the rule, although there is no reference in express terms; and parol evidence is admissible to show the circumstances under which the transaction occurred, and to connect the several papers constituting the contract between the parties. Strouse v. Elting, 110 Ala. 132. See also Jenkins v. Harrison, 66 Ala. 345; White v. Breen, 106 Ala. 159." 2 Ann. Cas. 294.
>
> "The rule is one founded in reason; and when, as practical men, we look at the writings and see, inhering in them, evidence which entirely satisfies the mind that they all relate to one general transaction, there is no reason why they should not be so considered. There is in such case a direct reference of the one to the other within the meaning of the law." White v. Breen, 106 Ala. 159, 19 South. 59, 32 L. R. A. 127, supra.

In Raubitschek v. Blank, 80 N. Y. 478, the defendant and H. negotiated for the exchange of certain real estate. The terms were agreed upon verbally by them. The defendant gave H. a check for $500 as payment, receiving therefor a receipt signed by H. In an action upon the check it was contended that there was no consideration for the check in that no contract within the statute of frauds had resulted from the transaction. The court held that the mutual relation of the receipt and check "appeared upon their face quite as clearly as it does where a letter has been written which contains the terms of contract and there is an acceptance," saying further, "It is sufficient if when taken together, a contract is made out, and there may be an identification of the documents."

Parol testimony was properly admitted to show the circumstances under which the instruments relied upon were executed, how the parties acted with reference to them after they were executed, and what they did with them. It then remained to be determined what was the effect of the writings when considered together. Flegel v. Dowling, 54 Or. 40, 102 Pac. 178, 135 Am. St. Rep. 812, 19 Ann. Cas. 1159. With the identity of the writings established, it was material to appellant's cause that she be permitted to show the exact nature and contents of the interest notices sent by her agent, the bank, to Arnold. If it should be made to appear that the notices, even though printed, with blanks filled out, were in the nature of communications addressed to defendant Arnold notifying him that on a date certain interest to the amount of $100 would be due from him by reason of an indebtedness aptly described and identified, and the notices bore the name or subscription of the bank, such writings and the checks promptly returned to the bank by the defendant Arnold, as was his custom for many years, will show, when considered together, that they relate to the same matter and constitute several parts of one connected transaction. They were, without question, linked together in the minds of the parties to such an extent that they must be found to have adopted the notices and checks as the expression of their purpose. Nickerson v. Weld, supra. From the relation thus established, there is such a reference of one to the other as satisfies the statutory requirement. 2 Ann. Cas. 293.

It does not appear that the checks signed by Arnold and the interest notices from the bank were pinned together, or in any way fastened to each other. But this was immaterial, for, in order to reach the bank when mailed, they were inclosed in an envelope, which so connected the two that, under all the circumstances, they may be taken together in each instance as one memorandum. Pearce v. Gardner, 1 Q. B. D. [1897] 688.

[2] The letter of October 13, 1917, written by Arnold to the bank, considered together with the check for the interest then due, which accompanied it, extended the statute of limitations on the note, as to him, four years from that time, or until October 13, 1921. This action was not commenced until after that date. The last of the quarterly checks was dated January 12, 1921. It was therefore necessary for the appellant to fully establish the existence of a sufficient acknowledgment or promise to take the case out of the operation of the statute of frauds. It was error to exclude the evidence by which appellant sought to establish the facts. Without such record the trial court was unable to fully determine whether, as matter of law (Concannon v. Smith, supra), a new and existing promise or acknowledgment was raised which took the case out of the operation of the statute. If it finds there was such an acknowledgment, it will also be necessary for it to determine whether or not the admission or promise by Leroy H. Arnold, one of the joint obligors, operated to suspend the running of the statute as against his wife, Nani A. Arnold. As a general statement, the promise of one of several joint obligors cannot avail to revive as against the others a cause of action barred by limitation, or to suspend the running of the statute. State Loan, etc., Co. v. Cochran, 130 Cal. 245, 255, 62 Pac. 466, 600. In the absence of evidence of agency for the purpose between Arnold and Mrs. Arnold, the judgment in Mrs. Arnold's favor would ordinarily be affirmed. Belloc v. Davis, 38 Cal. 242, 256; Titus v. Annis, 77 N. H. 478, 93 Atl. 114. But, as the point was not raised by either party here, and as the case must be sent back for a new trial as to Arnold, it may as well be tried anew as to both cross-defendants. There are circumstances under which a mortgage executed by a husband and wife may be foreclosed, though an action against the wife to recover the debt is barred. Wood on Limitations (4th Ed.) § 81d (4).

The judgment is reversed.

We concur: WILBUR, C. J.; MYERS, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.; KERRIGAN, J.

191 Cal. 399

REES et al. v. REES et al. (L. A. 7369.)

(Supreme Court of California. July 5, 1923.)

1. Deeds 🔑208(5)—Evidence held to show that delivery was not intended to be irrevocable.

Evidence of the delivery of a deed to the grantor's attorney with instructions to deliver it to his wife, the grantee, upon his death, and subsequent acts, *held* to show that such delivery was not intended to be irrevocable.

2. Evidence 🔑417(17)—Acts and statements of grantor admissible to prove or disprove efficient delivery in escrow of deed.

On the question of whether an efficient delivery in escrow of a deed has been made, evidence of the grantor's acts and statements during the entire time of the escrow may be proven.

3. Deeds 🔑211(4)—Evidence held sufficient to establish undue influence and coercion in securing execution.

Evidence that the wife of one suffering from a stroke of paralysis, within a week thereafter and after a second stroke, secured the execution of deeds granting to her about three times the property she would otherwise have been entitled to in the event of grantor's death, while the grantor was mentally and physically weak and debilitated, *held* to establish that the deeds were procured by undue influence and coercion.

In Bank.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Two actions by John H. Rees and Llewellyn Rees, special administrators of the estate of Lewis Rees, against Mary L. Rees, tried as one action, wherein defendant filed a cross-complaint joining as cross-defendants children of Lewis Rees, deceased. From judgment for plaintiffs, defendant appeals. Affirmed.

Smith & Breslin, of Los Angeles, for appellant.

W. D. Van Nostram and C. Ibeson Sweet, all of Los Angeles, for respondents.

KERRIGAN, J. This is an appeal from a judgment in an action to set aside certain deeds on the ground that as to one it was not delivered and as to the others that they were procured by undue influence.

Mary L. Rees was the third wife of Lewis Rees. They were married October 2, 1907. Lewis Rees died March 2, 1920, at the age of 80 years. At the time of his death he left surviving him six children by a former marriage. His widow, Mary L. Rees, had one daughter living, issue of a former marriage. She had no children by Lewis Rees. On the 3d day of September, 1919, Lewis Rees made and acknowledged a deed of gift to Mary

---

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

L. Rees, his wife, of twelve parcels of real property situated in Los Angeles county. On the same day, with the knowledge of his wife, Lewis Rees deposited this deed with his attorney, Joseph Smith, with instructions to hold it until his death and then to deliver the same to Mary L. Rees. On September 17, 1919, Lewis Rees made eight other deeds of gift, conveying the same property described in the deed of September 3. Two of these deeds conveyed to his wife six parcels of said real property, and were delivered directly to her on the day the deeds bear date. The other six deeds conveyed six lots to his children.

After the death of Lewis Rees the special administrators of his estate commenced an action against Mary L. Rees to set aside and cancel the two deeds of September 17 in her favor, on the ground that Lewis Rees was at the time of executing the same mentally incompetent to execute such deeds, and that the execution thereof was procured through the undue influence of said grantee. At the time of filing that action none of the children of deceased, including the special administrators, had any knowledge whatever of the existence of the deed of September 3. On the day the summons and complaint were served on Mary L. Rees in that action she caused to be recorded the deed of September 3, conveying to her all the real property theretofore belonging to Lewis Rees. Thereupon the plaintiffs commenced a second action to set aside and cancel the deed of September 3; the allegations in this action being practically the same as those in the first one, and further alleging that all of the property conveyed in the deed of September 3 was the property of the estate of decedent, and asking that the title thereto be quieted. Mary L. Rees answered both complaints, specifically denying all the material allegations therein, and filed a cross-complaint in both actions, alleging that she was the owner of all of the said property, and asked that title thereto be quieted in her. In filing her cross-complaint Mary L. Rees brought in all of the children of the deceased, and they individually answered the cross-complaint, denying the material allegations therein. By stipulation these actions were consolidated for trial.

The trial court found that the deed of September 3 had never been delivered by Lewis Rees to Mary L. Rees. The court further found that on September 10, 1919, Lewis Rees suffered a severe stroke of apoplexy, which, although not rendering him totally incompetent to transact business, still left him in a very weak and debilitated mental and physical condition; that prior to suffering the stroke of apoplexy Lewis Rees had great confidence in his wife; that she took advantage of his condition and the confidence he reposed in her and unduly influenced him to deliver to her the two deeds of September 17.

[1] The only question seriously discussed in the briefs is: Does the evidence sustain the findings of the trial court? We think it does. Referring to the deed of September 3, it is clear that the evidence supports the finding that the decedent did not intend to deliver that deed without the power of revocation. His conduct, as well as the conduct of defendant after the deed was made, supports this view. Two weeks after the making of that deed Lewis Rees, with the consent and approval of Mary L. Rees, made a different disposition of the property, and thereafter and until the action to set aside the deeds to plaintiff of September 17 was commenced, she relied entirely on the latter deeds. According to her testimony she had not questioned his right and power to make and deliver the deeds of September 17. In fact, these deeds to the children were not only signed by her, but according to evidence in the case, they were made at her request. In one instance she said she had been working for a month to have him make those deeds to his children. At another time, when one of the children hesitated to accept a deed, she said: "You keep still; accept that deed; I worked on your father all night to get him to make it."

It also appears in evidence that Lewis Rees called his children to what proved to be his deathbed, and stated in the presence of his wife that she was to have only a life estate in the property conveyed to her, and that after her death the property was to be divided among his children and her daughter, share and share alike. Certainly he would not have done this if he had intended to make an absolute conveyance of his property to Mary L. Rees. The surrounding circumstances, the conduct of the parties after the making of the deed of September 3, all indicate that Lewis Rees never intended to part with the dominion over his property. It is quite likely, as said by the trial court, that he intended to do with his property as many do, make a deed effective upon his death but subject in the meantime to his control and dominion.

[2] All this evidence was clearly admissible. It was relevant and material to show the intention of the deceased as to the question of delivery:

> "Where the very question is whether or not the alleged grantor has parted with his title by making an efficient delivery of his deed, his acts and statements material to the question of delivery during the entire period of the escrow may be proven." Smith v. Smith, 173 Cal. 725, 161 Pac. 495; Williams v. Kidd, 170 Cal. 631, 648, 151 Pac. 1, Ann. Cas. 1916E, 703.

[3] Coming now to the deed of September 17, concerning which the court found that

it was obtained by Mary L. Rees from Lewis Rees by undue influence and coercion, the evidence shows that he had been seriously ill for some little time before he suffered the stroke of paralysis on September 10, and it cannot be gainsaid that from that time until his death he was mentally and physically weak and debilitated. Indeed, before the making of the deed of September 17 he had suffered a second stroke. During most of the time after he was first stricken he was helpless, and he required to be "cared for like a baby." Mentally he appeared to have lost his initiative. As a rule he would speak only when spoken to, and then answered only in monosyllables.

It was Mrs. Rees who suggested the making of the deeds and, doubtless, the distribution of the property. It was she who secured the blank forms of deed, who sent for the notary public to fill out the blanks and to acknowledge the conveyances, and who in most of the instances delivered the deeds to the respective grantees. She initiated, took charge of, and conducted the entire matter of the distribution of the property and obtained thereof for herself property worth about $49,000, while the children collectively received property worth about $4,000, thus receiving about three times the amount to which she would otherwise be entitled, for the property was the separate property of the deceased, and he died intestate.

Doubtless it was the understanding between Lewis Rees and his wife that she should enjoy the property conveyed to her for the period of her life with remainder over to her daughter and to his children, for he in effect so stated to his children in her presence and hearing, and by her silence she acquiesced in what he there said. In fact, a few days after the death of Lewis Rees she was asked by Henry J. Hortsman, her brother-in-law, if she had made "a will as Lewis wanted you to do," and she said, "I made one, but destroyed it." On at least two occasions Mr. Hortsman urged Mary L. Rees to make a will leaving the property to her daughter and to the children of the deceased, as had been intended, "and to take the widow's share." To this advice she gave no heed, and on the occasion of the last conversation she said that, "I have it [the property], and why should I give it up?" She also requested Hortsman and his wife to forget what they had heard and not to tell all they knew, referring to a conversation heard by them between her and the deceased as to what was to be done with the property.

The testimony of the appellant was not the testimony of a person innocent of the charges made in the complaint. She asserted and denied matters later contradicted or admitted, which conduct showed a guilty conscience.

There are several places in the record where it appears that hers was the dominating will so far as the deceased was concerned. It appeared that the deceased had become old and feeble; that his physical and mental powers were weak and waning; that he was an easy victim for a designing person in whom he had confidence; and it further sufficiently appears that the defendant, his wife, influenced him to make the deed to her by promising to make a will leaving the property to her daughter and to his six children. This promise she did not keep and she apparently never intended to keep it.

Judgment affirmed.

We concur: WILBUR, C. J.; LAWLOR, J.; SEAWELL, J.; WASTE, J; MYERS, J.; RICHARDS, Justice pro tem.

191 Cal. 287

WILLARD et al. v. DOBBINS et al. (L. A. 7071.)

(Supreme Court of California. June 18, 1923.[1] Rehearing Denied July 16, 1923.)

1. Corporations ⚷361—Evidence held sufficient to show prima facie that directors were liable to a judgment creditor of the corporation.

Where the answer admitted that defendants were the only directors of the corporation, against which plaintiff had a judgment, and that defendants sold the entire assets, paying a specified amount to bona fide creditors other than plaintiff, and the balance to two of defendant directors, plaintiff's proof of her judgment against the corporation was sufficient to shift the burden of proof to defendants to show that the amount paid to the two directors was in satisfaction of bona fide claims against the corporation, in view of Civ. Code, § 309, making directors jointly and severally liable for their acts in distributing the capital stock to the prejudice of creditors.

2. Corporations ⚷361—Evidence held insufficient to show that payments made by directors were in satisfaction of bona fide debts.

In an action by a judgment creditor against the directors of the V. corporation to recover the amount of the judgment, on the ground that defendants had distributed the assets of the corporation without first paying plaintiff's claims contrary to Civ. Code, § 309, evidence *held* insufficient to show that payments made by defendants to two of their number represented actual and bona fide indebtedness of the corporation to the C. corporation, of which defendants were also directors.

---

[1] Date changed to February 21, 1923, by supplemental order set forth at end of opinion.

3. Corporations 🔑346—Amendment to statute relating to liability of directors held not to restore statute of limitations as to action already begun.

Where Civ. Code, § 309, prior to its amendment in 1917, provided that no statute of limitations should bar a suit against directors of a corporation making payments out of capital stock before creditors' claims are satisfied, the omission of such provision from the amendment did not impair a cause of action which arose and on which suit was brought prior to the amendment, in view of a provision in the amendatory act that it should not affect actions already begun.

4. Judgment 🔑910(3)—Cause of action does not accrue until judgment becomes final.

A cause of action on a judgment does not accrue until the judgment becomes final.

On Application for Modification.

5. Appeal and error 🔑1184—On death of appellant, affirmance made as of date of submission.

Where appellant died after submission, but before judgment of affirmance, *held* that the judgment would be modified by rendering the same as of the date of submission.

In Bank.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Mary E. Willard and the London Assurance Corporation, against Caroline W. Dobbins and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Porter & Sutton, of Los Angeles, for appellants.

Ernest C. Griffith, Jesse F. Waterman, and Denis & Loewenthal, all of Los Angeles, for respondents.

KERRIGAN, J. This is an action by plaintiffs against defendants, to recover the amount of a judgment obtained against the Valley Gas & Fuel Company, a defunct corporation, of which the defendants were directors.

The complaint is based upon the theory that there had been a distribution of the assets of the Valley Gas & Fuel Company among the defendants contrary to the provisions of section 309, Civil Code, leaving the plaintiffs with no means of satisfying the judgment against that corporation.

Section 309 of the Civil Code in part provides that the directors of a corporation must not, until after the debts of the corporation are paid, divide or withdraw or pay to the stockholders or any of them any part of the capital stock; and for a violation of the provisions of that section the directors under whose administration the same may happen are, in their individual capacity, jointly and severally liable to the corporation and the creditors thereof to the full amount of the capital stock so divided. The section also provided, prior to the amendment of 1917, and when this action was commenced, that no statute of limitations was a bar to any suit against such directors for any sums for which they were liable by that section.

In the year 1910 the home of plaintiff, Mary E. Willard, which was partly insured by the plaintiff corporation, was destroyed by fire. Thereafter these plaintiffs brought an action against the Valley Gas & Fuel Company, alleging that the destruction of said premises was caused by its negligence. Judgment was obtained for the value of the property destroyed, and an appeal was taken and the judgment reversed. The action was retried, judgment again rendered in favor of the plaintiffs, another appeal was taken, and the judgment with a slight modification was affirmed.

Prior to the second appeal taken to this court, the Valley Gas & Fuel Company and the California Coke & Gas Company sold all of their property to the Los Angeles Gas & Electric Company for the net price of approximately $160,000. At the time of the sale of the properties to the Los Angeles Gas & Electric Company appellant Caroline W. Dobbins held $145,000 par value of an authorized bond issue of the coke company, secured by a deed of trust against its real property, and which had been issued to her in exchange for stock in the Valley Gas & Fuel Company.

Before the payment of the proceeds of said sale to the Valley Gas & Fuel Company the bonds of the coke company held by Mrs. Dobbins had been released of record in order to comply with the terms of the agreement requiring clear title to the coke company's property before payment over of the purchase price. Mrs. Dobbins was therefore, at the time the distribution of the funds derived from such sale was made, a general creditor without security. It also appeared in evidence introduced by defendants that the coke company was indebted to Mrs. Florence Dobbins Lowe in the sum of $10,000. The books of account of both corporations purported to show, and the testimony of Thaddeus Lowe, who was the president of each of them, was to the effect that in the distribution of the assets $115,000 was paid to Mrs. Dobbins and $10,000 to Mrs. Lowe on account of money due them from the coke company; that the Valley Gas & Fuel Company owed the coke company for cash advanced the sum of $172,000, and that these payments were in reduction or satisfaction of the indebtedness of the Valley Gas & Fuel Company to the coke company.

[1] The trial court found that the plaintiffs had obtained a final judgment against the Valley Gas & Fuel Company approximately for $12,000 with interest and costs; that at all the times mentioned thereafter the de-

fendants were stockholders and constituted all the directors of the Valley Gas & Fuel Company; that they were also all the stockholders and directors of the coke company; that on the 20th day of May, 1913, all the properties of both these corporations were sold to the Los Angeles Gas & Electric company for the sum of approximately $160,000; that of this sum the coke company was entitled to approximately $48,000 and the Valley Gas & Fuel Company to $112,000; that the whole of the proceeds of the sale were paid to the Valley Gas & Fuel Company. The court also found that immediately following the receipt of the proceeds of said sale the appellants, as directors of the Valley Gas & Fuel Company, distributed approximately $35,000 in payment of various debts of said company, and that all the creditors, other than these plaintiffs, were thereby paid in full; that on the 22d day of May, 1913, the defendants paid the entire balance of the fund to two of their number, to wit, Caroline W. Dobbins, the sum of $115,000, and to Florence Dobbins Lowe the sum of $10,000; that, after the making of these payments, nothing remaining of the capital or assets of the Valley Gas & Fuel Company, no further business was done by it, and such company forfeited its charter and ceased to be a corporation on November 13, 1913. The court also found that the appellants agreed to make such payments at a joint meeting held by them as directors and stockholders of both of said corporations; that the Valley Gas & Fuel Company was not indebted to the coke company in the sum of $172,000, or, in any other sum; that the payments made to Mrs. Dobbins and Mrs. Lowe were made under "the guise, device, and subterfuge" partly of paying off bonds and partly of paying a claimed indebtedness of the Valley Gas & Fuel Company to the coke company by partly paying at the coke company's request said sum in satisfaction of the debts alleged to be owing Mrs. Dobbins and Mrs. Lowe by the coke company; and, further, that such payments were made for the purpose of absorbing and distributing the remaining assets of the Valley Gas & Fuel Company in order to defeat the claims of plaintiffs and to divide the capital stock and the assets of the Valley Gas & Fuel Company between Mrs. Dobbins and Mrs. Lowe. Further, the court found that the bonds referred to were not the bonds of the Valley Gas & Fuel Company but were the bonds only of, and a lien, upon the property of the coke company, and that if any sums were necessary to discharge the same, it was not proper to pay for the retirement thereof more than such proportion of the proceeds of the sale as belonged to the coke company. Judgment was accordingly entered for the plaintiffs for the amount demanded. The main question in the case is whether or not the evidence is sufficient to sustain the findings of the court in plaintiffs' favor that the Valley Gas & Fuel Company was not indebted to the coke company in the sum of $172,000.

The answer of the defendants admitted that they constituted all of the directors of the Valley Gas & Fuel Company; that they had sold the entire assets of that corporation and with the proceeds had expended $35,000 in payment of bona fide claims of creditors of said corporation, and that, as above stated, they had paid $115,000 to Mrs. Dobbins and $10,000 to Mrs. Lowe. These matters having been thus admitted the plaintiffs introduced their judgment against the Valley Gas & Fuel Company showing that they were creditors of that corporation in approximately the sum of $13,000, and the plaintiffs thereupon rested.

[2] We think it can fairly be said that plaintiffs had proved sufficient facts to make a prima facie case. The burden thereupon shifted to the defendants to prove the defense set up in their answer, namely, that the payments to Mrs. Dobbins and Mrs. Lowe were on account of existing indebtedness from the Valley Gas & Fuel Company to the coke company, and from the latter in turn to Mrs. Dobbins and Mrs. Lowe. They attempted to prove that the Valley Gas & Fuel Company was indebted to the coke company and that the latter was indebted to Mrs. Dobbins and Mrs. Lowe. After spending a great deal of time in a vain effort to get the books of the two corporations in evidence over the objections of plaintiffs that no foundation had been laid, in order to save time a stipulation was entered into to the effect that "the books show a claim of the coke company against the Valley Gas & Fuel Company of $172,000. The testimony of Mr. Lowe will show that his independent recollection was at that date this indebtedness or claimed indebtedness was this figure of approximately $172.000." This stipulation was immediately coupled with the statement of counsel for plaintiffs: "We do not admit the correctness of the books or of the testimony of Mr. Lowe." We think it can fairly be said that this stipulation embodies substantially all of the evidence offered by defendants in support of their claim of an existing indebtedness of the Valley Gas & Fuel Company on account of which this money was paid. It is not sufficient to compel a finding in favor of defendants upon this issue. There was no evidence that any specific sum of money was ever in fact loaned or advanced or paid by the coke company to the Valley Gas & Fuel Company. There was no evidence of any fact or state of facts out of which an indebtedness from one to the other would arise, with the possible exception of the testimony of Lowe to the effect that at some time or other the coke company leased certain property to the Valley Gas & Fuel Company at a rental of $100 per month.

The entries in the books of account touching the matter with which we are here concerned are meager and fragmentary. We are inclined to think that the evidence of the book entries falls short of the requisite proof. But, however that may be, the trial court was not compelled or required to give it any weight whatever, in view of other facts which were either proved or admitted. As before stated, some of them are as follows: The Valley Gas & Fuel Company was organized by the defendants and its capital stock was issued to them; the only consideration for its issue being the transfer to it of certain patent rights. The coke company was also organized by the defendants and its stock issued to them in consideration of the transfer to it of certain other patent rights. Then the defendants caused the coke company to issue bonds which they took from it in exchange for their shares of the Valley Gas & Fuel Company, which they thereupon transferred to the coke company. The result of these transactions was that the coke company owned all of the capital stock of the Valley Gas & Fuel Company and the defendants in turn owned all the capital stock and all of the bonds of the coke company, for which they had paid nothing at all except the transfer of some patent rights, the value of which, if they had any value, is entirely unknown. Florence Dobbins Lowe is the daughter of Mrs. Dobbins, and Thaddeus Lowe is the husband of the former, and Horace M. Dobbins is also the son of Mrs. Dobbins. The defendants at all times comprised the board of directors of both corporations, the fifth director being one McPherson, who was merely a salaried employee of the defendants, having no interest in either corporation. The defendant Lowe at all times was the manager of both corporations; the same employee was at all times bookkeeper for both corporations, and the accounts of both corporations were kept in the same set of books. Under these circumstances the trial court might well and justly have concluded that the claimed indebtedness which the books purported to show amounted to nothing more than a series of bookkeeping entries which the defendants had caused to be made to suit their own purposes.

From what has been said it would appear that, since the coke company was entitled to approximately $48,000 of the proceeds of the sale to the Los Angeles Gas & Electric Company, the payment to Dobbins and Lowe at the request of the coke company to the extent of that amount was authorized, but the remainder of the net receipts of the sale constituted the assets of the Valley Gas & Fuel Company, and the directors thereof acted in violation of the provisions of section 309 of the Civil Code when they distributed those assets amongst some of the holders of its stock without first paying the amount of plaintiffs' claim.

[3] There is no merit in the remaining point that plaintiffs' account is barred by the statute of limitations. The action was brought for the violation of section 309, Civil Code, as that section stood in the year 1905, and when this action was brought. That section then contained a proviso that "no statute of limitations is a bar to any suit against such directors for any sums for which they are liable by this section." That section, as amended in the year 1917 (Stats. 1917, p. 658), while omitting the above-quoted portion, still expressly provides that the section as amended shall not apply to any right, cause of action, or liability then existing, which it declared shall be prosecuted in the same manner and with the same effect as if the amendment had not been passed.

[4] It may be added that this action, having been commenced within eight months after the judgment upon which it is based, became final, and no statute of limitations has run against it. A cause of action upon a judgment does not accrue until the judgment becomes final. Feeney v. Hinckley, 134 Cal. 467, 66 Pac. 580, 86 Am. St. Rep. 290.

Judgment affirmed.

We concur: MYERS, J.; WASTE, J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.

Modification of Opinion.

LAWLOR, Acting C. J. Rehearing denied.

[5] Upon suggestion and application by affidavit of George J. Denis, on behalf of respondent, London Assurance Corporation, it appearing that Florence Dobbins Lowe, one of the appellants herein, died May 31, 1923, subsequent to the submission of the appeal to this court, and before the decision thereof, it is hereby ordered that the decision and judgment of this court, made and entered June 18, 1923, affirming the judgment appealed from, be, and the same is hereby, set aside. And it is further ordered and adjudged that said decision and judgment of this court, rendered in said cause, on the 18th day of June, 1923, with the opinion of the court therewith filed, be, and the same is hereby, rendered as of the date of the submission of said cause for decision to this court, to wit, February 21, 1923, and the clerk of this court is hereby ordered to enter said decision and opinion as of said last-named date. Remittitur to issue forthwith.

191 Cal. 375

GLASSELL DEVELOPMENT CO. v. CITIZENS' NAT. BANK OF LOS ANGELES. (L. A. 6952.)

(Supreme Court of California. June 29, 1923.)

1. Banks and banking 🔑119, 138—Bank becomes depositor's debtor; bank cannot pay out deposit except by depositor's direction.

A bank in receiving ordinary deposits becomes the depositor's debtor, and its implied contract with him is to discharge this indebtedness by honoring such checks as he may draw on it, and it is not entitled to debit his account with payments not made by his order or direction.

2. Banks and banking 🔑148(1)—Payment on forged or altered checks by bank cannot be charged to depositor's account.

As between a bank and its depositors, payment of forged or altered checks by it is made at its peril and cannot be charged against depositor's account unless some negligent act or conduct of depositor has contributed to induce such payment, the bank itself being free from negligence, or unless by conduct depositor is estopped to deny correctness of such payment.

3. Banks and banking 🔑148(3)—Depositor owes duty to examine passbook returned with canceled checks within reasonable time.

When a depositor's passbook has been written up and returned to him with canceled checks which have been charged to his account, it is his duty to examine such checks within a reasonable time, and if they disclose forgeries or alterations to report them, failing in which he cannot, if his failure results in detriment, dispute the correctness of payment thereafter made by it on similar checks.

4. Banks and banking 🔑148(3)—Bank liable for payment of forged and altered checks if by exercise of proper care forgeries or alterations could have been discovered.

When by the exercise of proper care a bank could have discovered alterations or forgeries of checks, it must bear the loss, notwithstanding that depositor failed in his duty to examine his passbook and canceled checks.

5. Banks and banking 🔑148(1)—Alteration in amount of checks held not to suggest to bank presence of fraud.

Where, under the circumstances in which raised checks were drawn and presented, there was little, if anything, in the fact of alteration of the amounts called for to suggest to the paying teller of defendant bank the presence of fraud, especially in view of the fact that plaintiff's checks bearing similar alterations on their face, the validity of which was not disputed, were not infrequently drawn on defendant and honored by it, in action by the depositor to recover money paid out on raised checks, it cannot be said that evidence did not support the trial court's conclusion that the alterations were rendered possible by the depositor's gross negligence prior to payment thereof by the bank.

6. Banks and banking 🔑148(3)—Negligence of depositor in failing to examine monthly statement for errors cannot affect bank's liability on forged check unless bank prejudiced thereby.

The negligence of a depositor in failing to examine his monthly statement and report error therein cannot affect a bank's liability to make good to him the amount of the first forged check, since such negligence contributed in no manner to its payment, unless the bank makes affirmative showing of prejudice as the result of such failure to examine and report.

7. Banks and banking 🔑154(2)—Action controlled by statute providing that suit by depositor to recover on forged check barred in one year.

In view of the situation arising on payment by a bank of a forged or raised check, wherein the bank charges the amount thus paid to depositor's account and refuses to return to him the amount of his deposit except as diminished by such unauthorized payment, which refusal gives rise to an action to recover that particular amount, such action is the one referred to in Code Civ. Proc. § 340, subd. 3, providing that action by a depositor against the bank for payment of forged or raised check is barred after lapse of one year.

8. Constitutional law 🔑48 — Statutes given construction which will sustain them.

Statutes should be given a construction which will sustain rather than defeat them, and make them operative rather than without effect.

9. Limitation of actions 🔑67—Limitation of action by depositor on forged check begins to run from notice to depositor given by bank.

Limitation of Code Civ. Proc. § 340, subd. 3, requiring a depositor to bring an action against bank for payment of forged check within one year, begins to run from notice to the depositor given by the bank.

10. Limitation of actions 🔑66(9)—No accrual of action to depositor to recover deposit until payment is demanded or act of bank dispenses therewith.

A deposit with a bank creates a debt of the bank payable when demand for payment is made, and hence there is no accrual of the cause of action against a bank to recover the balance of a general deposit, until its payment is demanded or there is some act on the part of the bank dispensing with such demand.

11. Banks and banking 🔑154(2)—Action by depositor on forged check barred by one-year statute.

Notwithstanding that prior to amendment to Code Civ. Proc. § 340, subd. 3, requiring an action by a depositor against a bank for the payment of a forged check to be brought within one year, section 348, placing no limit as to time of bringing action to recover money deposited with a bank, would govern; section 340, dealing with a particular class, falling otherwise within the general class, under Civ. Code, § 3534, prevails, and moreover would prevail as the more recent enactment.

In Bank.

Appeal from Superior Court, Los Angeles County; J. T. Wood, Judge.

Action by the Glassell Development Company against the Citizens' National Bank of Los Angeles, Cal. Judgment for defendant, and plaintiff appeals. Affirmed.

Stephens & Stephens, of Los Angeles, for appellant.

T. B. Cosgrove, Robert B. Murphy, and Hunsaker, Britt & Cosgrove, all of Los Angeles, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of the defendant in an action by the plaintiff to recover $10,495.85 paid out of the account of the plaintiff on eight altered or raised checks between January 18, 1917, and July 23, 1918.

The plaintiff and five other corporations during the period involved in the transactions giving rise to this action maintained a joint office in the city of Los Angeles under the management of C. Wesley Roberts. One Charles H. Smith was in charge of this joint office. He had sole charge of the auditing and bookkeeping for all of these companies, and the clerks and stenographers of the office were under his supervision. Originally employed at a salary of $75 per month, he later received $150, which was subsequently reduced to $100. In their banking transactions the companies used in common a voucher form of check upon which appeared the names of all six of them.

The raised checks were all issued for the purpose of adjusting payments made for the benefit of two or more of the companies from the funds of one of them. All checks were signed by C. W. Roberts, president, and A. Glassell, secretary, and the attached voucher was initialed by Smith, under whose direction the checks were prepared and who, after they had been signed, made the alterations and caused them to be deposited. Smith was the sole custodian of cash taken in by the various companies. Some of this cash he misappropriated, and to cover the shortage thus created he altered previously signed checks issued by the plaintiff, so that upon presentation for collection the amounts of said checks were debited to the plaintiff's account and credited to that of the respective payees thereof, who in this manner were repaid the amount of Smith's peculations, but with the result of an unauthorized diminution of the plaintiff's account with the defendant.

Plaintiff's account was balanced monthly, and its passbook and canceled checks, including the raised checks, with the bank's statement showing an itemized list of deposits and withdrawals, were returned to the plaintiff monthly. Printed at the top of each of such statements was this request from the bank:

> "Please examine at once. If no error is reported in ten days the account will be considered as correct."

Notwithstanding that the officers of plaintiff knew of the custom of banks in Los Angeles to render these monthly statements and to return canceled checks to their depositors, the record shows that none of them during the five years of Smith's employment ever made or caused to be made any systematic examination of the canceled checks or bank statements, or compared either with the plaintiff's record of checks issued, or even compared the balance as shown by the passbook and monthly statements with the company's ledger account.

On October 27, 1918, one of the forgeries was discovered by Roberts, and upon being questioned Smith admitted the others.

Thereafter the plaintiff presented to the bank a check covering the entire amount of Smith's embezzlement, payment of which was refused. The plaintiff then presented a check for $3,100, covering the amounts embezzled within a year prior to the date of presentation. Of this also payment was refused, whereupon this action was brought, and resulted in a judgment in favor of the defendant.

The trial court filed findings of fact and conclusions of law in which it found that in altering the said eight checks Smith was acting in the direct scope and course of his employment, and therefore his acts were the acts of plaintiff; that the alteration of the checks by Smith was rendered possible of accomplishment by the gross negligence of the plaintiff prior to the payment of said checks respectively and not by the negligence of defendant; and that as to the first three checks the cause of action was barred by the provisions of subdivision 3 of section 340, Code of Civil Procedure.

In its appeal taken from such judgment the plaintiff urges as ground for reversal that the evidence is insufficient to support the findings or the conclusions of law based thereon.

Before discussing the evidence it may not be amiss to state the general principles governing the question of liability as between a bank and its depositors when forged checks are involved.

[1, 2] It is settled law that a bank in receiving ordinary deposits becomes the debtor of the depositor, and its implied contract with him is to discharge this indebtedness by honoring such checks as he may draw upon it, and the bank is not entitled to debit his account with payments not made by his order or direction. As between the bank and its depositors the payment of forged or altered checks by it is made at its peril and cannot be charged against the depositor's account unless some negligent act or conduct of his has contributed to induce such payment—the bank itself being free from neg-

ligence, or unless by his subsequent conduct in relation to the matter he is upon equitable principles estopped to deny the correctness of such payments. Otis Elevator Co. v. First Nat. Bank, 163 Cal. 31, 124 Pac. 704, 41 L. R. A. (N. S.) 529; 4 Cal. Jur. 215, 216, §§ 103, 104; 7 C. J. 683.

[3] And the weight of authority, and perhaps of reason, supports the view that when a depositor's passbook has been written up and returned to him with canceled checks which have been charged to his account, it is his duty to examine such checks within a reasonable time, and if they disclose forgeries or alterations to report them to the bank, failing in which he cannot, if his failure results in detriment to the bank, dispute the correctness of payments thereafter made by it on similar checks. 7 Corp. Jur. 687; Cal. Vegetable Union v. Crocker Nat. Bank, 37 Cal. App. 743, 174 Pac. 920; Morgan v. U. S. Mortgage & Trust Co., 208 N. Y. 218, 101 N. E. 871, L. R. A. 1915D, 741, Ann. Cas. 1914D, 462.

[4] This rule, however, assumes that the bank itself has not been guilty of negligence in making the payment, for when by the exercise of proper care it could have discovered the alteration or forgery, it must bear the loss notwithstanding that the depositor failed in his duty to examine the accounts. Manufacturers' Nat. Bank v. Barnes, 65 Ill. 69, 16 Am. Rep. 576; Merchants' Nat. Bank v. Nichols & S. Co., 223 Ill. 41, 79 N. E. 38, 7 L. R. A. (N. S.) 752; Leather Mfrs. Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811; 2 Morse on Banking (5th Ed.) §§ 466, 472; N. Y. Produce Exchange Bank v. Houston, 169 Fed. 785, 95 C. C. A. 251.

This subject is quite fully treated in volume 3, Ruling Case Law, 537, 538, §§ 167, 168, where it is said:

> "The majority of the suits brought by depositors to recover payments made on forged or fraudulently altered checks result from the crimes of some trusted employee of the depositor, and usually the court has to deal with a long series of successful forgeries. In such cases, after his passbook has been balanced and returned to a depositor with any of the forged or fraudulently altered checks, the authorities practically agree that in the absence of negligence on the part of the bank the failure of the depositor to notify the bank within a reasonable time that such checks have been forged or fraudulently altered will, if the delay is caused by his negligence in not using due care and diligence in examining the passbook and vouchers, or in giving notice, if he had discovered the forgeries, constitute a defense by the bank to the depositor's suit for the money subsequently paid out on similar checks. * * *
>
> "A bank is under an obligation to its depositor to use care in scrutinizing checks paid, to discover forgeries and render its accounts to prevent the perpetration of frauds upon its depositor. And if the bank's officers, before paying forged or altered checks, could by proper care and skill have detected the forgeries, then it cannot receive a credit for the amount of these checks, even if the depositor omitted all examination of his account. In every case where suit is brought by a depositor to recover from a bank money deposited by him, which the bank has paid out otherwise than in conformity with his orders, and the bank sets up the defense that it is nevertheless entitled to charge the depositor with such payments, because of conduct of the depositor subsequent to such payment, the preliminary question to be determined is whether the bank was or was not guilty of negligence in making the payments. If it was negligent, if its officers are found to have failed to exercise due and reasonable care in detecting the forgery or fraud, then the subsequent negligence of the depositor, his failure to perform his duty in examining his passbook and vouchers with reasonable care and report to the bank in a reasonable time any errors or mistakes, will constitute no defense, and it is generally a question for the jury whether the bank was negligent in paying a forged or fraudulently altered check."

[5] The evidence in the case at bar shows that the plaintiff did not exercise ordinary care and prudence in the manner of issuing its checks, and that it entirely failed to examine its canceled checks, passbook, and bank statements of checks paid, or to compare the same with its records, which would have immediately disclosed the forgeries, the first or any of which having been discovered, their repetition could have been avoided.

The negligence of the plaintiff in failing to examine the bank's monthly statements is admitted; but it is urged that the defendant is not in a position to take advantage of this circumstance, for the reason that it was itself negligent in paying the checks, and that the finding of the trial court that their payment was due to the plaintiff's negligence and not to that of the defendant is unsupported by the evidence.

In this contention the appellant refers particularly to the evidence in the case showing that an inspection of the raised checks readily disclosed that the figures designating the amount called for had in each case been altered, and that it was therefore the duty of the bank to refuse to honor it, or at least to have inquired of the officers of the plaintiff as to the authenticity of the alteration before treating the check as valid; and that in not doing so the bank was guilty of negligence, and is, therefore, not in a position to urge in its defense the admitted negligence of the plaintiff in failing to examine the bank's monthly statements.

Whether a given act or course of conduct is negligent, it has often been said by the courts, depends upon the circumstances of the particular case; and the degree of care to be exercised by a bank in the payment or honoring of a check must be measured by the circumstances presented to it for its consideration. In the case at bar it will be noted that each of the checks bore the genuine signature of the drawer; each was a voucher form of check upon which appeared the names of the several corporations managed by Roberts, including both the drawer and payee of the check; the respective corporations were managed by the same individual, had a common office, and their accounts were kept by the same person, and three of them carried their banks accounts with the defendant, who knew of the interlocking management of these depositors. The purpose of each check was stated on its face, and in every instance that purpose was an adjustment of accounts between the drawer and payee of the check. The checks, with the exception of one of them, the first, when presented merely entailed the debiting of the account of one of these related corporations and the crediting of that of another of them; none of them required the delivery of money to any individual.

Now, the raising of a check is usually done by and for the benefit of the payee thereof, who, in case he succeeds in cashing it, resorts to flight, rendering the recovery of the money by the bank or the drawer of the check extremely unlikely. That a corporation should present for passage to its credit the check of an allied corporation after it had been fraudulently raised is quite an unusual occurrence, and the benefit to be derived in doing so not easily conceived of. Under the circumstances in which the checks were drawn and presented there was little, if anything, in the fact of the alteration of the amount called for to suggest to the paying teller of the bank the presence of fraud, especially in view of the fact that checks of the plaintiff bearing similar alterations upon their face, the validity of which was not disputed, were not infrequently drawn upon the defendant and honered by it; at least that view might be reasonably entertained either by a trial court or a jury. It is apparent that in the case at bar the trial court so regarded the matter, and we are unable to say that the evidence does not fully and logically support its conclusion.

[6] It is evident, however, that the negligence of the plaintiff in failing to examine the bank's monthly statements and to report errors therein cannot affect the bank's liability to make good to the plaintiff the amount of the first forged check, since that negligence contributed in no manner to its payment, unless the bank makes an affirmative showing of prejudice as the result of such failure to examine and report; such prejudice usually consisting in the loss of opportunity to take timely steps for the recovery of the money of which it was fraudulently deprived, and which steps it could have taken if promptly advised of the incorrectness of its statement arising from the unauthorized payment. Janin v. London & S. F. Bank, 92 Cal. 14, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82. In the case at bar the defendant has made no such affirmative showing; and it does not appear that the situation in this respect was any different at the time of the rendition of its statement disclosing the first forgery than at the time the series of forgeries was discovered and reported.

It is true the bank relies upon other acts of alleged negligence on the part of the plaintiff to exempt it from the obligation to make good the amount paid out upon this first forgery, such as the practice of the plaintiff in having its checks made out upon a typewriter, its failure to perforate them so as to disclose the respective amounts for which they were drawn, and an alleged practice on the part of the plaintiff to issue valid checks bearing erasures. But in view of the finding of the trial court that the recovery of the amount of this first check, together with the second and third, is barred by subdivision 3 of section 340 of the Code of Civil Procedure, it will be unnecessary to consider the effect of this additional negligence (if such it may be called) if the court's conclusion as to the bar of the statute must be upheld.

[7] It is conceded that the present action was not commenced until more than a year elapsed after receipt by the plaintiff of notice from the bank of the payment of the first of the series of raised checks.

Said section and subdivision of the Code of Civil Procedure provide that an action "by a depositor against a bank for the payment of a forged or raised check" is barred after the lapse of one year; and if this Code provision has application to the present action it is conceded that as to the check now under consideration the action was not commenced within time.

It is very earnestly contended by the appellant that such provision is not applicable, and that its rights are governed by section 348, Code of Civil Procedure, providing that there is no limitation in the time for commencing suit against a bank for the recovery of money or other property deposited with it. In support of this contention the appellant points out that the language of the subdivision in question does not technically describe the present action. It denies that the action is one "for the payment of a forged or raised check," but is one to recover the amount of a deposit with the bank.

[8] It must be admitted that the language in question is extremely inept to describe the nature of the action; but if we bear in mind the situation which arises upon the payment by a bank of a forged or raised check, namely, that the bank charges the amount thus paid to the depositor's account, and refuses to return to the depositor the amount of his deposit except as diminished by such unauthorized payment, which refusal gives rise to an action against the bank to recover that particular amount, it is sufficiently obvious that such action is the one referred to. Unless the statute applies to such cases, it is, as claimed by the defendant, meaningless.

It is a cardinal rule in the construction of statutes that they should be given one which will sustain rather than defeat them, which will make them operative, if the language will permit, rather than render them without effect. Lewis' Sutherland, Stat. Construction (2d Ed.) § 498; Civ. Code, § 3541; Cuthbert v. Woodman, 185 Cal. 43, 45, 195 Pac. 673. It has been held that the word "for" means "by reason of," "because of," and "on account of," and that a statute prescribing a limitation on "actions for injury to the person * * * caused by negligence" should be interpreted to mean action "by reason of" or "because of" or "on account of" injuries to the person caused by negligence. Sharkey v. Skilton, 83 Conn. 503, 77 Atl. 950.

[9, 10] This is the construction given to this provision in the case of Cal. Vegetable Union v. Crocker Nat. Bank, 37 Cal. App. 743, 174 Pac. 920. That action arose out of the payment of a series of forged checks charged to the plaintiff's bank account. The court held that the effect of this section applied to that action was to bar all checks which were paid more than a year after the rendition of the bank's statement to the depositor before its commencement. In passing it may be said that while the syllabus in the report of that case states that "the provision of the statute of limitations embodied in subdivision 3 of section 340, C. C. P., that an action against a bank by a depositor for the payment of a forged check must be brought within one year, begins to run on presentment and payment of the check, and not upon discovery of the forgery," still we think this is not the true effect of the decision, since in that case the year provided by the statute had elapsed not only from the time of the payment of the checks but also from the time of the rendition by the bank of its monthly statement showing such payment; in fact, that action was not commenced until one year and seven months after the time when the depositor received such monthly account, so that the depositor allowed more than a year to elapse before bringing its action after it had had ample time in which to discover the forgeries if it had exercised reasonable diligence, and this fact is mentioned in the opinion of the court. The true rule, we think, is that the year prescribed by the statute commences to run from notice to the depositor given by the bank. It is the settled rule that the relation between a bank and its depositor arising out of a general deposit is that of debtor and creditor. The deposit creates a debt of the bank payable as and when demand for payment is made. Accordingly, it is the general rule that there is no default on the part of the bank, and hence no accrual of a cause of action against it to recover the balance of a general deposit, until its payment is demanded or there is some act on the part of the bank dispensing with such demand. Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110; 7 C. J. 663, § 366, and cases cited; 3 R. C. L. 569, and cases cited. But the basis of the rule, and indeed the statement of it, shows its proper limitations. A demand is ordinarily necessary because until it is made and refused there is no denial by the bank of its liability to pay and no default out of which a cause of action could arise. Where, however, the bank, either in terms or in effect, has denied liability to the depositor for the amount in question, this is "an act on the part of the bank dispensing with such demand," the cause of action accrues, and the statute of limitations, where one is applicable, is set in motion.

[11] Undoubtedly before the amendment to subdivision 3 of section 340, Code of Civil Procedure, the provisions of section 348 governed an action of the character here in question. But that section declares a general rule, and subdivision 3 of section 340 deals with a particular class of cases falling otherwise within the general rule. In such a case the particular prevails over the general. Civ. Code, § 3534. Moreover, the particular rule is of more recent enactment, and on that ground alone would govern the case if applicable.

We hold, therefore, that the trial court correctly concluded that the plaintiff's action, in so far as the check now under consideration is concerned, was barred.

The respondent urges an additional reason why the judgment appealed from is correct, viz., that the trial court found that the forgeries were all committed by an employee of the plaintiff in the course of his employment and under such circumstances as to render the plaintiff liable for the wrong thereby committed, citing Otis Elevator Co. v. First Nat. Bank, 163 Cal. 31, 124 Pac. 704, 41 L. R. A. (N. S.) 529; but since the judgment must be affirmed for the reasons already given, it is not necessary to consider this further point.

Judgment affirmed.

We concur: WILBUR, C. J.; MYERS, J.; SEAWELL, J.; WASTE, J.; LENNON, J.

MEMORANDUM DECISIONS

62 Cal. App. 305

ALBERTSON v. WESTLAKE et al. (Civ. 4571.) (District Court of Appeal, First District, Division 2, California. May 28, 1923. Hearing Denied by Supreme Court July 26, 1923.) Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge. Action to foreclose a mortgage by R. Albertson against W. J. Westlake and others. Judgment for defendants, and plaintiff appeals. Affirmed. Sawyer & Sawyer and F. W. Sawyer, all of San Francisco, for appellant. Donahue, Hynes & Hamlin, of Oakland, for respondents.

NOURSE, J. This is an appeal from a judgment in favor of defendants in an action to foreclose a mortgage on real property. The mortgage was executed by one Westlake to the plaintiff. Thereafter Westlake executed his deed of trust to the Citizens' Bank of Fruitvale, predecessor of defendant Bank of Italy, covering the same property. This deed of trust was recorded prior to the recordation of the mortgage. The trial court found that, at the time of the making and delivery of the deed of trust, the plaintiff, for a valuable consideration, entered into an agreement with the Citizens' Bank that he would waive and relinquish the priority of his said mortgage over said deed of trust, that said deed of trust should be a prior and superior lien upon said real property, and that the lien of plaintiff's mortgage should be second or inferior to said deed of trust. The only attack upon the judgment is based upon the ground that the evidence does not support these findings. We have examined the record, and find that there is sufficient evidence to support each finding under attack. Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

62 Cal. App. 797

DOON v. WALCOTT et al., Civil Service Commission of City and County of San Francisco. (Civ. No. 4420.) (District Court of Appeal, First District, Division 2, California. May 28, 1923.) Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge. Application for a writ of mandate by James M. Doon, opposed by Earle A. Walcott and others, as members of and constituting the Civil Service Commission of the City and County of San Francisco. From a judgment denying the application, petitioner appeals. Affirmed. William A. Kelly, of San Francisco, for appellant. Geo. Lull, City Atty., and Maurice T. Dooling, Jr., Asst. City Atty., both of San Francisco, for respondents.

NOURSE, J. This is an appeal from a judgment denying appellant's petition for a writ of mandate to compel the respondents, constituting the civil service commission of the city and county of San Francisco, to restore his name to a place upon the register of candidates eligible to appointment to the position of general clerk in the classified civil service of the city and county of San Francisco. The appeal is submitted on the record in Gilbert v. Civil Service Commission (Civil No. 4390; Cal. App.) 215 Pac. 97. No briefs are filed upon this appeal and therefore nothing new is presented for consideration. Upon the authority of the Gilbert Case the judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

62 Cal. App. 296

PEOPLE v. LENNERT. (Cr. No. 685.) (District Court of Appeal, Third District, California. May 24, 1923.) Appeal from Superior Court, Napa County; Percy S. King, Judge. Edward Lennert was convicted of burglary, and he appeals from the judgment and order denying a new trial. Affirmed. Russell F. O'Hara, of Vallejo, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Appellant was convicted of three separate acts of burglary charged in one information in different counts, and he has appealed from the judgment and an order denying his motion for a new trial. There has been no appearance for him in this court nor has any argument been submitted in his behalf. We have, however, carefully examined the transcript and have found no error therein. The motion for a new trial was made solely upon the ground that the evidence was insufficient to justify the verdict, but it was promptly denied by the trial court. It would serve no useful purpose to set out the evidence, but we are satisfied that it was amply sufficient to justify the conviction. The judgment and order are affirmed.

We concur: FINCH, P. J.; HART, J.

NATIONAL UNIVERSITY LIBRARY
3 1786 10046 8468

NATIONAL UNIVERSITY
LIBRARY SAN DIEGO

NON CIRCULATING

NATIONAL UNIVERSITY
★ ★ ★ ★